THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE P.KESHAVA RAO

WRIT PETITION NO.21587 OF 2017

O R D E R
(*Per Sri Justice Sanjay Kumar)*

The petitioners, being auction purchasers, assail the action of the UCO Bank (*hereinafter*, 'the bank') in not returning the sum of Rs.1,02,31,000/- paid by them towards the sale consideration along with interest.

Facts necessary for adjudicating this dispute are as under: The petitioners participated in the mega e-auction sale of secured assets held by the bank on 27.05.2016 under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (*for brevity*, 'the SARFAESI Act'). They emerged the highest bidders for the property mentioned at Item No.7 of the bank's sale notice dated 23.04.2016. This item of property comprised the residential three-storied building bearing House No.14-1-219, in an extent of 200 square yards, in Survey Nos.31, 32, 34 and 37 of Allapur Village, Kukatpally, Balanagar Mandal, Ranga Reddy District. The reserve price fixed for this item of property was Rs.96,56,000/- while the petitioners bid the highest price of Rs.1,02,31,000/-. They deposited Rs.9,65,000/- towards the earnest money deposit on 26.05.2016. On the date of the auction itself, they deposited Rs.15,92,500/- towards the balance of 25% of the sale consideration. They paid Rs.76,72,900/- towards the remaining 75% of the sale consideration on 13.06.2016. Their grievance is that the bank did not deliver possession of the property purchased by them. They alleged that the bank had proceeded to put the subject property to sale without even securing possession thereof and misled them into believing that they could purchase the property with clear title and possession. They also alleged that the bank had failed to disclose that as on the date of the auction sale, the borrower had approached the Debts Recovery Tribunal, Hyderabad, in S.A.No.585 of 2015 and that the matter was *sub judice*. They stated that they had to avail a loan from Yes Bank so as to pay the sale consideration. Despite their entreaties to return the amount paid by them, the bank remained unmoved. Hence, the writ petition.

The bank filed a counter through its Manager-cum-authorized signatory. Therein, it stated that M/s.Shanmukha Sai Agencies, a partnership firm, availed loan facilities from it and mortgaged the subject property as security therefor. Default having been committed in repayment, the loan account was classified as a non-performing asset and recovery proceedings were initiated under the SARFAESI Act. In pursuance thereof, the sale notice dated 23.04.2016 was published fixing the date of the auction as 27.05.2016. Therein, the petitioners became the purchasers of the subject property. The bank filed Crl.M.P.No.654 of 2016 before the learned Chief Metropolitan Magistrate, Cyberabad at L.B.Nagar, for securing possession of the subject property under Section 14 of the SARFAESI Act. The Advocate Commissioner, appointed pursuant to the order passed therein, issued notices to the occupants of the subject property. The occupants of the first and second floors vacated the premises and physical possession of the same was handed over to the bank. The partners of the borrower firm however failed to vacate the remaining portions on the ground floor and requested more time to do so. On 05.11.2016, the Advocate Commissioner, along with the Authorized Officer and other personnel of the bank, took the assistance of the police and secured actual physical possession of the remaining two portions on the ground floor of the subject property. However, on the same day evening, the partners of the borrower firm took law into their own hands and broke open the locks affixed on the western side of the portion in the ground floor and grabbed illegal possession thereof. A complaint was given by the bank to the Station House Officer, Sanathnagar Police Station, in this regard and an FIR was registered in Crime No.423 of 2016 on the file of the said Police Station, under Sections 427, 448 and 506 r/w Section 34 IPC, against the partners of the borrower firm. A charge-sheet was also laid thereafter before the competent Court. Further, the bank approached the learned Chief Metropolitan Magistrate, Cyberabad at L.B.Nagar, by filing Crl.M.P. SR No.175 of 2017 in Crl.M.P.No.654 of 2016, furnishing the details of the forcible re-entry by the borrower into the western portion of the ground floor of the subject property and seeking relief. However, the petition was returned, by order dated 03.03.2017, stating that it was not maintainable as the Advocate Commissioner already handed over the subject property to the bank and had filed a report to that effect. Aggrieved by this development, the bank filed W.P.No.21587 of 2017 before this Court and the same is pending. The Manager of the bank therefore asserted that all possible steps had been taken in accordance with law to secure and handover possession of the subject property and that there was no willful default or negligence on their part. He further stated that the bank had sold the property on an 'as is where is' and 'as is what is' basis and therefore, the petitioners were presumed to have visited the subject property before participating in the auction. He asserted that they should have conducted due diligence with regard to possession of the property. He concluded by stating that the bank was ready to hand over physical possession of the eastern side portion of the ground floor along with the entire first and second floors of the building in the subject property.

At this stage, it may be noted that Section 13(6) of the SARFAESI Act states that any transfer of a secured asset after taking possession thereof or taking over of management under Section 13(4) by the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred, as if the transfer has been made by the owner of such secured asset. Therefore, the sale by the secured creditor is practically on par with a sale by the owner of the secured asset himself. Further, the provision makes it clear that the transfer needs to be made after the secured creditor takes over the possession of the property brought to sale.

Rules 8 and 9 of the Security Interest (Enforcement) Rules, 2002 (*for brevity*, 'the Rules of 2002') deal with sale of immovable secured assets, time of such sale, issuance of the sale certificate and delivery of possession, etc. Rule 9(6) states that upon confirmation of the sale and compliance with the terms of payment, the authorized officer shall issue a certificate of sale of the immovable property in favour of the purchaser in the form given in Appendix V to the rules. This form in Appendix V contains a recital that delivery and possession of the scheduled property were handed over to the purchaser. Rule 9(9) states that the authorized officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money.

The aforestated statutory scheme demonstrates that the secured creditor has to deliver the possession of the property to the auction purchaser after the sale. In the present case, the sale certificate issued by the bank to the petitioner contains a recital that possession of the subject property was delivered to the petitioner but, obviously, it was not a factually correct statement.

In this regard, it may be noted that failure to deliver to the auction purchaser the possession of the property sold vitiates the sale. In ***RAMKRIPAL RAGHUPATI SINGH V/s. UNION OF INDIA***[1], a Division Bench of the Bombay High Court was also dealing with a case arising under the SARFAESI Act. The auction purchaser of the property brought to sale by the bank under the provisions thereof was not delivered possession, owing to the mischief played by the borrower. On facts, the Bombay High Court condemned the inaction on the part of the bank in taking steps to deliver peaceful possession of the property to the auction purchaser and adjourned the matter to enable the bank to take effective steps by the next date of hearing, failing which the Court proposed to pass orders directing refund of the entire sale consideration along with interest and costs.

In ***ATISHAYA CONSTRUCTION PVT. LTD. V/s. CENTRAL BANK OF INDIA***[2], the Gujarat High Court was dealing with the claim of an auction purchaser for refund of the sale consideration paid by it as the bank which had sold the property was unable to deliver possession thereof. This was also a case arising under the SARFAESI Act. Therein, the bank had resorted to sale of the property without even securing the possession thereof, as in the present case, and had also failed to mention this fact in the sale notice. It was only after receipt of the full sale consideration from the auction purchaser that the bank disclosed that an application for taking possession of the

[1] 2016 SCC OnLine Bom 8279
[2] 2014 SCC OnLine Guj 9204

property was still pending with the Chief Metropolitan Magistrate concerned. On behalf of the bank, it was contended that symbolic possession of the property had been taken over and the offer of the auction purchaser was accepted on an 'as is where is' and 'as is what is' basis. It was therefore argued that the auction purchaser had acquiesced with the fact that physical possession of the property would be handed over to it only after the application pending before the Chief Metropolitan Magistrate was decided. Referring to Rule 9 of the Rules of 2002, the Court observed that the certificate of sale of immovable property in favour of the purchaser was to be issued in the form given in Appendix-V to the Rules of 2002 and perusal of the same reflects that the authorized officer, issuing the said certificate, is required to deliver possession of the scheduled property. It was therefore concluded that once the sale was confirmed after payment was made in full, the bank must issue the sale certificate and deliver possession of the property in question to the purchaser. As in that case, possession was not handed over despite the payment being made in full, the learned Judge held that the statutory provision had not been complied with and directed refund of the sale consideration. The case on hand stands on an identical footing on facts.

In ***ROYAL STAR TRADING COMPANY V/s. IFCI LIMITED***[3], the Delhi High Court was also dealing with a case arising under the SARFAESI Act, wherein the auction purchaser prayed for refund of the sale consideration paid by him along with interest as he was not delivered possession of the property sold. The immovable property therein, along with plant and machinery in the factory, were covered by a mortgage/hypothecation and were accordingly put to sale on an

[3] 2014 SCC OnLine Del 4671

'as is where is or whatever there is' basis. The highest bidder, the petitioner therein, called upon the financial institution to issue the sale certificate and hand over possession. A sale certificate was issued under Rule 9(6) and Rule 7(2) of the Rules of 2002 within two weeks from the date of payment of the consideration, even before delivery of possession. When the petitioner went to take possession of the property sold, it found that certain valuable components of the plant and machinery had been removed, considerably reducing its value. The petitioner therefore declined to take possession of the said assets and called upon the financial institution to refund 50% of the purchase price on account of fall in the value of the assets sold or in the alternate, refund the entire consideration along with interest. Faced with this situation, the learned Judge referred to Rule 7(2) of the Rules of 2002, which provides that the authorized officer shall issue a certificate of sale in the form prescribed in Appendix-III to the Rules specifying the movable secured assets sold and observed that transfer of title in the said movable assets would take place on the sale becoming absolute, i.e., upon issuance of the sale certificate under Rule 7(2) of the Rules of 2002. The form of the sale certificate prescribed in Appendix-III to the Rules of 2002 clearly indicated that handing over possession was an inseverable part of the transaction. As in that case, the sale certificate had been issued even prior to the delivery of possession, the Court opined that the same was not in compliance with the Rules of 2002. The argument of the financial institution that as the assets had been offered for sale on an 'as is where is or whatever there is' basis, it would not be liable for the loss of valuable components thereafter, was rejected on the ground that Clause 2.4 of the terms and conditions provided for inspection of the assets by interested parties and therefore, Clause 2.6 would not absolve the financial institution from delivering the assets that were inspected by the petitioner pursuant thereto. The writ petition was allowed directing refund of the amount paid by the petitioner, duly canceling the sale certificate issued by the financial institution.

Applying the same principle, it is not open to the bank to now claim that the petitioners should accept the rest of the building excluding the western portion on the ground floor. As the bank put the entire property to sale, it is duty bound to deliver the whole of the property sold and not just a part thereof. Further, the above case law makes it clear that the secured creditor/bank cannot seek to shield itself by saying that the property was sold on an 'as is where is' and 'as is what is' basis and claim immunity. It is not open to a reputed bank, such as the UCO Bank, to baldly state that it obtained the subject property as security for the loan sanctioned by it to a borrower and that once it proposed to sell it on an 'as is where is' and 'as is what is' basis, it is freed from all responsibility.

The duty cast upon the secured creditor to deliver the possession of the property sold under the SARFAESI Act is clear and specific, as elaborated in the Rules of 2002 and, in consequence, under the Transfer of Property Act, 1882. Notably, in **HARYANA FINANCIAL CORPORATION V/s. RAJESH GUPTA**[4], the Supreme Court negatived the contention of the seller that when a secured asset is sold on an 'as is where is' basis, the purchaser cannot thereafter be permitted to wriggle out of a confirmed bid on the ground that there is a material defect in the property sold. Further, the concept of 'as is where is' and 'as is what is' basis has lost its

[4] (2010) 1 SCC 655

significance in the current commercial milieu and the principle of *caveat venditor* is more on the rise as compared to the outdated principle of *caveat emptor*. The Transfer of Property Act, 1882, requires the seller to own up to certain duties and it is not open to a responsible bank to take an innocent auction purchaser for a ride by selling to him a property without possession and thereafter claim protection under the principles of 'buyer beware'.

On the above analysis, this Court finds that the bank ought not to have put the subject property to sale without even securing actual physical possession thereof. Further, the allegation of the petitioners that the bank did not disclose this fact in the sale notice remains unrebutted. Despite the sale having been held as long back as on 27.05.2016, the bank is not in a position even as on date to deliver actual physical possession of the property sold. It is not open to the bank to harass and victimize innocent auction purchasers by making them part with their valuable monies with no consequential return therefor.

The writ petition is accordingly allowed. The bank shall refund the sum of Rs.1,02,31,000/- paid by the petitioners along with interest at 18% per annum, from the date of deposit by the petitioners till the date of repayment to them, within three weeks from today. This rate of interest is adopted by taking a cue from **MATHEW VARGHESE V/s. M.AMRITHA KUMAR**[5], as the bank is itself responsible for this imbroglio and the petitioners are entitled to be reimbursed with a higher rate of interest for the inconvenience and loss suffered by them.

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[5] (2014) 5 SCC 610

Pending miscellaneous petitions shall stand closed in the light of this final order. No order as to costs.

SANJAY KUMAR, J

P.KESHAVA RAO, J

23rd FEBRUARY, 2018

SVV/PGS