Sharayu Khot.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4139 OF 2008

Kumar Urban Development Private Limited **...Petitioner**

Versus

Indian Bank & Ors. **...Respondents**

Mr. Simil Purohit, a/w Mr. Gaurav Gopal, Ms. Naveli R., i/by Wadia Ghandy & Co., for the Petitioner.

Mr. Jitendra P. Patil, for the Respondent No. 1.

Mr. M.S. Bharadwaj, a/w Mr. D.A. Dube, for the Respondent No. 9-UoI.

CORAM	:	**A.A. SAYED & R.I. CHAGLA, JJ.**
Reserved on	:	**02 May 2019**
Pronounced on	:	**04 July 2019**

JUDGMENT : ***(Per R.I. Chagla, J.)***

1. Rule. Rule made returnable forthwith. Heard by

consent of parties.

2. The Petitioner by the present Petition challenges the judgment and order dated 28th April 2008 passed by the Debts Recovery Appellate Tribunal at Mumbai (for short "***D.R.A.T.***") by which the judgment and order dated 20th December 2007 of Debts Recovery Tribunal-II and order dated 15th June 2007 passed by the Recovery Officer, D.R.T.-II was upheld.

3. The Petitioner has sought a direction against the Respondent No. 8 and/or Respondent No. 9 to refund to the Petitioner a sum of Rs. 1.10 Crores being Earnest Money Deposit (for short "EMD") deposited by the Petitioner pursuant to the Petitioner having been declared as a successful bidder of the immovable property of Respondent No. 2 in the auction held by the Recovery Officer.

4. The brief background of facts is necessary:-

(i) Respondent Nos. 3 and 4 were partners in the

Respondent No. 2-firm.

(ii) Respondent No. 2 was granted credit facility in the year 1982 against mortgage of factory and land at Survey No. 200 (Part) CTS No. 286/1 to 2 of Bhandup village, Mumbai Suburban District (hereinafter referred to as "***the said property***").

(iii) The account of Respondent No. 2 had become NPA in 1992 and Respondent No. 1 filed Recovery Suit in this Court bearing Suit No. 2667 of 1993.

(iv) Thereafter, the Suit was transferred to the D.R.T. and numbered as OA No. 2449 of 1999.

(v) The D.R.T.-II passed the order decreeing the Original Application on 20th June 2003.

(vi) Respondent No. 2 and others filed Writ Petition

No. 1754 of 2003 before this Court which in turn was dismissed on 28th July 2003.

(vii) A Review Petition was also preferred by Respondent No. 2 and others being Review Petition No. 14 of 2003 before the D.R.T.-II which also got dismissed on 20th November 2003.

(viii) An Appeal was preferred by Respondent No. 2 and others against the order dated 20th November 2003 and in which a Miscellaneous Application No. 105 of 2004 was taken out for waiver of pre-deposit in D.R.A.T. The waiver Application was rejected by the D.R.A.T. on 23rd August 2008.

(ix) The mortgage property was put to auction on 23rd May 2007 on "as is where is basis" for reserve price of Rs. 11 Crores. The entire bid amount was to be deposited within 15 days from the date of sale.

(x) A public notice which was issued regarding auction of the said property and which was published by the Recovery Officer of D.R.T.-II, the said property was disclosed, as only being mortgaged to the Respondent No. 1-Bank in the column which read as "details of encumbrances to which the property is liable" and in the column marked as "claims, if any which have been put forward to the property and any other known particulars being on its nature and value" it was shown as "not known".

5. It is the case of the Petitioner that although the public notice was published by the Recovery Officer, in the table giving the schedule of the immovable property, the column

wherein the encumbrances to which the said property was liable was not disclosed. It is the Petitioner's case that these encumbrances on the said property namely tenancies/leases claimed by Maharashtra State Electric Board, Allahabad Branch, Central Warehousing Corporation, etc. were not mentioned. The names of the said parties were also not mentioned in the claims column despite the fact that there was existence of such tenancies/leases which would affect the value of the said property.

6. The physical inspection of the said property had been provided by the Respondent No. 1-Bank to all bidders on 21st May 2007. It is only after the said inspection that the said property was put to auction on "as is where is basis" for reservation price of Rs. 11 Crores. The entire bid amount was to be deposited within 15 days from the date of the sale i.e. on 6th June 2007. Whereas 25 percent of the bid amount was to be deposited immediately which was a condition of the auction sale.

7. The EMD of Rs. 1.10 Crores had been deposited by the Petitioner on 22nd May 2007 i.e. 1 day prior to the auction of the said property. The Petitioner was declared as the successful bidder having made the highest bid of Rs. 34 Crores at the auction conducted on 23rd May 2007. Thereafter, the Petitioner requested the Recovery Officer initially for two days time for deposit of 25 percent(i.e. Rs. 7.40 Crores after adjustment of Rs. 1.10 EMD) on 25th May 2007 and this request was allowed by the Recovery Officer with condition that the entire bid amount had to be deposited on or before expiry of the 15 days i.e. 6th June 2007. After the expiry of two days as requested by the Petitioner for deposit of 25 percent of the bid amount, the Petitioner on 25th May 2007 again addressed a letter to the Recovery Officer seeking further time upto 31st May 2007 for deposit of 25 percent of the bid amount. The Petitioner once again addressed a letter to the Recovery Officer for additional two weeks time and raised several issues as to the title of said property. It is the Petitioner's case that upon the Petitioner being declared as successful bidder, the Petitioner

came to know about encumbrances on the said property. The Petitioner also by the said letter dated 31st May 2007 requested the Recovery Officer that if the Petitioner is not satisfied with the title of the said property, they may be permitted to withdraw that EMD without forfeiture.

8. On 6th June 2007 the Petitioner forwarded with a letter of the same date, pay order of Rs. 7.40 Crores being the balance of 25 percent of the bid amount to the Recovery Officer, D.R.T.-II, Mumbai. Initially, the Recovery Officer accepted the pay order of Rs. 7.40 Crores, however, on realizing that the last date of submitting the total bid amount was 6th June 2007, the Recovery Officer, D.R.T. -II passed order rejecting the deposit of Rs. 7.40 Crores.

9. The Petitioner on 6th June 2007 also filed a Miscellaneous Application before the Recovery Officer seeking directions which included the direction that the Petitioner be permitted to deposit the balance payment of the bid amount

after the encumbrances are sorted out and till then restrain the certificate debtors from dealing with the said property. The Recovery Officer on 15th June 2007 rejected the Miscellaneous Application and forfeited EMD amount of Rs. 1.10 Crores. On the same day an opportunity was given to the second highest bidder, being one M/s. Sanjana Developers to pay the balance amount within 15 days which was subsequently extended to 3rd July 2007. However, this amount was not paid. Pursuant to a Miscellaneous Application filed by M/s. Sanjana Developers before the Recovery Officer, the EMD was not forfeited and returned vide order of the Recovery Officer dated 6th August 2007.

10. The Petitioner filed an Appeal from Order of the Recovery Officer dated 15th June 2007 before the D.R.T. seeking *inter alia* setting aside of the said order of the Recovery Officer. This Appeal was rejected by the Presiding Officer of D.R.T.-II, Mumbai, vide order dated 20th December 2007, more particularly, on the ground that the Recovery Officer was not

justified in granting extension, when it was not provided in the terms and conditions of the sale. The Petitioner thereafter, filed an Appeal, being Miscellaneous Appeal No. 8 of 2008 against the D.R.T. order before the D.R.A.T. The D.R.A.T. by the impugned order dated 28th April 2008 dismissed the said Miscellaneous Appeal. Hence, the Petitioner filed the present Petition.

11. It is material to note that subsequent to the filing of the Petition on 12th June 2008, the said Property was put up for auction on 16th June 2008 and one M/s. Kakade Infra Projects Builder (P) Ltd. was a successful bidder for the said property for an amount of Rs. 41.25 Crores. The sale was confirmed by the D.R.T. on 30th June 2008 and a sale certificate was issued by the Recovery Officer on 5th August 2008. The D.R.T. Receiver handed over the physical possession of the property on 7th August 2008 to the successful bidder. Respondent No. 1-Bank received Rs. 17,16,10,212/- towards their decretal claim on 7th August 2008 and the account was

closed on 11th August 2008. An application had been taken out by Respondent No. 2 and the other borrower before the D.R.A.T. for treating forfeited EMD Rs. 1.10 Crores as a pre-deposit. This Application was rejected on 23rd August 2008. Respondent No. 2 and the other borrower challenged to the order of the D.R.A.T. by filing SLP before the Supreme Court. The challenge was unsuccessful.

12. Mr. Simil Purohit, learned Counsel for the Petitioner has submitted that the Respondent No. 1-Bank had failed to disclose the encumbrances on the said property in the public notice issued by the Bank on 20th April 2007. The only disclosure made in the said public notice was that there was a mortgage of the said property to the Respondent No. 1-Bank. It is only thereafter, in the subsequent public notice issued on 9th May 2008 by the Respondent No. 1-Bank i.e. after forfeiture of the EMD and the re-auction of the said property by the Respondent No. 1-Bank, the various encumbrances on the said property have been disclosed, particularly that the said property

is occupied by Allahabad Bank and Central Warehousing Corporation, etc. under lease agreement and that the said property is therefore sold on "as is where is basis" along with the said encumbrances.

13. He has submitted that although the said property was sold on "as is where is basis", it was the duty of the Respondent No. 1-Bank to disclose all encumbrances on the said property and having not done so, the Petitioner cannot held to be in default of the terms of sale of the said property and the EMD could not have been forfeited. He has relied upon the judgment of this Court in ***Asha Mehta Vs. Allahabad Bank***[1], wherein it has been held that where the auction sale that has been conducted is found lacking transparency, by a failure to disclose the material particulars and which would have a material bearing effect on the price which would be offered by an intending bidder, an exceptional case has been made out for interference in the auction sale and the rights which would accrue upon the sale being confirmed by the authority can be

1 ***2011(1) Mh.L.J. 1011***

held to have been extinguished in the above decision. This Court in turn had relied upon the decision of the Supreme Court in ***Valji Khimji & Co. Vs. Official Liquidator of Hindustan Nitro Product (Gujarat) Limited***[2]. He has also relied upon the decision of the Supreme Court in ***Ai Champday Industries Ltd vs Official Liquidator & Anr.***[3] in support of his submission that the encumbrances on the said property have to be disclosed by the Bank and the Bank cannot merely rely on the term of the sale being on “as is where is basis”. He has submitted that “as is where is basis” only pertains to quality of the said property being sold and not to encumbrances which must be capable of being found out on inspection of the said property. The said encumbrance on the said property impairs the use of the land or diminishes the value of the said property and is held to be a charge on the said property. He has submitted that in the present case the encumbrances were not disclosed in the relevant public notice published by the Respondent No. 1-Bank and it is only after the auction sale was conducted and the

---

2 ***(2008) 9 SCC 299***

3 ***(2009) 4 SCC 486***

Petitioner was held as successful bidder that the Petitioner became aware of these encumbrances. He has submitted that it was not possible for the Petitioner to know about these encumbrances at the inspection which was granted two days prior to the auction of the said property being held. He has also relied upon the judgment of the Supreme Court in ***Haryana financial Corporation & Anr. Vs. Rajesh Gupta***[4] in support of his submission that it cannot be held that the Petitioner as auction purchaser had failed to comply with the conditions of sale, as it was the Respondent No. 1-Bank who had failed to disclose the encumbrances on the said property and hence, the Respondent No. 1-Bank cannot take advantage of its own wrong. He has also relied upon the decision of the Allahabad High Court in ***Smt. Rekha Sahu Vs. UCO Bank & Ors.***[5] wherein it has been held that the immunity claimed by a bank on the pretext of "as is where is basis" and "as is what is basis" is dying a slow death and the bank being the secured creditor has to make due diligence/make thorough search of the property

4 ***(2010) 1 SCC 655***

5 ***2013 SCC Online All 13203***

before proposing it for sale. He has submitted that it is not sufficient for the Respondent No. 1-Bank to rely upon the terms of the sale being "as is where is basis" and that it was the duty of the Respondent No. 1-Bank to disclose any encumbrances on the said property. He has submitted that the Bank has a duty to disclose such encumbrances and more particularly the contents of a proclamation of the sale of immovable property to be drawn up by the Respondent No. 1-Bank and the contents thereof has been provided for under Rule 53 of Schedule II of the Income Tax Act which provides for a disclosure of the said property to be fair and accurate as possible. It is submitted that the relevant Rule 53 of Schedule II of the Income Tax Act has not been complied with by the Respondent No. 1-Bank, despite being binding on it. He has placed reliance upon the order of the D.R.T. which had allowed the application of the second highest bidder M/s. Sanjana Developers for refund of forfeited EMD. He has submitted that similar order was required to have been passed in the case of the Petitioner and the impugned order upholding the forfeiture of EMD order requires setting aside.

14. Mr. Jitendra Patil, learned Counsel for the Respondent No. 1-Bank has submitted that the entire proceedings initiated by the Petitioner including filing this Writ Petition is nothing but an afterthought and/or attempt to get back the amount of EMD which had already been forfeited by the Recovery Officer as well as an attempt to justify the delay in payment of the balance bid amount. He has submitted that the Petitioner is by this Petition seeking declaration that the auction sale of the said property pursuant to which the Petitioner was the successful bidder is void on account of material irregularities and suppression of material facts. He has submitted that the Petitioner had sought extension of time to deposit 25% of the bid amount, although the amount was to be deposited immediately after declaration of sale and having failed to secure such extension has now sought refund of the EMD on the pretext that the declaration of sale being void. He has submitted that the Petitioner had initially been ready and willing to purchase the said property under auction despite according to the Petitioner the issues and contentions regarding

encumbrances on the said property were not being resolved and still in existence. The Petitioner had made their offer for purchase of the said property for Rs. 34 Crores before the Presiding Officer of D.R.T. as well as Chair-person of the D.R.A.T. This offer had been made by the Petitioner having realized that the prices of the said property was escalating. He has submitted that the Petitioner, having failed to pay the balance of the bid amount, claimed that the Petitioner was not satisfied with the title of the said property and that they would pay the complete amount only after being satisfied. It was appropriate for the Recovery Officer to forfeit the EMD under Rule 58 read with Rule 57 of Schedule II of the Income Tax Act. He has further submitted that the D.R.A.T. in the impugned order had recorded that the application/claims made by the tenants against auction of the said property was rejected by the Recovery Officer on 24/25th and 28th May 2007 and that on 31st May 2007 when the Petitioner made Application for further two weeks time for deposit of 25% of the bid amount, they were aware that the claim of the tenants had been rejected. He has submitted that the Petitioner had been granted inspection of the said property and it would be apparent from such inspection that there were tenants/lessees in occupation of the said property. He has submitted that the D.R.A.T. after granting sufficient opportunity to the Petitioner, had passed the impugned order rejecting the contentions of the Petitioner and expressly holding the Recovery Officer has no power to grant extensions as requested by the Petitioner for payment of the 25% of the bid amount which was to be paid immediately upon declaration of sale. Further, the entire bid amount was to be paid within a period of 15 days from the declaration of sale of the said property which was never complied with by the Petitioner. In fact, it was on the expiry of the period for deposit of the entire bid amount that the Petitioner sought to pay 25% of bid amount less EMD and which payment had been correctly rejected by the D.R.A.T. He has submitted that the second highest bidder has also backed out of the auction due to the dishonest conduct and misrepresentation made by the Petitioner that there was a defect in the title of the said property. In fact, in the subsequent auction held, the successful bidder despite the tenancies created in respect of said property, had purchased the said property for an amount of Rs. 41.25 Crores which is way above the amount which had been bid by the Petitioner i.e. an amount of Rs. 34 Crores. The successful bidder Kakade Infra Projects Builder (P) Ltd. had not faced any difficult in getting possession of the said property. He has submitted that there is no merit in the Petition and that the Petition be dismissed.

15. Mr. Bharadwaj, the learned Counsel for the Respondent No. 9 has submitted that the EMD which has been forfeited is lying with the D.R.T. and kept in the form of fixed deposit receipt with Respondent No. 1-Bank. He has submitted that there is no merit in the Petition and that the EMD which has been forfeited, has validly and justifiably been forfeited by the Recovery Officer upon the failure on the part of the Petitioner to comply with the terms and conditions of sale as well as Rules 57 and 58 of Schedule II of the Income Tax Act.

16. We have considered the rival submissions. We are of the view that the Petitioner having failed to comply with the terms of the sale and deposit the bid amount as provided for under relevant Rules 57 & 58 of Schedule II of the Income Tax Act is entitled to claim refund of the EMD which had been forfeited by the Recovery Officer. It is relevant to extract Rules 57 and 58 of Schedule II of the Income Tax Act which are expressly made applicable as far as possible to the Recovery of Debts Due to Bank and Financial Institutions Act, 1993 by virtue of Section 29 thereof and reads as under:-

*"**Deposit by purchaser and resale in default.***

57. (1) On every sale of immovable property, the person declared to be the purchaser shall pay, immediately after such declaration, a deposit of twenty-five per cent on the amount of his purchase money, to the officer conducting the sale; and, in default of such deposit, the property shall forthwith be resold.

(2) The full amount of purchase money payable shall be paid by the purchaser to the Tax Recovery

Officer on or before the fifteenth day from the date of the sale of the property.

Procedure in default of payment.

58. In default of payment within the period mentioned in the preceding rule, the deposit may, if the Tax Recovery Officer thinks fit, after defraying the expenses of the sale, be forfeited to the Government, and the property shall be resold, and the defaulting purchaser shall forfeit all claims to the property or to any part of the sum for which it may subsequently be sold."

17. These Rules expressly provide for deposit of 25% of the purchase amount immediately upon declaration of sale of the immovable property in favour of the person declared to be a purchaser. In fact, it is further provided that full amount of purchase money shall be payable by the purchaser to the Recovery Officer on or before 15 days from the date of sale of the property. The default in payment within the period prescribed under Rule 57 of Schedule II of the Income Tax Act, would entitle the Recovery Officer under Rule 58 to forfeit the

amount deposited after defraying the expenses of the sale. The property would then be resold and that defaulting purchaser shall forfeit all claims to the property or to any part of the sum for which it is subsequently be sold. It is thus clear from these Rules that the Petitioner upon failing to deposit 25% of the purchase amount had forfeited any right to claim the EMD.

18. We do not accept the contention of the Petitioner that the Respondent No. 1-Bank had failed in its duty to disclose the encumbrances on the said property and / or there has been non-compliance of Rule 53 of Schedule II of Income Tax Act. The Petitioner had been granted inspection of the said property prior to the auction sale having been held. In fact, even after the Petitioner alleged that they had come to know about the encumbrances after the auction sale was held, they had sought extension of time to make payment of 25% of the bid amount which was to be paid immediately upon declaration of sale in favour of the Petitioner. In fact, this extension had been sought on two occasions and on the last date, for payment of the

entire bid amount, the Petitioner had deposited 25% of the bid amount. The Miscellaneous Application which had been preferred by the Petitioner on that date for deposit of the balance bid amount conditional upon sorting out the encumbrances on the said property can only be as and by way of afterthought, particularly, since the Petitioner could not deposit the entire bid amount on that date i.e. on 6th June 2007.

19. We find that the judgment of the Supreme Court in ***Ai Champday Industries Ltd.*** (supra) relied upon by the learned Counsel for the Petitioner has gone into the meaning of the words “encumbrances” and has held that the encumbrances must be capable of being found out either on inspection of the land or the office of Registrar or a statutory authority. We find in the present case a proper inspection of the said property which had been offered to the Petitioner would have revealed that there was encumbrances in the form of tenancies created on the said property and that tenants were in fact occupying the said property. Further, as observed in the

impugned order of the D.R.A.T. the intervention application filed by the tenants were dismissed by the Recovery Officer and that the rights of the tenants could not stand in the way of sale of the said property. Further, in the public notice itself it was stated that the sale would be on “as is where is basis” and “as is what is basis” and that the Petitioner had bid for the said property on that basis and even after coming to know about the encumbrances, which according to the Petitioner, was after sale of the said property, the Petitioner offered to pay 25% of the bid amount and tendered such payment.

20. The judgment of the Supreme Court in ***Haryana financial Corporation*** (supra) relied upon by the learned Counsel for the Petitioner can be distinguished as in that case, it was incumbent upon the Appellants/Corporation to disclose to the Respondent about the non-existence of the independent passage to the Unit which would affect the price at which the unit would be sold. In fact in that case, the Appellant/Corporation had failed to produce to the buyers the

entire documentation and accordingly, the Supreme Court has held that the Appellant/Corporation had acted unfairly and was trying to take advantage of its own wrong. In the facts and circumstances of the present case, the Respondent No. 1-Bank had offered inspection of the said property to the bidders including the Petitioner prior to auction of the subject property. In fact, the Petitioner had been given every opportunity to inspect the subject property and that there had been no act on the part of the Respondent No. 1-Bank which could be stated to be unfair and / or by which it could be held that the Respondent No. 1-Bank was taking advantage of its own wrong. In fact, the applications by the tenants against auction of the property had been rejected by the Recovery Officer on 24, 25 and 28th May 2007 and after such rejection on 31st May 2007, the Petitioner had made application for two weeks time to pay the 25% of the bid amount knowing fully well that the said property was free for possession. The other judgment of this Court in ***Asha Mehta*** (supra) and the judgment of the Allahabad High Court in ***Smt. Rekha Sahu*** (supra) relied upon by the learned Counsel for the

Petitioner are inapplicable in the facts and circumstances of the present case.

21. We do not find any infirmity in the impugned order of the D.R.A.T. The D.R.A.T. has correctly arrived at the finding that the Recovery Officer had no power to grant such extension of time for deposit of 25% of the bid amount and that such amount was to be deposited immediately and the balance bid amount was to be deposited within a period of 15 days from the date of auction.

22. The impugned order further observed that the auction purchaser / Petitioner had failed to deliver up that payment of the entire bid amount on the expiry of 15 days after declaration of sale of the said property in favour of the Petitioner and had only deposited 25% of the bid amount less EMD which had been justifiably rejected by the Recovery Officer. The non-payment of the bid amount by the 15th day from the date of sale of property as provided for under Rule 57

of Schedule II of the Income Tax Act can only result in forfeiture of the EMD as provided in Rule 58 of the said schedule.

23. In our view, it is apparent that the Petitioner was not capable of making payment of the entire bid amount on the 15th day from the date of the sale of the property and in fact as and by way of afterthought sought to raise issues on the title of the said property and preferred the Miscellaneous Application for seeking direction for deposit of the entire amount subject to title of the property being free of all encumbrances. In fact the Petitioner sought to rely upon the order of the D.R.T. which had allowed the application of the second highest bidder M/s. Sanjana Developers for refund of the forfeited EMD. This order cannot be relied upon by the Petitioner for claiming refund of the EMD, as the procedure of retaining the EMD of the second highest bidder was not provided for in the publication of the auction sale. This has been observed by the D.R.A.T. in the impugned order. In fact, it was as a result of the issue raised by the Petitioner on the title of the said property that the second

highest bidder had not gone ahead with the purchase of the said property and sought refund of the EMD. The second highest bidder has accordingly been treated on a different footing from the Petitioner. Thus, the Petitioner cannot rely upon the said order of the D.R.T. for claiming refund of the EMD which has been justifiably forfeited by the Recovery Officer.

24. We accordingly, find no merit in the Petition and dismiss this Petition with no order as to costs.

[R.I. CHAGLA, J.] **[A.A. SAYED, J.]**