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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 05.11.2019

\+ CRL.M.C. 3721/2017 & Crl.M.A. 15115/2017, 15179/2017

IDBI BANK LTD & ANR ..... Petitioners

Through Mr.Dayan Krishnan, Sr. Adv. with Ms.Niharika Kaul & Mr.Sumit Nagpal, Advs.

versus

GOVT OF NCT OF DELHI & ORS ..... Respondents

Through Mr. K.K. Ghei, APP for State SI Rajpal PS Pahar Ganj. Mr.Sameer Dewan, Adv. with Mr.Rajesh Kumar Mishra, Adv. for R-2.

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T (ORAL)

1. Vide the present petition, the petitioner seeks direction thereby to Set aside and quash the order dated 07.06.2017 passed by the learned ACMM, Tis Hazari Court, Delhi, in Complaint Case No.83/1/2015 and emanating proceedings thereto.

2. The brief facts of the case are that M/s. Krishna Designers, a Proprietary firm of Sh. Shiv Sareen (the borrower) who had availed Cash

Credit limit of ₹495 lakh from the Petitioner Bank, which was sanctioned vide letter dated 20.02.2009. The said facilities were renewed and enhanced to ₹650 lakh vide sanction letter dated 25.05.2010. Further, an adhoc limit of ₹100 Lakh was also sanctioned. The property being Residential property bearing Plot No.84, Ground Floor & Basement, HU Block, Pitampura, New Delhi - 110088 was inter alia mortgaged by Shiv Sareen, proprietor of M/s.Krishna Designers as security towards loan facilities extended by the Petitioner Bank. However, since Shiv Sareen failed and neglected to maintain financial discipline and operate the accounts in due compliance of the terms of sanction and consequently in view of the defaults committed by the borrower, the account of the borrower became a Non-Performing Asset (NPA) on 28.01.2011. Pursuant to the same, since the borrower defaulted in payment of the outstanding dues of the Petitioner Bank, the Petitioner Bank initiated recovery proceedings and accordingly, in terms of the powers conferred upon the Petitioner Bank under SARFAESI Act, 2002, the Petitioner Bank issued a notice under Section 13(2) on 24.05.2012, thereby calling upon the borrower to pay an outstanding amount of ₹9,07,38,873/- as on 30.04.2012. In the meantime, during the month of March 2014, an unknown person introducing himself as "*Vicky*" and claiming himself to be an ex-employee of Shiv Sareen, delivered a copy of a document purported to be an attachment order dated 25.11.2013 issued by the Income Tax Department in respect of the afore-stated mortgaged property to the Petitioner Bank. In terms of the said purported attachment order, there was alleged income tax dues of ₹1,20,40,720/- along with interest payable under Section 220 (2) of the Income Tax Act against Shiv Sareen. The said purported order was neither addressed to the Petitioner Bank nor was issued by the Tax Authorities to the Bank as a Garnishee Order under Section 226 (3) of the Income Tax Act and accordingly, the Petitioner Bank was not in a position to verify the veracity of said order.

3. Learned senior counsel appearing on behalf of the petitioners submits, it is generally seen in most NPA cases, when the banks initiate measures for recovery, it is standard practice of the borrowers to try and create some obstacle to thwart or delay realization and recovery of dues by the Bank by raising such kind of innocuous impediments. However, despite the fact that the Petitioner Bank was proceeding under the provisions of the SARFAESI Act and thus by virtue of non-obstante provision of Section 35 of the said Act, the measure being undertaken override anything to the contrary in any other law, still the Petitioner Bank did not ignore the said alleged attachment

order from Income Tax Department. In order to independently verify the veracity of the alleged attachment order, visited the said mortgaged property on 19.03.2014 and again on 30.05.2014 to find out whether any such alleged attachment order/ notice was pasted on the property in terms of Rule 51 of PART III of the second schedule of Income Tax Act, 1961 which provides that, "*the order of attachment shall be proclaimed at some place on or adjacent to the property attached by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and on the notice board of the office of the Tax Recovery Officer*". Since no such order was found affixed/pasted on the property and in any case the provisions of SARFAESI Act having an overriding effect, the Petitioner Bank under powers conferred in terms of Section 13(4) of the SARFAESI Act, 2002, took symbolic possession of the said mortgaged property on 30.05.2014. Pursuant to the above, a public notice was also duly published in newspaper on 03.06.2014.

4. Learned senior counsel further submits, the petitioner Bank, as an abundant caution, also wrote to the Income Tax Department on 10.09.2014, 15.10.2014 & 03.01.2015 for confirming/verifying the authenticity of the alleged attachment order dated 25.11.2013 purportedly issued in the name of

the borrower i.e. Shiv Sareen. However, no reply was received from the Income Tax Department by the Petitioner Bank to any of the said letters and accordingly, the Petitioner Bank, in terms of the Section 14 of the SARFAESI Act, 2002, approached the Ld. Chief Metropolitan Magistrate (CMM), Delhi for appointing a Court Receiver to take possession of the said property, wherein the Ld. CMM vide order dated 03.01.2015 granted permission and accordingly, the Petitioner Bank took actual physical possession of the property on 22.01.2015 with the assistance of the Court Receiver.

5. Further submitted that Pursuant to the above, a Public Sale Notice was issued on 24.01.2015, wherein the date of e-auction was fixed on 26.02.2015. The Petitioner Bank even before the e-auction, once again wrote to the Income Tax Department on 11.02.2015 informing that since the Bank had not received any response from the Income Tax Department, the Bank has presumed the said alleged attachment order to be unauthentic and accordingly, proceeding with the sale of the mortgaged property. Since by that date no revert from Income Tax Department was received, the Petitioner No.2 in order to avoid any issue in respect of non-disclosure or concealment of information about Income Tax liability, if the said alleged attachment

order is found to be true later on, the following was stipulated in the Public Notice:

> *"All statutory liabilities/taxes/maintenance fee/Property tax/electricity/water charges etc outstanding as on date and yet to fall due would be ascertained by the bidder(s) and would be borne by the successful bidder. Bank does not take any responsibility to provide Information on the same".*

6. Further it is pertinent to mention that the Public Notice clearly mentioned that the sale will take place on *"As is where is, as is what is & whatever there is and without recourse basis"*.

7. Learned senior counsel further submits that despite various letters issued by the Petitioner Bank to the Income Tax Department, no reply was received by the Bank. Accordingly, e-auction was conducted on 26.02.2015 and the Respondent No.2's bid was accepted and he was declared as the successful auction purchaser for the ground floor property. At the time of Sale, Confirmation was issued to the Respondent No.2 vide letter dated 28.02.2015.

8. Further submits that the Petitioner Bank as a prudent measure further vide its letter dated 03.03.2015 informed the Income Tax Department that the Bank had sold the properties in public auction. However, the Respondent No. 2 did not make payment of balance 75% of the auction

price within the stipulated period of 15 days from the date of confirmation of sale and vide letter dated 09.03.2015, requested the Petitioner to extend the repayment time.

9. It is also submitted that in terms of the confirmation of sale terms and conditions, in case of failure to make payment of balance sale consideration, earnest money deposited by the Respondent No.2 of ₹15.40 Lakh was liable to be forfeited.

10. Learned senior counsel further submits that on 18.03.2015 for the first time, the Petitioner Bank received a letter dated 16.03.2015 from the Income Tax Department stating that there are income tax dues of Shiv Sareen amounting to ₹169.66 lakh and requested the Petitioner Bank to remit the sale proceeds to them. In the mean time, the respondent no.2 again requested for extension of time vide letter dated 19.03.2015. The Petitioner Bank granted further extension of time to the Petitioner and the same was intimated vide e-mail dated 15.04.2015. Pursuant to the above, the Petitioner Bank vide its letter dated 08.04.2015 informed the Income Tax Department that IDBI is a secured creditor and the said property has been mortgaged with the Bank much prior to the attachment by the Income Tax Department.

11. He further argued that the petitioner is protected under section 32 of the SARFAESI Act, 2002 which is reproduced as under:

> *"32. Protection of action taken in good faith.—No suit, prosecution or other legal proceedings shall lie against any secured creditor or any of his officers or manager exercising any of the rights of the secured creditor or borrower for anything done or omitted to be done in good faith under this Act."*

12. While advancing arguments, learned senior counsel appearing for the petitioner submits that there is no inducement or damage caused to the respondent no.2 and the order passed by the Ld. Trial Court is illegal and deserves to be set aside.

13. On the other hand, learned counsel appearing on behalf of the respondent no.2 submits that the auction of the property in question took place on 26.02.2015 and the petitioner being the successful purchaser of the same, deposited 25% of the auction proceedings. Accordingly, the petitioner received letter dated 16.03.2015 on 18.03.2015, despite that he did not convey the same to the said respondent. Moreover, the extension to deposit the balance amount was granted twice. The respondent no.2 was kept in dark due to which the sale deed got delayed. Moreover, the respondent suffered a lot and was compelled to run from pillar to post to get the sale deed registered after depositing the auction amount.

14. I have heard learned counsel for the parties and perused the material available on record.

15. It is not in dispute that till 26.02.2015, when auction had taken place, the income tax department did not respond to the petitioner regarding authenticity of the attachment order dated 25.11.2013. Thereafter, only the petitioner was supposed to apprise the respondents regarding the confirmation of attachment order dated 25.11.2013, however, the petitioner admittedly received confirmation letter dated 16.03.2015 on 18.03.2015 from the Income Tax Department.

16. It is also not in dispute that the respondent no.2 filed a suit for damages against the petitioner which is pending for adjudication. It is also not in dispute that attachment order dated 25.11.2013 has been set aside vide order dated 13.07.2016 passed by Division Bench of this court in case of ***Suresh Kumar Goyal vs. Chief Commissioner Income Tax and Ors.*** in W.P.(C) No. 3430/2016. Thus, admittedly the property is with the respondent/auction purchaser.

17. It cannot be disputed, the petitioners are protected under Section 32 of SARFAESI Act. The auction took place on 26.02.2015 and till then, despite repeated request, the petitioners had not received confirmation of attachment

from Income Tax Department. Therefore,, I am of the considered view that while dealing with the property in question with the respondent, there is no criminality on the part of the petitioner.

18. However, as I discussed above, the petitioners are at fault for not apprising the respondent no.2 of the letter dated 16.03.2015 which they received on 18.03.2015 due to which the respondent was compelled to run from pillar to post to get possession of the property in question.

19. Accordingly, I hereby set aside the order dated 07.06.2017 passed by the learned Trial Court and emanating proceedings thereto. While allowing the present petition and setting aside impugned order mentioned above, I hereby impose cost of Rs.5 lacs upon the petitioner to be paid in favour of the respondent no.2.

20. In view of above, the petition is allowed and disposed of.

21. Pending applications stand disposed of.

22. The cost amount shall be paid within a period of two weeks from the receipt of this order.

23. Order *dasti*.

(SURESH KUMAR KAIT)
JUDGE

NOVEMBER 05, 2019/ab