IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.01.2018

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Writ Petition No.16579 of 2016

V.Sridhar .. Petitioner

Versus

The Authorized Officer
Indian Bank, Guindy Branch
GST Road, Guindy
Chennai-32. .. Respondent

Writ Petition has been filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorarified Mandamus calling for the records of the respondent in connection with the impugned order passed in proceedings NIL dated 06.10.2015 and quash the same and further direct the respondent to refund the amount paid by the petitioner viz., Rs.1,21,37,500/- (Rupees One crore twenty one lakh and thirty seven thousand and five hundred only) with interest.

For Petitioner : M/s.S.Sivakumar
For Respondent : Mr.N.Chandra Raj

ORDER

(Order of the Court was delivered by V.BHAVANI SUBBAROYAN,J.)

The petitioner has come forward with the present Writ Petition for issuance of a Writ of Certiorarified Mandamus calling for the records of the respondent in connection with the impugned order passed in proceedings NIL dated 06.10.2015 and to quash the same and further direct the respondent to refund the amount paid by the petitioner viz., Rs.1,21,37,500/- (Rupees One crore twenty one lakh and thirty seven thousand and five hundred only) with interest.

2. The case of the petitioner is that the respondent issued a notification on 05.06.2015 and invited applications for tender -cum- e-auction sale, in respect of the property of land and building measuring an extent of 3274 sq.ft. at Door No.65,

New No.132 Sengalaneer Pilliar Kovil Street, New Street, Mannadi, Muthialpet, Chennai, Fort-Tondiarpet Taluk, Chennai District, in O.S.No.1826, R.S.No.3060 and C.C.No.447, which was taken possession by the Bank under Section 13(4) of SARFAESI Act, 2002, to recover a sum of Rs.3,99,33,842.86 with further interest and other charges thereon; and in the e-auction notice, the reserve price for the property was fixed at Rs.3,25,00,000/-. The further case of the petitioner is that he submitted his application and participated in the e-auction that was held on 10.07.2015 in which, the petitioner quoted a sum of Rs.3,25,00,000/- and the respondent bank declared the petitioner as the highest and successful bidder. Immediately, as per the condition of the bid, as a successful bidder, the petitioner deposited 25% of the bid amount, viz., Rs.81,37,500/- to the respondent as per the respondent's direction on the same day and the sale confirmation letter was issued by the respondent on 20.07.2015 and the petitioner was directed to pay the remaining 75% of the sale amount within the period of 15 days from the date of receipt of the letter. It is also the case of the petitioner that on the receipt of the said sale confirmation letter, he went to the schedule mentioned property and found that there were number of persons residing in the schedule mentioned premises and the petitioner informed the same to the respondent, by way of his representation dated 03.08.2015, which was acknowledged by the respondent on the same day. In his letter dated 03.08.2015, the petitioner has brought to the knowledge of the respondent that the physical possession of the said auctioned property has not been taken, despite the bank having invoked Section 14 proceedings before Chief Metropolitan Magistrate, Chennai, to take possession, which was also pending. However, the respondent, despite receiving the said letter dated 03.08.2015 sent a reply on 31.08.2015 by referring to it's letter dated 04.08.2015 and informed the petitioner to make the balance payment within the mandatory period of 15 days of receiving the sale confirmation letter as per the terms of tender -cum- e-auction sale. The petitioner has further averred that he made another representation on 27.09.2015, about the pendency of Civil Suits filed by the tenants, who are occupying the auctioned property. The petitioner in the representation dated 27.09.2015 further contended that on the assurance and surety given by the bank orally, he has further paid a payment of Rs.40,00,000/- totalling Rs.1,21,37,500/-. By the said representation, the petitioner also informed the respondent bank that he is always ready and willing to pay the balance amount of sale consideration and requested the bank to clear encumbrance and fix a date to hand over the vacant possession of the property to him enabling him to pay the remaining payment on the same date, failing which the bank should refund the entire amount of Rs.1,21,37,500/- paid by him with interest and damages. However, instead of receiving the same, the respondent bank issued a letter dated 06.10.2015 forfeiting the entire amount of Rs.121.37 lakh paid by the petitioner, which is now under challenge in the Writ Petition.

3. On the other hand, the respondent bank has filed counter affidavit stating that by letter dated 06.10.2015, they have given valid and tenable reasons for forfeiting the said amount of Rs.1,21,37,500/- remitted by the petitioner. It is also contented that after the cancellation of the sale, the petitioner has voluntarily remitted a sum of Rs.40,00,000/- without the knowledge and authorisation for the same, and the said Rs.40,00,000/- was returned to the petitioner on 06.05.2016. Due to the act of the petitioner, the property was sold under a private treaty for a sum of Rs.270 lakhs and the bank has lost a sum of Rs.55 lakhs. Forfeiture of the initial bid amount is done as per law and in accordance with the accepted terms and conditions of the e-auction tender notice. Since the petitioner has not challenged the said terms and conditions of the e-auction tender notice, Writ Petition is not maintainable.

4. Heard the learned counsel for the petitioner and the learned counsel for the respondent and perused the materials available on record.

5. Learned counsel for the petitioner would submit that the impugned order is not maintainable either in law and on facts. The respondent has failed to consider Rule 9(9) of the Security Interest Enforcement Rules, 2002, which states that the authorized officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money, as specified in sub-rule (7). But the respondent suppressed all the litigations/encumbrances relating to the auctioned property. Since the petitioner was always ready and willing to pay the balance amount (75%) of sale consideration, he has repeatedly requested the bank to clear the encumbrance and hand over vacant possession of the property to him and to enable him to pay the remaining payment, but the respondent has failed to do so. Therefore, the petitioner requested the bank to refund the amount with interest. However, the bank without assigning any reason has passed a non-speaking order, forfeiting the entire amount (Rs.81,37,500/- + Rs.40,00,000/- = Rs.1,21,37,500/-), which is illegal and against the principles of natural justice.

6. Learned counsel for the respondent would contend that the property was sold on “as is where is” basis and on “as is what is” conditions and “without any representations and warranties on the part of the Bank relating to encumbrances/statutory liabilities etc.,” and therefore, presence of the tenants in the building and pendency of a CBI case against the borrowers and guarantors, are not matters

affecting the sale of the property. He would further contend that the respondent bank has never undertaken to give vacant possession of the property to the petitioner, either in the tender document or by any letter, and therefore, the claim of the petitioner that he was not given vacant possession is not sustainable in law and on facts. Since the petitioner has not paid the remaining 75% of the bid amount, the initial deposit of 25% of the bid amount, was forfeited. Sum of Rs.40,00,000/- paid by the petitioner, after the cancellation of the sale, was returned to the petitioner, in the form of DD on 06.05.2016. Therefore, the learned counsel for the bank has prayed to dismiss the Writ Petition, with costs.

7. The only issue to be decided in this Writ Petition is that having participated in the auction conducted by the respondent, whether the petitioner is entitled for refund of Earnest Money Deposit made by him.

8. It is not in dispute that Indian Bank, Guindy Branch, the respondent herein, has issued a notification on 05.06.2015 inviting applications, for tender-cum- e-auction sale, in respect of the property mentioned in tender-cum-e-auction sale. The terms and conditions of the e-auction sale are enumerated in the said notification.

9. The important contention of the learned counsel for the petitioner is that possession of the property mentioned in the auction notice was not taken by the bank as specified under Section 14 of the SARFAESI Act, 2002. Learned counsel for the petitioner has contended that it is the duty of the bank to hand over unencumbered possession to the auction purchaser and unless the encumbrance is cleared, liability of the bank or the onus of the bank, in fulfilling the duty conferred on it under Section 13(4) of the SARFAESI Act, 2002 does not end, merely because the auction purchaser had participated in the auction and paid 25% of the bid amount. Learned counsel for the petitioner has vehemently contended that it is the responsibility of the bank, to hand over the property unencumbered meant to be auctioned, in the e-auction and having received 25% of the bid amount and thereafter, Rs.40,00,000/- on the remaining 75% of the bid amount, the bank is under the obligation, either to handover the unencumbered property or to return the Earnest Money Deposit along with Rs.40,00,000/- subsequently paid, by the petitioner with interest. To substantiate the argument, learned counsel for the petitioner relied on the unreported judgment of this Court in W.P.No.32337 of 2016 {RG Housing and Infrastructure Private Limited ..vs.. Union of India, represented by Secretary to Government, Ministry of Finance and two others}, wherein Earnest Money Deposit was directed to be refunded. Learned counsel for the petitioner, also relied on the unreported judgment of this Court dated 04.01.2017 made in W.A.No.530 of

2016 (V.Sambandan ..vs.. The Punjab National Bank, represented by its Chairman cum Managing Director).

10. Per contra, learned counsel representing the bank has contended that the property was intended to be transferred or conveyed on "as is where is" basis and on "as is what is" condition and "without any representations and warranties on the part of the Bank relating to encumbrances/ statutory liabilities etc., attached to the property". Learned counsel for the respondent bank has contended that the petitioner has participated in the tender-cum-e-auction sale, on his own volition. He also contended that as clause-06 of the terms and conditions of e-auction sale clearly provides for forfeiture of 25% remitted amount, if the remaining amount or balance sale consideration is not paid within 15 days of the confirmation of the sale or within the extended time, in writing, the question of returning the Earnest Money Deposit deposited by the petitioner will not arise. In support of his contention, learned counsel for the respondent bank has relied on the judgments of the Hon'ble Supreme Court reported in 2012 (8) SCC 197 (Punjab Urban Planning and Development Authority and others ..vs.. Raghunath Gupta and others) and 2009 (4) SCC 660 (UT Chandigarh Administration and another ..vs.. Amarjeet singh and others).

11. The respondent bank has filed counter affidavit contending that under clause-02 of the terms and conditions of e-auction sale, property shall be transferred or conveyed on "as is where is" basis and "as is what is" condition and "without any representations and warranties, on the part of the bank, relating to the encumbrances/statutory liabilities etc.," on "tender-cum-e-auction sale" basis, from the public. Apart from the above submission, learned counsel for the bank also contended that the bank has been put to heavy financial loss, as the subsequent attempt by the bank to sell the property, did not yield the desired result, and that the property was sold, under private treaty, for a sum of Rs.2,70,00,000/-, as against the petitioner's admitted amount of Rs.3,25,50,000/-, and that the bank has lost a sum of Rs.55,00,000/- due to the act of the petitioner. Therefore, learned counsel for the bank has submitted that forfeiture of initial bid amount, is in consonance with the terms and conditions, as accepted between the parties, under the e-auction tender notice.

12. In the above circumstances, to decide the present lis, clauses 1, 2 and 6 of the terms and conditions of tender-cum-e-auction sale, are relevant, and extracted hereunder:-

> "01. The inspection of the scheduled mention property can be inspected by the intending tenderer on 25.06.2015 at his/her expenses, between 11.00 am and 02.00 pm. The

related documents / up-to-date EC, can be verified/inspected by the intending purchasers / bidders on 26.06.2015 between 10.00 am and 5.00 pm at Indian Bank, Guindy Branch, at their own expenses.

02. The property shall be transferred or conveyed on "as is where is" basis and "as is what is" condition and "without any representations and warranties on the part of the bank relating to the encumbrances/ statutory liabilities etc.," on "tender-cum-e-auction sale" basis from the public by means of a sale certificate in the name of purchaser only.

03. .....
04. .....
05. .....

06. Once the e-auction is completed, the sale is conferred on the person making the highest offer/tender/bid. The successful bidder will be intimated by email, as the case may be, who has to remit 25% of the bid amount (less the EMD) immediately by RTGS/NEFT/Account Transfer and/or any other acceptable mode of money transfer, failing which, the EMD remitted will stand forfeited. The balance sale price shall be paid within 15 days of confirmation of sale or extended time in writing. If the balance amount is not remitted within stipulated/ agreed time, the amount of 25% remitted will also be forfeited."

As per the clauses of tender-cum-e-auction sale, the bank has auctioned the property.

13. Going through the clauses of auction, it would be appropriate to refer Section 13 of the SARFAESI Act, 2002, which reads thus:-

"13. Enforcement of security interest.-
(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice, failing which the secured creditor shall be entitled to exercise all or any of the rights under sub- section (4).

(3) The notice referred to in sub- section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non- payment of secured debts by the borrower.

(4) In case the borrower fails to discharge his liability in full within the period specified in sub- section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realise the secured asset;

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.”

....

....

14. Sub-section 13(4) of SARFAESI Act, 2002 provides a procedure, under which, the secured creditor, shall enforce the liability to be discharged by the borrower. Primarily, after the issuance of notice under Section 13(2) and if the borrower

fails to discharge his liability, within the period specified under Section 13(2), the secured creditor under Section 13(4)(a), can take possession of the secured assets of the borrower, including the right to transfer by way of lease, assignment or sale for releasing the secured assets. Section 13(4)(a) of SARFAESI Act, 2002 should be conjointly read with Rule-9 Clauses-9 and 10 of the Security Interest (Enforcement) Rules, 2002. Rule-9 of the Security Interest (Enforcement) Rules, 2002 reads, thus:-

> "9. Time of sale, Issue of sale certificate and delivery of possession, etc.-
>
> (1) No sale of immovable property under these rules shall take place before the expiry of thirty days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub-rule (6) or notice of sale has been served to the borrower. (2) The sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid or tender or quotation or offer to the authorised officer and shall be subject to confirmation by the secured creditor:
>
> Provided that no sale under this rule shall be confirmed, if the amount offered by sale price is less than the reserve price, specified under sub-rule (5) of rule 9 :
>
> Provided further that if the authorised officer fails to obtain a price higher than the reserve price, he may, with the consent of the borrower and the secured creditor effect the sale at such price.
>
> (3) On every sale of immovable property, the purchaser shall immediately pay a deposit of twenty-five per cent. of the amount of the sale price, to the authorised officer conducting the sale and in default of such deposit, the property shall forthwith be sold again.
>
> (4) The balance amount of purchase price payable shall be paid by the purchaser to the authorised officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the parties.
>
> (5) In default of payment within the period mentioned in sub-rule (4), the deposit shall be forfeited and the property shall be resold and the defaulting purchaser shall forfeit all claim to the property or to any

part of the sum for which it may be subsequently sold.

(6) On confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorised officer exercising the power of sale shall issue a certificate of sale of the immovable property in favour of the purchaser in the Form given in Appendix V to these rules.

(7) Where the immovable property sold is subject to any encumbrances, the authorised officer may, if he thinks fit, allow the purchaser to deposit with him the money required to discharge the encumbrances and any interest due thereon together with such additional amount that may be sufficient to meet the contingencies or further cost, expenses and interest as may be determined by him.

[Provided that if after meeting the cost of removing encumbrances and contingencies there is any surplus available out of money deposited by the purchaser such surplus shall be paid to the purchaser within fifteen day, from date of finalisation of the sale.]

(8) On such deposit of money for discharge of the encumbrances, the authorised officer 15 [shall] issue or cause the purchaser to issue notices to the persons interested in or entitled to the money deposited with him and take steps to make, the payment accordingly.

(9) The authorised officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in sub-rule (7) above.

(10) The certificate of sale issued under sub-rule (6) shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not.”

15. Admittedly, when the tender-cum-e-auction sale was notified on 05.06.2015, the respondent bank has not taken physical possession of the property. Admittedly, learned counsel for the petitioner has submitted that the respondent bank has not taken any steps to take actual physical possession of the property, under Section 14 of the SARFAESI Act, and that the same was pending, at the time of e-auction.

16. At this juncture, it would be appropriate to refer Section 14 of the SARFAESI Act, 2002 which reads as follows:-

> "14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset.-
>
> (1) Where the possession of any secured assets is required to be taken by the secured creditor or if any of the secured assets is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured assets, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or as the case may be, the District Magistrate shall, on such request being made to him-
>
> (a) take possession of such asset and documents relating thereto; and
>
> (b) forward such asset and documents to the secured creditor.
>
> (2) For the purpose of securing compliance with the provisions of sub- section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.
>
> (3) No act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of this section shall be called in question in any court or before any authority."

17. Learned counsel for the petitioner counsel also submitted that e-auction notice, does not contain or mention, about the encumbrance in the property, which amounts to misleading the auctioneers.

18. Though the respondent bank has filed a counter, there is no specific averment, denying the facts stated in the affidavit filed by the petitioner/auction purchaser in the Writ Petition, especially paragraph No.6 of the affidavit, which reads thus:-

> "6. It is submitted that the respondent has not taken any steps to take possession of the property and not cleared the court cases

> pending in the CMM Court (Section 14 application) and City Civil Courts. It is pertinent to note here that the respondent have not mentioned about the existence of the tenancy in the auction notice dated 05.06.2015 and also not mentioned about the encumbrance of the property is amounts to misleading the auctioneers and against the bid policy. Further the respondent have prior knowledge and information about the tenants issue and the respondent has exchanged so many communications with the Muthialpet Police Station and the petitioner has learnt that there was an order by the Debts Recovery Tribunal (DRT) prohibiting the respondent bank not confirm the sale by an order dated 18.02.2015 in S.A.No.26 of 2015. But for the reasons best known, the respondent has failed to disclose the same and received the EMD amount, 25% of bid amount and further payment of 40 lakhs is highly arbitrary and discriminatory in nature besides violation of principles of natural justice. In view of the above act of the respondent, the petitioner very much suffered and his huge hard earned money is locked with the respondent, hence narrating all these facts, the petitioner made representation on 27.09.2015 and immediately after the receipt of the representation/letter the respondent without taking any steps to cure the defects, simply passed the impugned order forfeiting the entire amount paid by the petitioner."

The averments stated in the affidavit filed by the petitioner in the Writ Petition have not been denied by the respondent bank in the counter affidavit. Learned counsel for the respondent is also not in a position to enlighten this Court, about the taking possession of the property under Section 14 of the SARFAESI Act, 2002 as on the date of tender-cum-e-auction sale ie., on 05.06.2015.

19. Conjoint reading of Section 13(4) of the SARFAESI Act and Rule 9 clauses 9 and 10 would clearly show that the authorised officer, shall deliver the property to the purchaser, free from encumbrances known to the secured creditor, on deposit of money as specified in sub-rule 2. However, the above said rule does not prevent the bank to bring the property for auction, when there are encumbrances attached to the property. Hence, the contention of the petitioner that bank cannot bring the property for auction, when there is encumbrance attached to

it, cannot be sustained. However, bank is duty bound to disclose the encumbrances, attached to the properties and litigations or occupation by a tenant if there is any lis or lien attached to the property. Merely by including a clause “as is where is” basis or “as is what is” condition stated in the sale notice does not obviate the bank from disclosing the encumbrance attached to the property, brought for in auction. When there is no notification or mention of encumbrance, it is difficult to accept the contention of the bank that the property was auctioned “as is where is” basis and “as is what is” condition. Though it would satisfy the Rules of Security Interest Enforcement Rules, 2002, bank cannot, in any situation, wash away the responsibility in disclosing the encumbrances, in the notification or taking clear possession under Section 14 of the SARFAESI Act 2002 and handing over possession to the auction purchaser. There is no mention neither in the counter nor by the respondent counsel that whether possession has been taken under Section 14 of the Act. Unless the bank takes possession, the question of bringing the property for e-auction under Section 13(4) is not completed. Though as a secured creditor on the assets of the borrower or mortgaged or collateral, the right of the bank on such property will assume only after taking possession under Section 14 of the Act and only thereafter, the bank can initiate steps to bring the property for auction.

20. Learned counsel for the petitioner has relied on two unreported judgments of this Court reported in W.P.No.32337 of 2016 (RG Housing and Infrastructure Private Limited ..vs.. Union of India, represented by Secretary to Government, Ministry of Finance and two others), W.A.No.530 of 2016 (V.Sambandan ..vs.. The Punjab National Bank, represented by its Chairman cum Managing Director), which according to him, would come in aid to the contention raised by the petitioner. Hon'ble Division Bench of this Court, in W.A.No.530 of 2010 cited supra, by discussing elaborately, on this issue had held as follows:-

> “36. Admittedly, when notice, under Section 13(4) of the SARFAESI Act, 2002, was issued by M/s.Punjab National Bank, Chennai, respondents herein, physical possession of the subject property mortgaged, was not taken. Reading of Rule 9 makes it clear that there is a clear distinction, between sale of immovable property, subject to encumbrance and costs, to be incurred for removing the encumbrance.
>
> 38. Auction notice does not indicate anything about the encumbrance in the subject property sought to be sold, but it only states that sale of the property would be in, "as is where is/as is what is" condition. Section 13 (4) of the SARFAESI Act, 2002, enables the

secured creditor to take actual possession of the secured assets of the borrower.

41. In the abovesaid notice, dated 28.07.2009, auction purchaser/appellant has also stated that there was suppression of material facts, in conducting the auction. He has also stated that the authorised officer was not in a position to deliver possession of the auctioned property, without any encumbrances and free of litigations. He has stated that the original title deeds, as well as copies of documents, including the judgment and decree from the competent Court, pertaining to the auctioned property, except the sale deed Document No.2125/1990, dated 02.07.1990, were not furnished to him and in the abovesaid circumstances, he has issued the said notice, calling upon the authorised officer to cancel the auction proceedings, held on 17.07.2009 and return the deposit amount of Rs.3,30,000/-, within a weeks' time, from the date of receipt of the said notice.

49. In Kathikkal Tea Plantations vs. State Bank of India reported in (2009) 7 MLJ 24, Kathikkal Tea Plantations, represented by its Managing Director, availed loan. There was default. Symbolic possession was taken under Section 13(4) on 11.12.2006. Bank sold the property by a private treaty on 09.04.2007 and issued a sale certificate. Property was not physically dispossessed and continued to hold on de facto possession, even after without issuance of sale certificate. Therefore, bank, filed an application under Sections 14(1)(2) of the SARFAESI Act, before the learned Chief Judicial Magistrate, Udhagamandalam, on 13.11.2008, seeking an order to take possession of the petitioner's property with the help of police aid and hand over the same to the bank. Permission was granted. Writ petition was filed challenging the order of the learned Chief Judicial Magistrate, Udhagamandalam contending inter alia that once sale certificate was issued in favour of the auction purchaser of the property, there is no secured debt and that the bank loses the character of the secured creditor. Contention has been made that the question of taking actual physical possession does not arise

after the issuance of sale certificate. After considering Transcore vs. Union of India reported in (2008) 1 SCC 125, that banks are entitled to take actual possession of the property in terms of Section 13 of the SARFAESI Act, 2002 and other decisions, in Kathikkal Tea Plantations' case, a Hon'ble Division Bench of this court, at paragraph 16 observed thus:

"The third party, who comes forward to purchase the secured asset, must have a confidence that he would get the property at the earliest. If the transferring of the property by way of title is going to be delayed endlessly, then the object of the Act which is meant for speedy recovery, would be defeated in whole."

58. When rules permit sale, with encumbrance and without, contention of the learned counsel for the appellant that the sale should be free from encumbrance, cannot be accepted. On the facts and circumstances of the instant case, what is required to be considered by us, is whether the Bank has notified the encumbrances on the property sold.

59. In the light of the decisions, stated supra, we are unable to accept the contentions of the bank that by imposing a condition, "as is where is" and "as is what is", the Bank has no obligation to mention in the auction notice, the encumbrance of the property, sought to be sold and it is suffice to contend that in the auction notice, the Bank has clearly stated that the property sold was in "as is where is" and "as is what is" condition and that the same would satisfy the requirements of Rule 8(6) of the Security Interest (Enforcement) Rules, 2002, which states that the authorised officer shall state the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor. In Jai Logistics's case (cited supra), defence of the Bank that the encumbrance was not known to them, and hence, could not be published on the sale notice, to sustain the order of forfeiture, was not accepted by this Court.

> 60. On the facts and circumstances of the case, the Bank may be right in contending that physical possession need not be taken before bringing the mortgaged property for auction, but they cannot shirk their duty to hand over possession to the auction purchaser. If the bank was not in a position to take physical possession, before sale, then recourse ought to have been taken under Section 14 of the Act and under the scheme of the Act, the Bank cannot be permitted to contend that there is no statutory obligation, on its part, to put the auction purchaser in possession.
>
> 61. Ordinarily, a sale is completed, on receipt of the entire sale consideration and handing over possession. But if encumbrance is specifically mentioned in the sale notice and if the auction purchaser with eyes open, had purchased the property, then there could be a cause to contend that it is the purchaser, who had taken the risk. While issuing a sale notice, it is the duty of the Bank to mention all the encumbrances in the property. The condition, "as is where is" or "as is what is" may indicate that when the property is sold, everything is not clear. But at the same time, the purchaser cannot be expected to know that the property sold was already mortgaged to another bank, viz., Nedungadi Bank and that there was a decree in O.S.No.328 of 1999, dated 10.07.2000, on the file of Subordinate Judge, Poonamallee."

21. Material on record shows that the petitioner has participated in the e-auction and declared as the highest bidder by the bank and thereafter, the petitioner has paid Rs.81,37,500/- being 25% of the bid amount on the same day of the e-auction ie., 10.07.2015 and the respondent bank has issued sale confirmation letter on 20.07.2015 and directed the petitioner to pay the remaining 75% of the sale amount, within 15 days. During the said period, on 03.08.2015 the petitioner has sent a representation to the respondent bank, received by the respondent bank on the same day, in which, presence of the tenants, in the auctioned property and non-taking of physical possession of the auctioned property, by the bank, under Section 14 of the SARFAESI Act, were stated. At paragraph-2 of the said letter, the petitioner has stated as follows:-

"After bidding the property, I went personally to inspect the property, to my shock, still there is lot of tenants occupied the property and I enquired with them regarding their status, I came to know from that the mortgagor of the property received nearly about Rs.40,00,000/- (Rupees forty lakh only) from the tenants as lease amount to the above property, still you have not taken physical possession of the property and I came to know that your have filed petition on the file of the CMM Court, Egmore, under Section 14 of the SARFAESI Act, to take possession of the above mentioned property, but still it is pending in the Court, no orders are passed by the Court in the above matter, if you are not able to take possession of the property, my expenses to the property will go very high and lot of tenancy cases will be filed by the tenants, I have to run around courts to tackle tenancy cases after investing huge amount to purchase the above mentioned property"

22. Without referring to the receipt of the letter dated 03.08.2015, Indian Bank, Guindy Branch, has sent a letter on 31.08.2015. The subject, reference and the content, read as follows:-

"Sub : A/c Health Foods with our Branch -
Ref : Our letter dated 04.08.2015 and your letter dated 17.08.2015.

****

Please refer our letter dated 04.08.2015, wherein we have advised you to make the balance payment within the mandatory period of 15 days of receiving the sale confirmation letter as per the terms of Tender-cum-e-auction sale. But the full amount is not paid so far.

Please note that the amount paid by you is forfeited and we will be going ahead with fresh tender-cum-e-auction."

23. Thereafter, the petitioner has sent another letter dated 27.09.2015, to which the bank has issued the impugned order dated 06.10.2015. The last two paragraphs of the impugned order are, as follows:-

"Please note that the auction was conducted on "as is where is basis" and you participated in the auction after doing your due diligence / inspection of the property. Hence, your justifications for not paying the balance amount for the reason that "vacant possession of the property should be provided" is not tenable.

In view of the above, please note that the amount of Rs.121.37 lakh paid by you stands forfeited."

24. Though the property has been auctioned on "as is where is" basis and on "as is what is" condition, as discussed earlier, this Court in W.A.No.530 of 2010 has held that the banks cannot shrink away the responsibility to hand over, possession of the property, to the auction purchaser. There is no averment in the counter by the bank nor any submissions made by the learned counsel for the respondent bank with regard to taking of possession of the auction property. Having regard to the statutory provisions, We are of the view that, it is the responsibility of the bank to specify the encumbrances attached to the property, while bringing the property for auction.

25. Referring to the letter dated 27.09.2015 of the petitioner, the respondent has declined the justification of the petitioner in not paying the balance amount, for the reason that "vacant possession of the property should be provided" is not tenable, and therefore, submitted that the respondent bank is entitled to forfeit the entire amount of Rs.1,21,37,000/- paid by the petitioner. It is seen that the respondent bank earlier, by its letter dated 31.08.2015, forfeited the amount paid by the petitioner and thereafter, by the impugned order dated 06.10.2015 forfeited Rs.1,21,37,000/-, which includes Rs.40,00,000/- paid by the petitioner, after issuing the letter dated 31.08.2015. Hence, from the above, We are of the view that the bank has not followed the provisions of the SARFAESI Act, 2002 and Security Interest Enforcement Rules, 2002, scrupulously, in notifying the encumbrances attached to the property, to be auctioned in the auction notice and in the above circumstances, the petitioner is entitled for the refund of the money, deposited as Earnest Money Deposit, and the amount received by the respondent bank subsequently.

26. In the light of the above discussion, this Court directs the respondent bank to refund a sum of Rs.1,21,37,500/- (One Crore twenty one lakhs thirty seven thousand and five hundred only), to the petitioner. However, it is stated in the counter that Rs.40 lakhs, was refunded to the petitioner, in the form of DD dated 06.05.2016, after the filing of Writ Petition on 25.04.2016. Though, normally, in this situation, the petitioner is entitled for interest, as a purchaser, the petitioner is also duty bound to enquire about the property, before participating in the auction, as a person of normal diligence before buying any immovable property and when the petitioner himself has not made proper enquiries on the schedule

property and encumbrance, there is a fault on the part of the petitioner also and therefore, this Court is not inclined to grant any interest to the amount paid by the petitioner.

27. In the result, the Writ Petition is allowed and the impugned order dated 06.10.2015 passed by the respondent is hereby quashed. The respondent bank is directed to refund a sum of Rs.1,21,37,500/- (One Crore twenty one lakhs thirty seven thousand and five hundred only), less the amount already paid if any, to the petitioner, within a period of four weeks from the date of receipt of a copy of this order, failing which the amount shall carry interest at 9% per annum from 10.07.2015 till the date of payment. No costs.

-s/d-
Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

mra

To

The Authorized Officer
Indian Bank, Guindy Branch
GST Road, Guindy
Chennai-32.

+1 CC to M/s. N. Chandra Raj, Advocate sr 5952.
+1 CC to Mr.S. Sivakumar, Advocate sr 5215.

Writ Petition No.16579 of 2016

KAN(CO)
SP(09/02/2018)