

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH**

WRIT PETITION NO.39084 OF 2017

Between:

Mr. Mandava Krishna Chaitanya

... Petitioner

and

UCO Bank, Asset Management Branch

... Respondent

DATE OF JUDGMENT PRONOUNCEMENT: 21st FEBRUARY, 2018

SUBMITTED FOR APPROVAL:

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

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1. Whether Reporters of Local newspapers may be allowed to see the judgment? Yes/No
 2. Whether copies of the judgment may be marked to Law Reporters/Journals Yes/No
 3. Whether His Lordship wishes to see the fair copy of the judgment? Yes/No

SANJAY KUMAR, J

P.KESHAVA RAO, J

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

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<Gist:

>Head Note:

! Counsel for petitioner : Sri P. Sri Ram

^Counsel for respondent : Sri G.Anand Kumar



? CASES REFERRED:

1. (2014) BC 221 (DB) (ALL)
2. AIR (38) 1951 Madras 470
3. 2016 SCC OnLine Bom 8279
4. 2014 SCC OnLine Guj 9204
5. 2014 SCC OnLine Del 4671
6. (1994) 1 SCC 575
7. (2010) 1 SCC 655
8. (2010) 7 MLJ 353 = (2010) 4 CTC 627 = 2010 SCC Online Madras 3830
9. 2014 SCC OnLine Cal 17489 = (2014) 4 Cal LT 526
10. (2014) 5 SCC 610

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

WRIT PETITION NO.39084 OF 2017

O R D E R

(Per Hon'ble Sri Justice Sanjay Kumar)

The petitioner is an auction purchaser. He seeks a direction to the UCO Bank, Asset Management Branch, Hyderabad (*hereinafter*, 'the bank'), to refund the sale consideration of Rs.4,80,44,000/- paid by him, with interest at 18% per annum, by declaring the auction sale held by it in relation to Plot No.13, admeasuring 425 square yards with a house constructed thereon, bearing Door No. 1-89/6/2/5 in Survey Nos.43 to 47 and 49-part of Madhapur Village, Serilingampally Mandal, Ranga Reddy District, as illegal.

Facts, to the extent germane, are as follows: The bank published mega e-auction sale notice dated 25.07.2016 in daily newspapers on 27.07.2016. Thereunder, it also proposed to sell the subject property, which it held as a secured asset. The reserve price fixed for its sale was Rs.4,34,44,000/-. The petitioner participated in the auction held on 29.08.2016 and emerged the highest bidder for this item of property at Rs.4,80,44,000/-. Having paid 25% of the bid amount on the date of the sale, he deposited the balance sale consideration on 12.09.2016. Aggrieved by this sale, M/s.V.G.Constructions, the borrower, filed an application under Section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (*for brevity*, 'the SARFAESI Act') in S.A.No.191 of 2016 before the Debts Recovery Tribunal, Hyderabad (*hereinafter*, 'the Tribunal'). By order dated 27.09.2016, the Tribunal set aside the auction sale. Aggrieved

thereby, the bank filed Appeal No.25 of 2017/437 before the Debts Recovery Appellate Tribunal, Kolkata (*hereinafter*, 'the Appellate Tribunal'). The appeal was allowed by order dated 10.07.2017, setting aside the order of the Tribunal and confirming the auction sale. The petitioner was also a party to the appellate proceedings. At that stage, the petitioner learnt that the bank had misrepresented several facts. The possession of the subject property was not even with it and no steps were taken by it to secure the actual physical possession and control of the same. Upon enquiries, the petitioner also came to know that the registration authorities were refusing to register the sale certificate in relation to the subject property as proceedings under the Urban Land (Ceiling and Regulation) Act, 1976 (*for brevity*, 'the Act of 1976') had concluded upto the stage of Section 10(6) thereof. Further, the Greater Hyderabad Municipal Corporation informed the petitioner *vide* letter dated 22.09.2017 that no regularization proceedings had been issued on 26.10.2009, as claimed, in relation to the construction of a house on the subject property and that the application for such regularization had been rejected as the land in question fell within the full tank level of the lake, Durgam Cheruvu, as earmarked by the Irrigation Department of the State. The Urban Land Ceiling Authorities informed the petitioner, *vide* letter dated 05.10.2017, that possession of the lands in Survey Nos.43 and 44/1 of Madhapur Village, Serilingampally Mandal, Ranga Reddy District, had been taken over in C.C.No.F1/403/05 as per their record. The land in question was therefore stated to be ceiling surplus land. The Irrigation Department also confirmed, *vide* letter dated 17.10.2017, that the subject land fell within the full tank level of Durgam Cheruvu. Construction

activity is prohibited within the full tank level of any lake and therefore, the house standing in the subject land was constructed illegally. The regularization proceedings dated 26.10.2009 provided to the petitioner were not genuine as per the communication received from the municipal authorities. As the bank had suppressed material defects in the subject land, whereby lawful title could not be conveyed by it, the petitioner made a representation to the bank on 17.03.2017 requesting it to refund the amounts paid by him along with interest thereon. A legal notice was also gotten issued by him on 14.08.2017 on the same lines. By letter dated 21.08.2017, the bank rejected his request and asked him to collect his sale certificate. A reminder was issued by the bank on 20.09.2017. The petitioner asserted that the bank had failed to conduct due diligence and title search before accepting the subject property on mortgage as security for the loan advanced by it and could not seek to make him the scapegoat when it was not in a position to convey lawful and clear title over the same. The petitioner accordingly sought refund of the sale consideration paid by him, along with interest, by declaring the sale held by the bank to be illegal.

The bank filed a counter through the Chief Manager of its Asset Management Branch at Hyderabad. Therein, while admitting that the petitioner was the successful auction purchaser in the auction held on 29.08.2016 as regards the property comprising House No.1-89/6/2/5 built on part of Plot No.13, admeasuring 425 square yards, in Survey Nos.43 to 47 and 49-part of Madhapur Village, Serilingampally Mandal, Ranga Reddy District, the bank stated that Clause 13 of the e-auction notice dated 25.07.2016 read to the effect that the property was sold on 'as is where is' and 'as is what is' basis

and that the intending bidders had to make discreet enquiries as regards the property to satisfy themselves about the title, extent, quality and quantity of the property before submitting their bid. The bank further declared therein that no claim of whatsoever nature regarding the property put for sale, charges, encumbrances over the property or on any other matter, etc., would be entertained after submission of the online bid. As the petitioner participated in the auction sale knowing fully well that this was one of the conditions of the sale, the bank asserted that he could not now raise an objection as to the title of the subject property not being clear or lawful. After the allowing of the appeal by the Appellate Tribunal confirming the sale, *vide* order dated 10.07.2017, the bank issued the sale certificate to the petitioner on 13.07.2017 and he was requested to collect the same *vide* letter dated 13.07.2017. However, the petitioner failed to do so and started corresponding with the bank on the issue of the auctioned property lacking clear title. As the property was sold on 'as is where is' and 'as is what is' basis, the bank asserted that the rule of *caveat emptor* would apply and the borrower had to beware, i.e., a careful buyer should take care to examine the item before accepting it or obtain expert advice. The bank denied that the registration authorities had refused to register the sale certificate as the previous title deed of the borrower had been registered in January, 2007. The other claims of the petitioner that the land was a ceiling surplus land and fell within the full tank level of a lake were also denied. The bank therefore disclaimed any illegality on its part in putting the subject property to sale and prayed for dismissal of the writ petition.

The petitioner filed a reply affidavit, wherein he stated that he was under the impression that as the property was sold on 'as is

where is' and 'as is what is' basis, it might have defects in the construction which have to be attended to after the purchase, but the bank played a fraud on him by selling the property with defective title. He stated that as the auction was held by a reputed bank, he believed that it would have conducted due diligence before accepting the property on mortgage and that the property sold would have clear title. He pointed out that the bank had auctioned the property without even taking over its possession and that the property had been let out on lease in the meanwhile. He further stated that the old rule of 'buyer beware' under the principle of *caveat emptor* was superseded by the concept of *caveat venditor* and therefore, it was the duty of the bank, being the seller, to disclose material defects before selling the property. The petitioner therefore reiterated his prayer for relief.

At the outset, it may be noted that the material filed by the petitioner clearly bears out that the registration authorities informed him under letter dated 29.08.2017 that the lands in Survey Nos.43, 44, 45, 46 , 47 and 49 of Madhapur Village, Ranga Reddy District, were declared as ceiling surplus under Section 10(6) of the Act of 1976. The table appended to the said communication demonstrates that the subject property was one such ceiling surplus land. The market value certificates provided by the registration department also contained the 'Note' that the subject property was notified under Section 10(6) of the Act of 1976. Similarly, the communications from the municipal authorities as well as the State Irrigation Department bear out that the regularization of the construction in the subject property was not true and that the land fell within the full tank level of the lake, Durgam Cheruvu.

The question however is whether the bank can seek to protect itself at this stage with the shield of the '*caveat emptor*' principle.

No doubt, the bank made it one of the conditions of the auction sale notice dated 25.07.2016 that the property in question was sold on 'as is where is' and 'as is what is' basis but the issue is whether the same would be sufficient for it to claim protection and immunity.

In this regard, 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. 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 8(1) requires the secured creditor to take or cause to be taken possession of the secured asset which is an immovable property by delivery of a possession notice. Rule 8(2) requires such possession notice to be published in two newspapers not later than seven days. Rule 8(3) states that in the event possession of the immovable property is actually taken by the authorized officer of the secured creditor, he shall keep it in his own custody or in the custody of any person authorized or appointed by him who shall take as much care of the property in his custody as an owner of ordinary prudence would, under similar circumstances, take of such property. Rule 8(4) states that the authorized officer shall take steps for preservation and

protection of secured assets and insure them, if necessary, till they are sold or otherwise disposed of. Rule 8(5) requires the authorized officer, before he effects sale of the immovable property, to obtain valuation thereof from an approved valuer so as to fix the reserve price therefor in consultation with the secured creditor and prescribes the modes in which he may sell the said property. Rule 8(6) deals with issuance of notice of 30 days to the borrower intimating him of the intention to sell the immovable secured assets. The *proviso* to this rule details the terms of the sale which need to be mentioned in the public notice that would be published in newspapers under Rule 9(1). Clauses (a) and (f) in this *proviso* are relevant and read as under:

‘(a) the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;

.....

(f) any other thing which the authorized officer considers it material for a purchaser to know in order to judge the nature and value of the property.’

Rules 9(1) to (5) deal with publication of the notice of sale, confirmation of such sale and payment of sale consideration. 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 the sale of the scheduled property was made free from all encumbrances known to the secured creditor. Rule 9(7) states that where immovable property sold is subject to any encumbrances, the authorized 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. Rule 9(8) provides that on such deposit of money for discharge of the encumbrances, the authorized officer 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. 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 as specified in sub-rule (7). Rule 9(10) states that the certificate of sale issued under sub-rule (6) shall specifically mention whether the purchaser has purchased the immovable secured asset free from encumbrances known to the secured creditor or not.

The aforestated statutory scheme demonstrates that the secured creditor may also sell a secured asset which is not free from encumbrances. However, an endeavour must necessarily be made by the secured creditor to know as to whether any encumbrances attach to the secured asset, as the rules stipulate delivery of the property to the purchaser free from encumbrances 'known to the secured creditor'. The secured creditor cannot therefore blindly accept any property as security and go on to sell the same without even enquiring as to what encumbrances attach to it. Be it noted that a secured creditor and more particularly, a bank, offers loan facilities on the strength of such secured assets and, in most cases, such loan facilities are sourced from public funds garnered from the exchequer/common man and therefore, a high level of responsibility

attaches to the secured creditors, especially banks, to ensure that the secured assets, on the strength of which they offer tax payers' monies or customer deposits to borrowers, are worthy of being mortgaged as security for such loans. It is not open to a 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.

In this regard, reference may now be made to case law.

In **REKHA SAHU V/s. UCO BANK**¹, a Division Bench of the Allahabad High Court observed that any asset sold under the SARFAESI Act is sold on an 'as is where is' and 'as is what is' basis, unless specified otherwise, but Section 55(1) of the Transfer of Property Act, 1882, dealing with the rights and liabilities of the buyer and seller, mandates that the seller is bound to disclose to the buyer any material defect in the property or in the seller's title thereto. The Allahabad High Court therefore observed that a duty is cast upon the authorized officer of the bank to disclose to the auction purchaser any material defect in the title, failing which it could be construed that the purchaser was misled. Reference was also made to Rule 9(10) of the Rules of 2002, which states to the effect that the sale certificate must mention whether the purchaser purchased the immovable secured asset free from encumbrances, and it was observed that a duty was cast upon the bank to disclose those encumbrances which were known to it to exist on the property which was being sold by it. The Bench further observed that it is evident that the immunity claimed by the bank on the pretext of 'as is where

¹ 1(2014) BC 221 (DB) (ALL)

is' and 'as is what is' basis was dying a slow death and the secured creditor has to make due diligence/thorough search of the property before proposing its sale. It was further observed that borrowers were creating multiple registrations over the same property subsequent to execution of a mortgage with the bank and such frauds were rampant in the market. As these frauds may not be known to secured creditors in the normal course and if the property is sold 'as is where is' without knowledge of subsequent encumbrances, the auction proceedings could be stalled through judicial intervention on the ground of non-furnishing of information relating to encumbrances. The Bench therefore cautioned that the banks must tread very carefully before holding public auctions and take all necessary steps to ascertain and furnish all information relating to encumbrances/ attachments on the property to the intending purchaser.

A learned Judge of the Madras High Court opined in **GURIZALA VUDDANDAM V/s. JULURI VENKATAKAMESWARA RAO²** that when a vendor is not in a position to give possession of the property agreed to be sold by him, the purchaser would be entitled by virtue of Section 55(1)(f) of the Transfer of Property Act, 1882, and Section 39 of the Contract Act, 1872, to rescind the contract and claim the advance paid by him. This was a case arising out of an agreement for sale of immovable property. Possession of the property was to be delivered at the time of registration of the document and the agreement holder called upon the seller within the time stipulated to arrange for delivery of vacant possession as he was ready to pay the balance sale consideration. The seller however made it clear to the agreement holder that he was not in a position to deliver vacant

² AIR (38) 1951 Madras 470

possession. The question was whether the agreement holder was entitled to recession of the contract and to ask for refund of the amount already paid by him. It was in this context that the aforestated observations were made by the learned Judge.

In ***RAMKRIPAL RAGHUPATI SINGH V/s. UNION OF INDIA***³, a Division Bench of the Bombay High Court was 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 of the same, owing to the mischief played by the borrower. In these circumstances, 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 accordingly adjourned the matter to enable the bank to take effective steps by the next date of hearing, failing which the Bench 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***⁴, a learned Judge of the Gujarat High Court was dealing with the claim put forth by 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 property was still pending with the Chief

³ 2016 SCC OnLine Bom 8279

⁴ 2014 SCC OnLine Guj 9204

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 learned Judge 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. The learned Judge therefore concluded that once the sale was confirmed after payment was made in full, the authorized officer of 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.

In **ROYAL STAR TRADING COMPANY V/s. IFCI LIMITED**⁵, a learned Judge of 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

⁵ 2014 SCC OnLine Del 4671

accordingly put to sale on an '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 learned Judge further found that 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 learned Judge 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 accordingly allowed directing refund of the amount paid by the petitioner, duly canceling the sale certificate issued by the financial institution.

On the contrary, in **UNITED BANK OF INDIA V/s. OFFICIAL LIQUIDATOR**⁶, the Supreme Court held that an official liquidator does not provide any guarantee and/or warranty in respect of the immovable property sold by him and the purchaser is not entitled to claim any compensation or deduction in price on any account whatsoever and shall be deemed to have purchased the property subject to encumbrances, liens and claims. It was further observed that it is for the intending purchaser to satisfy himself in all respects as to title, encumbrances, and so forth of the immovable property that he proposes to purchase and he cannot, after having purchased the property on such terms, then claim diminution of the price on the ground of defect in title or description of the property.

It may however be noted that the aforestated decision was not rendered under the SARFAESI Act and the Rules of 2002. The duty cast upon the secured creditor under the SARFAESI Act being essentially different, as set out in the Rules of 2002 and, in consequence, the Transfer of Property Act, 1882, the law laid down in the aforestated decision cannot *ipso facto* be extended to cases arising under the SARFAESI Act. In fact, in **HARYANA FINANCIAL**

⁶ (1994) 1 SCC 575

CORPORATION V/s. RAJESH GUPTA⁷, the Supreme Court distinguished the powers of a secured creditor as opposed to those of an Official Liquidator while selling property and held that reliance placed on the **UNITED BANK OF INDIA**⁶ was wholly misconceived. The Supreme Court further negated the contention 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 title.

It may also be noted that the Madras High Court, in **JAI LOGISTIC V/s. THE AUTHORISED OFFICER, SYNDICATE BANK**⁸, also distinguished the aforesaid judgment of the Supreme Court in **UNITED BANK OF INDIA**⁶ and directed the Syndicate Bank to refund the earnest money to the petitioner therein as it was for it to indicate the encumbrances on the property sold under the provisions of the SARFAESI Act and as it had failed to do so, and the property was sold with undisclosed encumbrances to the detriment of the auction purchaser, the bank was not entitled to forfeit the earnest money deposit of such auction purchaser when he wanted to back out of the sale. The Madras High Court observed that the provisions of the Rules of 2002 were not applicable to an Official Liquidator, as in **UNITED BANK OF INDIA**⁶, and as Rule 8(6)(f) of the Rules of 2002 mandates that the secured creditor must set out in the terms of the sale notice, any other thing which he considers material for a purchaser to know in order to judge the nature and value of the property, the said rule would also include disclosure of all encumbrances relating to the property and the intending purchaser must be put on notice of the same, as otherwise, he/she may be

⁷ (2010) 1 SCC 655

⁸ (2010) 7 MLJ 353 = (2010) 4 CTC 627 = 2010 SCC Online Madras 3830

purchasing the property and buying litigation as well and the intending purchaser may not even bid in the event he/she came to know of such encumbrance.

Another contrary decision that weighs against the petitioner is that of a learned Judge of the Calcutta High Court, in **MAHENDRA MAHATO V/s. CENTRAL BANK OF INDIA**⁹, dealing with the claim of auction purchasers under the SARFAESI Act for delivery of peaceful and vacant possession of the secured asset sold to them. The bank contested this claim on the ground that the petitioners had submitted their bid upon inspection of the secured asset and as the same was put up for sale on an 'as is where is' and 'as is what is and whatever there is' basis and if there was obstruction to taking of possession of the secured asset, it would be the responsibility of the auction purchasers to have the occupants of the secured assets removed. The learned Judge posed two questions that arose for resolution – (1) whether the bank owed a duty to handover vacant and peaceful physical possession of the secured asset to the petitioners after receipt of the bid money and issuance of sale certificate, and (2) whether the bank ought to be directed to deliver vacant and peaceful physical possession of the secured asset to the petitioners. The learned Judge observed that in the event a public auction of immoveable property is conducted on an 'as is where is' basis, a prospective purchaser would not, in the normal turn of events, participate in the auction without utilizing the opportunity of inspecting the property. He would bid in the auction bearing in mind the existing situation, position and condition of the property. If the property is encumbrance-free (includes the non-occupancy factor)

⁹ 2014 SCC OnLine Cal 17489 = (2014) 4 Cal LT 526

and the amenities attached thereto are to his liking, most certainly he would offer a higher amount. The offer would most certainly be on the lower side, should the property be occupied or suffers from any disadvantages. Once, with open eyes, he participates in the auction, he cannot expect a better deal than what he was assured of on the day he offered his bid. As there was no promise held out by the bank that the sale on an 'as is where is' basis would be followed by making over vacant physical possession of the property put up for auction, the learned Judge held that the bank did not have a duty to handover vacant and peaceful physical possession of the secured asset to the petitioners and, therefore, a direction in this regard did not lie.

The above judgment however did not consider the scheme of the Rules of 2002 which casts a different duty and obligation upon the secured creditor *vis-à-vis* the auction purchaser or the decision of the Supreme Court in **HARYANA FINANCIAL CORPORATION⁷** or the precedential law holding otherwise. Be that as it may.

In terms of the statutory scheme of the SARFAESI Act and the Rules of 2002 and given the weighty preponderance of judicial wisdom, as set out *supra*, a secured creditor who is empowered under the SARFAESI Act to enforce any secured interest created in its favour, without the intervention of a Court or a Tribunal, but in accordance with the procedure prescribed therefor, cannot take the responsibility resting upon it lightly. Such a secured creditor not only owes a duty to protect the interest of the borrower by raising the best possible price while selling his mortgaged properties, but also owes a duty to the auction purchaser to verify the encumbrances that attach to the mortgaged property proposed to be sold, so as to inform all intending bidders of the same. Clauses (a) and (f) in the *proviso* to

Rule 8(6) of the Rules of 2002 bear out this responsibility explicitly, as the secured creditor is mandated thereunder to include the details of the encumbrances known to it and also any other thing which may be considered material for a purchaser to know in order to judge the nature and value of the property. These clauses therefore visit a duty upon the secured creditor to undertake due diligence at least at the stage of putting the secured asset to sale, if not at the time of taking the said property as security while granting loans, so that the bidders in the auction can rest assured that the bank has taken necessary measures in this regard and proceed to participate in the auction sale. Ignorance of the secured creditor as to the encumbrances on the property sold by it is no longer an acceptable argument in the light of the decisions of various Courts rejecting the plea that a sale on 'as is where is' basis constitutes a shield of protection.

Further, the concept of 'as is where is' and 'as is what is' basis has lost its 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 tainted property and thereafter claim protection under the principles of 'buyer beware'. The counter-affidavit filed by the bank clearly demonstrates that the bank undertook no exercise whatsoever to verify and ascertain as to what encumbrances attached to the subject property at any stage. No details are forthcoming of any efforts having been made by the bank, be it before the registration authorities or any other authority at any stage. Now, it has come to light that the property in question is

tainted on grounds more than one. It falls within the full tank level of a lake and, surprisingly, it is also treated as a ceiling surplus land. That apart, the possession of the property cannot even be handed over by the bank to the petitioner as the sale was effected without the bank securing actual physical possession thereof and the bank does not deny the factum of a lease having been created by the borrower in relation thereto. The bank therefore cannot comply with the statutory mandate of delivering actual possession of the property sold under the sale certificate. The decisions of various Courts referred to *supra* would come to the aid of the petitioner in this regard. That apart, the registration authorities already indicated to the petitioner that the subject land is noted as a ceiling surplus land. Therefore, even if they do entertain the sale certificate issued by the bank for registration, it would be subject to this cloud and would not amount to clear conveyance of title. It is therefore manifest that the bank made the innocent petitioner a victim by failing to exercise due diligence, not only in terms of the statutory scheme of the SARFAESI Act and the Rules of 2002, but also in its own commercial interest, let alone public interest, when it accepted this property as security for the loan sanctioned by it. This utter carelessness on the part of the bank in sanctioning loans, by use of public monies, on the strength of secured assets which are not even worthy of being mortgaged, requires to be deprecated in the strongest terms. Banks necessarily have to exercise more care and caution while using public monies available with them, be it through deposits by customers or otherwise, when sanctioning loans without caution or worse and cannot be permitted to claim protection under outdated legal principles so as to victimize innocent auction purchasers, such as the

petitioner. This Court therefore has no hesitation in holding that the auction sale held by the bank, without even exercising minimum care to ascertain the encumbrances attaching to the subject property and without informing the petitioner or other bidders of the same, vitiates the sale proceedings, culminating in issuance of the sale certificate which is yet to be registered.

The writ petition is accordingly allowed setting aside the said sale. The bank shall refund the sale consideration of Rs.4,80,44,000/- paid by the petitioner, with interest thereon at 18% per annum from the date of the deposit till the date of realization, within two weeks from the date of receipt of a copy of this order. As the bank is itself at fault for this entire imbroglio and the petitioner was made to part with his valuable monies with no consequential benefit therefor and the bank enjoyed the custody of these monies all through, the rate of interest as applied by the Supreme Court in like circumstances in **MATHEW VARGHESE V/s. M.AMRITHA KUMAR**¹⁰ is adopted.

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

21st FEBRUARY, 2018

**Note: L.R. copies to be marked – Yes
B/o Svv**

¹⁰ (2014) 5 SCC 610