

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.09.2019

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
AND
THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

W.P.No.13269 of 2016

K.Senthilkumar : Petitioner

Vs.

1.The General Manager,
Recovery Monitoring and Legal Services,
Bank of Maharashtra,
Central Office,
Lokmangal, 1501, Shivaji Nagar,
Pune-411 005.

2.The Assistant General Manager,
Bank of Maharashtra, Chennai Region,
No.4, Sivagnanam Road, T.Nagar,
Chennai-17.

3.The Authorised Officer,
Bank of Maharashtra,
No.247, Philips Road,
Broadway, Chennai-600 108.

4.E.Sankar

5.Sridhar

[R-4 and R-5 are impleaded as party-
respondents as per the order of this
Court dated 18.09.2019 in
W.M.P.No.22689 of 2016]

: Respondents

PRAYER: Writ Petition is filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Mandamus, directing the respondents to refund the amount of Rs.1,60,30,000/- with interest at 12% per annum that was paid towards the auction sale in respect of the auction held on 30.12.2014 as requested in the representation dated 06.11.2015 within the time stipulated by this Court.

For Petitioner

: Mr.M.Devaraj

For Respondents 1to3

: Mr.SP.Chockalingam

ORDER

M.GOVINDARAJ, J.

This Writ Petition has been filed seeking a direction to the respondents to refund the amount of Rs.1,60,30,000/- [Rupees One Crore, Sixty Lakhs and Thirty Thousand only] with interest at 12% per annum that was paid towards the auction sale in respect of the auction held on 30.12.2014, as requested in the representation dated 06.11.2015, within the time stipulated by this Court.

2. The facts, in brief, are as follows:

(i) The third respondent issued a notice dated 20.11.2014 inviting tender for the sale of the secured asset under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, [for brevity, 'SARFAESI Act'] in respect of three items of the property. The auction was E auction on 30.12.2014 with online bid. The petitioner along with others participated in the E auction and had bidden the property for Rs.1,60,30,000/- [Rupees One Crore, Sixty Lakhs and Thirty Thousand only] and the bid was confirmed in favour of the petitioner. As required, 25% of the bid amount was paid on the same day and the remaining 75% was to be deposited, within 15 days from the date of the confirmation of the sale. Accordingly, the entire bid amount was paid and the third respondent issued the sale certificate in respect of the property, namely Plot No.620A measuring 4800 square feet in Ramnagar South layout comprised in S.No.114, Madipakkam Village.

(ii) When the matter stood thus, one Sridhar entered into the property and started to obstruct the petitioner's entry, for which, a police complaint is also given. Thereafter, the petitioner informed the second and third respondents to settle the police complaint ascertaining as to whose documents are genuine and to safeguard the bank interest or in the alternate, return the bid amount paid in respect of the auction held on 30.12.2014 with interest.

(iii) Subsequently, the petitioner issued the legal notice dated 07.08.2015, calling upon the second and third respondents to return the bid amount. In the reply dated 24.08.2015, the second and third respondents denied that the documents in their custody are bogus and that were deposited by the borrower for the purpose of creating equitable mortgage, however, admitted that SA.No.396 of 2014 filed by the borrower has been allowed on 23.07.2015, setting aside the auction sale held on 30.12.2014. The Inspector of Police, Madipakkam Police Station, in his reply to the RTI, has clearly stated that original documents were not submitted and

the documents submitted by the bank are not genuine. Even then, the respondents have not taken any steps to refund the bid amount. Hence, having left with no other option, the petitioner is before this Court by filing the present Writ Petition.

3. Denying all the averments made in the affidavit filed in support of the Writ Petition, the third respondent has filed a counter-affidavit, stating that the subject property was purchased in auction by five persons, viz., K.Senthil Kumar, V.Bhuvaneshwaran, K.Rajendran, A.Velmurugan and P.Prem Prasanna, but, whereas, the Writ Petition has been filed by only one of them. Further, Section 17 of the SARFAESI Act contemplates that any person aggrieved by any of the measures taken by the Bank under Section 13(4) can challenge the same by way of an application before the Debts Recovery Tribunal. Without exhausting the alternative remedy available under the Act, the petitioner has filed the present Writ Petition, which is not maintainable in law. Contending so, the third respondent prayed for dismissal of the Writ Petition.

4. The core issue in this Writ Petition is refund of the amount deposited by the petitioner towards sale consideration i.e., a sum of Rs.1,60,30,000/- [Rupees One Crore, Sixty Lakhs and Thirty Thousand only] with interest at 12% per annum paid towards an auction sale, which is held on 30.12.2014.

5. The respondent bank has issued a sale notice on 25.08.2014 to sell the property of the fourth respondent measuring an extent of 4800 square feet in Survey No.114 in Paimash Nos.30/1 and 30/2, bearing plot No.620A, Ram Nagar South Layout, Madipakkam Village, Tambaram Taluk, approved in DTCP No.307/73. The petitioner participated in the auction held on 30.12.2014 and deposited a sale consideration of a sum of Rs.1,60,30,000/- [Rupees One Crore, Sixty Lakhs and Thirty Thousand only]. Later, the fourth respondent filed an application in S.A.No.396 of 2014, under Section 17(1) of the SARFAESI Act, to set aside the sale notice. The Debts Recovery Tribunal, in its order dated 20.10.2014, granted stay of the sale notice dated 25.08.2014, fixing the date of auction on 24.10.2014, on condition of payment of 15% of the outstanding amount. The said conditional order was not complied with by the fourth respondent. Thereafter, a sale certificate was issued by the bank on 14.01.2015.

6. Thereafter, on 23.07.2015, the auction sale was set aside and the property was handed over back to the borrower. Thereafter, the petitioner made a representation to the respondents on 06.11.2015 for refund of the money along with interest.

7. The petitioner wants refund of sale consideration on the ground of failure of the bank to convey the title to

the property, lack of information on the encumbrances by the seller and non-disclosure of the encumbrances, as contemplated under the relevant rules. Further, lack of identity, lack of existence and bogus documents employed in the process of availing the mortgaged loan were not informed and that the bank has not acted bona fide and in fact, failed to take any action against the fourth respondent.

8. Per contra, the respondents would contend that once the sale is completed, the sale certificate issued and possession handed over to the petitioner, the matter has become infructuous and they are not liable to refund any amount. The order passed by the Debts Recovery Tribunal to hand over the property to the borrower dated 23.07.2015, has been appealed against. The appeal is the continuation of the original proceedings and till the disposal of the appeal, the petitioner is not entitled to seek for refund of money.

9. The respondents would rely on the following judgments in support of their contention:

- "(i) United Bank of India vs. Satyawati [Manu/SC/0541/2010];
- (ii) V.Sambandan vs. The Punjab National Bank [Manu/TN/3041/2009];
- (iii) E.Muthuraj vs. Authorized Officer, Chief Manager & General Manager [Manu/TN/2157/2012];
- (iv) N.Suresh Vs. Indian Bank, Chennai [Manu/TN/0319/2013];
- (v) United Bank of India vs. Official Liquidator & Others [Manu/SC/0592/1994]
- (vi) Speed Track Cargo Vs. State Bank of Patiala & Others [Manu/DE/0359/2016];
- (vii) ICICI Bank Ltd. Vs. P.Veerendar Chordia [Manu/TN/3790/2010]; and
- (viii) K.Chidambaram Manickam Vs. Shakeena & Others [Manu/SC/7625/2007].

10. I have considered the submissions made by both sides.

11. At the outset, a perusal of the order passed by the Debts Recovery Tribunal dated 23.07.2015, raises a material defect of service of possession notice to the borrower under Section 13(4) of the SARFAESI Act. The bank has failed to produce any authentic proof to show that the mandatory notice was served on the borrower and that he has acknowledged the receipt of the same. Mainly, on this ground, the sale was set aside by the Debts Recovery Tribunal. Even, on the appeal, the bank has not come out with a clear statement that the possession notice was served on the borrower on a specific date. All through, it is stated that on receipt of the demand notice, the fourth respondent raised his objections and thereafter, they have taken possession of the secured asset and issued possession notice, as per Section 13

(4), as mandated by the Act. Therefore, once objection is made by the borrower against the demand and that possession is taken, it is not necessary to file the documents before the Debts Recovery Tribunal and the application filed by the borrower to set aside the sale should be dismissed as infructuous. Even now, we do not find any document to show that the borrower has acknowledged the receipt of notice, as held by the Debts Recovery Tribunal. In the event of the material defects being committed by the bank, one cannot expect an early disposal of the issue pending between the bank and its borrower. The petitioner has every reason to apprehend that he may not get the property.

12. The other contention that the fifth respondent lodged a criminal complaint against the bank in the Land Grabbing Cell. But the bank, after realizing substantial portion of the money, has not taken any action against the fourth respondent for the illegal activities. This discloses that the bank had definite knowledge about the encumbrances over the mortgaged property and lack of identity of the property. Non-disclosure of these material facts is contrary to Rule 8(6)(a) and 8(6)(f) of Security Interest (Enforcement) Rules, 2002. It is pertinent to note that the respondent/bank requested the Tahsildar, Sholinganalur, as early as on December, 2014 to identify and demarcate the property in possession. But, till date, property could not be demarcated by the revenue authorities and it could not be identified at all. In such an event, the statement that possession was taken may not be true. So, the allegation that the bank had approximately taken possession of property and failed to convey the title and put the petitioner in possession is unsustainable. This is further substantiated by the boundaries given to the property. Plot No.620-A is not at all existing. The settlement by the fourth respondent to his son mentions the suit property as 'plot No.620' and not '620-A'. The other settlement executed by the fourth respondent in favour of another son in respect of Plot No.618, does not mention the western side boundary as '620-A', rather it mentions as '620'. Therefore, in the identity of the property, existence of plot No.620-A is doubtful. To add further, information given under the Right to Information Act by Panchayat Union of St.Thomas Mount, reveals that no lay out plan as mentioned in the sale notification is available with them. All these above points would go to show that the very existence of the property, identity of the property and blanket title to the property is nebulous and the bank could not pass on a valid title to the petitioner.

13. The next contention of the petitioner that the original documents, based on which the property was sold in auction, were proved to be bogus documents by the Inspector of Police, Madipakkam Police Station, on an information sought under the Right to Information Act.

14. Even though the respondent/bank, by filing a detailed counter, would take a stand for the maintainability of the Writ Petition and the entitlement of the petitioner for refund of money deposited, there is no whisper about the allegations detailed above as to the validity of the title, bogus nature of the documents, existence of the property sold in auction, and non-disclosure of material information and encumbrances over the property.

15. All the judgments relied on by the respondents pertain to the maintainability of the petition in writ proceedings for the Recovery of Debts Due to Banks and Financial Institutions Act, which provides for appeal by any person aggrieved to approach only the Debts Recovery Tribunal. In the present case, the petitioner is not a person aggrieved over the sale of the property, but, he seeks to get refund of money. It is a common remedy available to the petitioner and the petitioner is very much entitled to maintain the petition.

16. Section 55 of the Transfer of Property Act, 1882, while describing the rights and liabilities of buyer and seller, specifies that the seller is bound to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover. Under Rule 8(6)(a) and 8(6)(f) of the Security Interest (Enforcement) Rules, 2002, it is the mandatory duty of the bank to disclose all the material defects which they find. As already decided, the petitioner is entitled to get refund of money, for non-compliance of Rule 8(6)(a) and 8(6)(f) of the Security Interest (Enforcement) Rules, 2002, as possession could not be handed over to him.

17. Besides, the learned counsel appearing for the petitioner would strenuously contend that as per Rule 8(6) of the Security Interest (Enforcement) Rules, 2002, the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor, shall be provided. As per Rule 8(6)(f) of the Security Interest (Enforcement) Rules, 2002, any other thing which the authorised officer considers it material for a purchaser to know, in order to judge the nature and value of the property, should also be put on notice. The Bank had suppressed all these material facts in the auction notice. Had it been disclosed, the writ petitioner would not have invested a huge sum in the auction proceeding.

18. Further, as per Rule 9(9) of the Security Interest (Enforcement) Rules, 2002, the authorised officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money. Rule 9(10) would further state that the certificate of

sale issued under sub-rule (6) shall specifically mention that whether the purchaser had purchased the immovable secured asset free from any encumbrances known to the secured creditor or not. Despite the mandatory provisions, the Bank had by giving wrong information, acted in contravention to the statutory requirement contemplated under the SARFAESI Act and Rules.

19. The learned counsel for the petitioner would rely on a Division Bench judgment of this Court in JAI LOGISTICS VS. THE AUTHORISED OFFICER, SYNDICATE BANK [2010 (4) CTC 627] wherein this Court had observed as follows:

"5. We have considered the submissions. Of course, in the aforesaid judgment, the Supreme Court, while considering a sale by the Official Liquidator, has held that it is the duty of the intending purchaser to satisfy himself as to the encumbrance before participating in the bid. Having participated in the bid, the intending purchaser cannot later on turn around and question the Official Liquidator on the ground that the encumbrance was not notified. In that case, the provisions of the Rules as applicable in the present case are not applicable to the Official Liquidator. But in the case on hand, once possession is taken over under Section 13(4) or under Section 14 of the SARFAESI Act, whenever the secured creditor contemplates a sale of immovable property, they will have to follow Rule 8 of the Security Interest (Enforcement) Rules, 2002. Rule 8(6) (f) mandates the secured creditors to set out in the terms of sale notice any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property. A reading of the said rule, in our opinion, would also include the encumbrance relating to the property. We are inclined to read the rule in that way keeping in mind the interest of the intending purchaser to be put on notice as to the encumbrance, as otherwise he/she will be purchasing the property and simultaneously buying the litigation as well and an intending purchaser may not bid in the event he/she came to know of any encumbrance over the property. That is why the rule specifically contemplates a provision for the authorised officer, while notifying the sale, to specifically state as to the encumbrance. It will be a different issue in the event the auction notice indicated that it is the duty of the intending purchaser to verify not only the encumbrance by way of alienation of the property, but also the other statutory liabilities and in that case, the intending purchaser cannot later on turn around and seek for either the refund of the earnest money deposited or insist the bank to

clear the encumbrance. In the absence of such indication in the sale notice, in our considered view, the respondent-bank would not be justified in compelling a purchaser to go ahead with the sale by depositing the balance sale consideration together with the encumbrance. "

20. The core issue before this Court is as to whether the writ petitioner is entitled for refund of the sale consideration deposited with the Bank with interest.

21. The bank initiated SARFAESI proceedings against the borrower to recover the outstanding. The bank issued a notification calling for bids to purchase the secured asset. The auction notification is silent with regard to the encumbrances and pending litigations. The notification proceeded as if the secured asset was free from litigation and the bank would be in a position to put the purchaser in vacant possession of the property.

22. There is no dispute that Rule 8(6)(a) and 8(6)(f) are mandatory in nature. The Purchaser should be put on specific notice about all the encumbrances and other materials so as to enable him to take a conscious decision with regard to his participation in the auction and the amount to be quoted in his bid. The disclosure is not an empty formality. The auction notification is defective and improper in case the encumbrances and known litigations are not disclosed. Since there is a statutory obligation on the part of the secured creditor under rule 9(9) to deliver the property free from encumbrance to the purchaser, such disclosure must be made well before the auction to give an option to the purchaser to take part in the auction.

23. There is a statutory obligation on the part of the bank to disclose the encumbrances in the sale notice. The failure to adhere to such duty would come within the ambit of sub Section (2) of Section 18 of the Contract Act, enabling the other party to avoid the contract.

24. In Indian Banks' Association, Bombay and others vs. Devkala Consultancy Service and others, 2004 (11) SCC 1, the Supreme Court observed that "it is well settled that when a procedure has been laid down, the Statutory Authority must exercise its power in the manner prescribed or not at all".

25. The bank was well aware of the cloud on title to the secured asset, on account of the pending litigations. Even then, the bank suppressed the information with regard to litigation in the sale notice. Whether the writ petitioner had prior knowledge of encumbrance

26. The Supreme Court in *Bharat Sanchar Nigam Ltd. vs. Telephone Cables Ltd.* [2010(3) Scale 36], indicated the need for the Public Sector Undertakings to ensure fairness in all their transaction.

"A public undertaking is required to ensure fairness, non-discrimination and non-arbitrariness in their dealings and decision making process. Their action is open to judicial review and scrutiny under the Right to Information Act, 2005."

27. In *Ambalavanan vs. Canara Bank* (order dated 01.04.2016 in Review Application (Writ) No.302 of 2015) a Division Bench of this court considered the question regarding payment of interest. The Division Bench made the following observation, while directing payment of interest to the purchaser of a secured asset:-

"9. The Bank issued the sale notice to auction the property mortgaged by the first respondent. The applicant participated in the auction. The bid submitted by the applicant was accepted by the Bank and the sale was confirmed in his name. The applicant paid a sum of Rs.65,07,000/- to the Bank. The amount was deposited on 27 August 2010. The sale was subsequently set aside by this Court. The Bank refunded the amount deposited by the applicant. However, interest was not paid. The Bank cannot be heard to say that the purchaser of the property is not entitled to interest. The money was deposited with the Bank. The Bank was having the money throughout the proceedings. The Bank utilized the money. The Bank charges different rates for different transactions. The Bank is charging 14% for mortgage loans. There are other transactions wherein the Bank charges even 18% interest per annum. Such being the factual position, the Bank cannot be heard to say that the applicant has to be satisfied only with the principal amount. We are of the view that the Bank having kept the amount for years together, is bound to pay interest to the applicant."

28. The petitioner is entitled to interest which we fix at 12% per annum.

29. In the result, the Writ Petition is allowed and the respondents 1 to 3 are directed to refund the amount of Rs.1,60,30,000/- [Rupees One Crore, Sixty Lakhs and Thirty Thousand only] with interest at the rate of 12% per annum from the date of deposit of the sale consideration, within a period of eight weeks from the date of receipt of a copy of this order. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To

- 1.The General Manager,
Recovery Monitoring and Legal Services,
Bank of Maharashtra,
Central Office,
Lokmangal, 1501, Shivaji Nagar,
Pune-411 005.
- 2.The Assistant General Manager,
Bank of Maharashtra, Chennai Region,
No.4, Sivagnanam Road, T.Nagar,
Chennai-17.
- 3.The Authorised Officer,
Bank of Maharashtra,
No.247, Philips Road,
Broadway, Chennai-600 108.

+1cc to Mr.M.Devaraj, Advocate Sr.80411
+1cc to Mr.S.P.Chockalingam, Advocate Sr.80844

W.P.No.13269 of 2016

spd[co]s
rg 19/11/2019