NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment Reserved on : 18.03.2021

Judgment Delivered on : 25.03.2021

Writ Appeal No. 365 of 2020

(Arising out of order dated 21.08.2020 passed by the learned Single Judge in WPC No. 845 of 2020)

- Union Bank of India, Rajbandha Maidan Branch, District Raipur Chhattisgarh, Through its Authorised Officer Sachchan Kumar, aged about 45 Years S/o Shri Kamta P. Sinha, presently posted as Assistant General Manager , Union Bank of India.

---- Appellant

Versus

1. Vinay Kumar Jain S/o Kasturchand Jain, Aged about 35 Years R/o House No. 4, Tirupati Apartments, Tagore Nagar, Near Pachpedi Naka, District Raipur 492009 Chhattisgarh.
2. Corporation Bank, through its Branch Manager, Main Branch, Raipur District Raipur Chhattisgarh.

---- Respondents

For Appellant : Mr. Ankit Pandey, Advocate
For Respondent No.1 : Ms. Ritu Chouhan, Advocate

Hon'ble Shri P. R. Ramachandra Menon, Chief Justice
Hon'ble Shri Parth Prateem Sahu, Judge

CAV JUDGMENT

Per, P. R. Ramachandra Menon, Chief Justice

1. Judgment passed by the learned Single Judge in WPC No. 845 of 2020, directing the Secured Creditor / Bank to refund the Earnest Money Deposit (EMD) amounting to Rs.35,88,250/- with interest @ 6% per annum from 21.02.2018 – the date of deposit, to the Writ Petitioner / successful bidder in respect of House No.B-76 (pursuant to setting aside the sale by the DRT), is subjected to challenge in this appeal. The challenge in the appeal is confined only to the 'interest' portion, the amount in deposit having already been returned vide Annexure-A/4.

2. At the very outset, it is to be noted that the Secured Creditor, who was arrayed in the Writ Petition was the 'Corporation Bank', which came to be merged with the Appellant-Bank namely, the Union Bank of India along with the Andhra Bank as per the relevant proceedings issued by the Competent Authority / Government of India *w.e.f.* 01.04.2020 as discernible from Annexure-A Notification dated 04.03.2020. Though the writ petition was filed in February, 2020 *i.e.* before the amalgamation, the Appellant-Bank was never brought in the party array and the proceedings were finalized by the learned Single Judge even without issuing notice to the Corporation Bank, but for getting the factual position ascertained through the learned Assistant Solicitor General (as contended by the Appellant). It is also pointed out from the part of the Appellant-Bank that, though the Appellant-Bank had filed an I.A., seeking to intervene in the proceedings on 14.08.2020, it did not turn to be fruitful and the writ petition came to be finalized without showing the name of the Bank or the counsel in the cause list. This has caused prejudice to the Appellant-Bank insofar as the correct factual particulars, particularly, as per the terms and conditions of the Sale “As is where is and What is there is” condition and that the “EMD will carry no interest” could not be brought to the notice of the learned Single Judge, while directing the amount deposited by the successful bidder to be refunded with interest as mentioned above.

3. The sequence of events reveals that Annexure-A/1 Notice was issued by the Secured Creditor / Bank on 12.01.2018 for conducting

the e-auction of the scheduled property to be held on 21.02.2018. The 1st Respondent, in his attempt to arrange a permanent place of residence, sought to participate in the proceedings by submitting the bid on 19.02.2018, giving a declaration / understanding as to the terms and conditions. In terms of the tender conditions, 10% of the bid amount had to be deposited as the 'EMD' and accordingly, Rs.13,09,300/- and Rs.10,65,300/- were deposited by him in respect of two houses numbered as B-55 and B-76 situated at Wall Fort City, Bhatgaon, Raipur.

4. In the e-auction conducted by the Secured Creditor, the 1st Respondent came to be the successful bidder and as per terms and conditions, he had to deposit 25% of the bid amount, minus the amount deposited by way of EMD, to have the sale confirmed in his name. The balance amount was to be satisfied within 15 days after confirmation of the sale or within such other period as mentioned in the Sale Notice. Accordingly, the 1st Respondent remitted a further sum of Rs. 12,13,650/- on 21.02.2018, to top up the figure to 25% of the bid amount of Rs.1,43,53,000/- in respect of the House No.B-76.

5. Despite the specific terms of the Sale Notice and inspite of request made by the 1st Respondent including by way of Annexure-P/4 dated 26.02.2018, followed by Annexure-P/7 dated 07.03.2018, requesting for Sale Confirmation, no such steps were pursued by the Secured Creditor to confirm the sale. On the other hand, the Petitioner was let known that the original owner of the property by name M/s.

Atharva Infrastructure (a partnership firm), who was the borrower, had filed WPC 542/2018 before this Court, being aggrieved of the proceedings and that this Court had granted an interim order of stay on 26.02.2018, preventing the Secured Creditor from effecting the Sale Confirmation. It is stated that the said case was disposed of with direction to have the matter pending consideration before the DRT (by way of Securitisation Application No.272/2016 preferred by the original owner M/s. Atharva Infrastructure) to be finalized.

6. Met with the situation, the 1st Respondent filed an application for impleading him in the party array in the Securitisation Application No.272/2016 on 23.03.2018; which however came to be rejected as per order dated 31.10.2018 passed by the DRT, Jabalpur on the ground that he was not a necessary party, as the Sale Confirmation was not effected so far. The Securitisation Application No.272/2016 was finalized by the DRT as per order dated 13.12.2019, whereby the auction proceedings were set aside, with liberty to Secured Creditor to have it pursued afresh, in accordance with law. In the said circumstance, the 1st Respondent submitted Annexure-P/10 request dated 02.01.2020 (Annexure-A/3 in the appeal), requesting to refund the amount deposited by him immediately; which however did not yield any positive result. In the said circumstance, Annexure-P/11 reminders were submitted on 10.01.2020, 28.01.2020 and 20.02.2020, wherein a demand was raised to pay interest as well (vide reminders dated 28.01.2020 and 20.02.2020). Since there was no response from the part of the Secured Creditor, the 1st

Respondent was constrained to approach this Court by filing Writ Petition No.845/2020 with the following prayers.

> "10.1.1 To direct the Respondent to immediately refund the EMD of 25% amount of bid i.e. Rs. 35,88,250/- paid vide RTGS enclosed as **Annexure P/2 (Colly)** & **Annexure P/3 (Colly)** herewith along with the compound interest @ 12% p.a., from the date of deposit of money till date of refund;
>
> 10.1.2 To order the Respondents to pay the damages to the extent of Rs. 50 lakhs towards unfair and illegal act of withholding of the money of the Petitioner and not acting in bonafide manner;
>
> 10.1.3 To order for costs of the Petitioner;
>
> 10.1.4 Any other relief which this Hon'ble Court deems fir and proper may also kindly be granted to the Petitioner, in the interest of justice."

7. As mentioned above, after getting the factual position ascertained from the part of the Bank through the Assistant Solicitor General, the learned Single Judge observed that there was total uncertainty with regard to the fate of the Writ Petitioner in getting the Sale confirmed, despite the huge deposit of Rs.35,88,250/- made by him about 2 ½ years ago. After observing that there was some failure / lapses on the part of the Secured Creditor in disclosing the pendency of the dispute between the Bank and the original owner / borrower and further that the Bank was not having the actual / physical possession of the property, but for symbolic possession even on the date of the Sale, the matter was finalized directing the Secured Creditor to return the sum of Rs.35,88,250/- with interest @ 6% per annum from 21.02.2018 i.e. the date on which the deposit was effected. It is the said verdict that is put to challenge in this appeal, after effecting the

refund of Rs.35,88,250/- vide Annexure-A/4 dated 17.09.2020, confining the challenge only against the direction to satisfy 'interest' and also as to the adverse observations made against the Bank. It is pointed out that the verdict passed by the DRT setting aside the Sale proceedings has already been subjected to challenge by filing appeal before the DRAT, where the matter is still pending.

8. Mr. Ankit Pandey, the learned counsel appearing for the Appellant-Bank submits that the verdict passed by the learned Single Judge is *per se* wrong and not sustainable in law, having made some adverse observations against the Secured Creditor without issuing any notice and without taking note of the subsequent developments including merger of the Secured Creditor (Corporation Bank) in the Appellant-Bank (Union Bank of India), who infact had filed a petition to intervene in the proceedings. The matter was finalized without showing the involvement of the Bank or its counsel in the proceedings and hence much prejudice has been caused to the Appellant-Bank in this regard. The learned counsel also points out that the Sale was conducted in "<u>As is where is and What is there is</u>" condition, as clearly mentioned in the terms and conditions of the Sale Notice, a copy of which has been produced as Annexure-A/2. The 1st Respondent / auction purchaser had given a declaration as well, to the fact that he had read and understood all the terms and conditions, which was stated as acceptable and had taken part in the proceedings. The bidders were also alerted that the amount of EMD paid by the interested bidder shall carry no interest and that the

same would be returned only after conclusion of the sale proceedings. The Bank had also notified that there was no other known encumbrance over the property, however adding that the intended bidder should make their own independent enquiries regarding the encumbrances, title of property put on auction and the claims / rights / dues affecting the property prior to submitting their bid, simultaneously making it clear that the property was being sold with all the existing and future encumbrances, whether known or unknown to the Bank and further that Authorised Officer / Secured Creditor shall not be responsible for any third party claim. This being the position, the 1st Respondent / Writ Petitioner was not entitled to get any interest and hence the direction to grant interest; that too from 21.02.2018 requires to be interdicted. The necessity to expunge the adverse observations passed without issuing notice to the Bank, is also passed, asserting that there was no lapse on the part of the Bank in any manner. It is stated that the adverse observations made by the learned Single Judge may have a bearing with regard to merits of the appeal pending consideration before the DRAT and hence it is sought to be expunged.

9. Ms. Ritu Chouhan, the learned counsel appearing for the 1st Respondent submits that there is no dispute from the part of the Bank as to the status of the 1st Respondent as the successful bidder, who participated in the bid and effected the deposit to the tune of Rs.35,88,250/-. The Bank, in fact, had not revealed anything in the Sale Notice as to dispute pending consideration before the DRT

(Securitisation Application No. 272/2016) between the borrower and the Bank and further that the actual / physical possession of the property was not with the Bank but with the original owner. It was only with intent to secure a place of residence that the Writ Petitioner had participated in the bid proceedings, arranging funds to satisfy the sale price. The deposits made by the Writ Petitioner to the tune of Rs.35,88,250/- were lying at the hands of the Secured Creditor / Bank for more than 2 ½ years and despite making Annexure-A/3 request on 02.01.2020, no steps were pursued to have the amount returned, in view of the uncertainty of the on going litigations. Request was made by way of further reminders, which also did not turn to be fruitful; which made the Writ Petitioner / 1st Respondent to approach the Court. The learned counsel submits that the factual position was got ascertained from the Bank through the learned Assistant Solicitor General and it was thereafter, that the matter was finalized by the learned Single Judge, which does not warrant any interference.

10. The relevant Clauses, forming part of the terms and conditions of the Sale, as contained in Anneuxre-A/2 are to the following effect :

> "1. The above movable/immovable secured assets will be sold in "**As is where is" and "What is there is"** conditions. Auction sale / bidding would be only through "Online Electronic Bidding" process through the Website **https://bankauction.in.**
>
> xxx xxx xxx
>
> 4. The amount of EMD paid by interested bidder shall carry no interest.

> 5. The amount of EMD paid by the successful bidder shall be adjusted towards the sale price. The interested bidder may inspect the property at site in consultation with the Branch Manager, Raipur Main Branch.
>
> xxx xxx xxx
>
> 9. The successful bidder shall at the end of the auction pay 25% of the amount of sale price less amount already deposited by way of EMD immediately on same / next day, after the acceptance of the purchase price and the balance within 15 days from the date of sale confirmation or within such period as agreed upon in writing by and solely in the discretion of the Authorized Officer. Payment is to be made by RTGS/NEFT to the account of - Authorized officer, Corporation Bank, Raipur Main Branch A/c No. **510101006039714 and IFSC Code-CORP0000157**. On default of the successful bidder, the property shall be resold and the defaulting purchaser shall not have any claim whatsoever and the amount already deposited by the successful bidder shall be forfeited.
>
> xxx xxx xxx
>
> 17. To the best of the knowledge and information of the Authorized Officer there is no encumbrance on any property, however the intending bidder should make their own independent enquiries regarding the encumbrances, title of property put on auction and claims / rights / dues affecting the property, prior to submitting their bid. The property is being sold with all the existing and further encumbrance whether known or unknown to the Bank. The Authorized Officer / Secured Creditor shall not be responsible in any way for any third party claim / rights / dues."

From the above, it is very much clear that the Sale was conducted in "<u>As is where is and What is there is</u>" condition, clearly alerting the bidders to make enquiries of their own, with regard to the nature and encumbrances over the properties. The successful bidders were also alerted that the EMD would be refunded only on conclusion of the Sale and that the EMD paid by the interested bidder shall carry no interest. This being the position, the claim for payment of interest on the EMD is not liable to be sustained.

11. However, Ms. Ritu Chouhan, the learned counsel appearing for the 1st Respondent, points out that the total deposit of Rs.35,88,250/- effected by the Writ Petitioner is not the EMD alone, but forms part of the sale consideration as well. It is pointed out that admittedly, EMD to be satisfied by the participating bidders was only to an extent of 10% of the bid amount and since the 1st Respondent had participated in the bid for purchase / sale of two houses, a sum of Rs.13,09,300/- and Rs.10,65,300/- had already been deposited. The 1st Respondent / Writ Petitioner came out successful in respect of the sale proceedings of one house (B-76) and in the said circumstance, as per the terms and conditions of the Sale, 25% of the bid amount had to be deposited, minus the EMD, on the same day or on the next day, as mentioned in Clause 9; with liability to satisfy the balance amount within 15 days from the date of confirmation of the Sale or within such period as agreed upon in writing by and solely in the discretion of the Authorised Officer. There is no dispute that the 1st Respondent / Writ Petitioner satisfied 25% of the bid amount within time, after getting credit of the total EMD effected by him (in respect of two bids Rs.13,09,300/- and Rs.10,65,300/- respectively). This being the position, we find considerable force in the submission made by Ms. Ritu Chouhan, the learned counsel appearing for the 1st Respondent, that the stand of the Appellant-Bank that no interest is liable to be satisfied, is not correct or sustainable.

12. Another important aspect is to be noted is with regard to the nature and character of the EMD, which was deposited by the 1st Respondent / Writ Petitioner on 19.02.2018 and the deposit of Rs. 12,13,650/- effected on 21.02.2018 so as to make the total deposit to be 25% of the bid amount.

13. Clause 5 of the terms and conditions clearly states that the amount of EMD paid by the successful bidder shall be adjusted towards the sale price. This means, once the bidder turned to be successful, the EMD effected by him would get converted as part of the 'sale price'. 25% of the bid amount, minus the said amount of EMD had to be effected on the same day or next day as mentioned in Clause 9. This part has been satisfied by the 1st Respondent / Writ Petitioner. As it stands so, on effecting the deposit of Rs. 12,13,650/- on 21.02.2018, the Writ Petitioner had virtually deposited 25% of the bid amount and the said amount formed part of the sale price. The purpose of effecting the EMD for participating the bid is to ensure that the bidder is a genuine / *bona fide* participant and that if for any reason he turned back, the EMD could be forfeited in terms of the sale proceedings. In the case of the unsuccessful bidders, this amount could be returned to them after conclusion of the sale and in the case of successful bidder, this amount would get converted as part of the sale price. This means, the nature of deposit effected by the successful bidder as EMD at the time of participating in the bid would lose its colour and characteristics as the 'EMD' (earnest money deposit), getting automatically transformed as part of the 'sale

price'. As such, though the terms and conditions of the Sale clearly stipulate that the EMD will not carry any interest, the question is whether interest is liable to be paid <u>on the 'sale price</u>' effected by the successful bidder, in a case where the sale is set aside because of the lapses on the part of the Bank, as held by the DRT (though the said finding is subjected to challenge in the appeal filed by the Bank before the DRAT).

14. As mentioned already, there is a case for the 1st Respondent / Writ Petitioner that the Petitioner was not told about the pending litigation between the Secured Creditor and the original borrower (Securitisation Application No. 272/2016) or the fact that the Bank was not having the actual / physical possession even on the date of sale, but for which the Writ Petitioner would not have participated in the proceedings. By virtue of the specific conditions of Sale as contained in Annexure-A/2 Notice (extracted above), we find it difficult to accept the said version, as it was very much obligatory for the participating bidder to have made necessary enquiries in respect of the Sale in “As is where is and what is there is” condition. That apart, after effecting deposit of 25% of the sale price on 21.02.2018 and when the Petitioner insisted for issuance of the sale confirmation vide Annexure-P/4 and Annexure-P/7, he was given to understand that Annexure-P/6 order had already been passed by this Court on 26.02.2018 in WPC No. 542/2018 preferred from the part of the original owner / borrower, granting interim stay of issuance of confirmation letter. The 1st Respondent / Writ Petitioner, however,

did not approach the Secured Creditor with any request to return the amount deposited by him stating that he was no more interested to proceed with the matter in view of the on going litigation. On the other hand, the 1st Respondent admittedly moved the DRT by filing an application dated 14.08.2020, seeking to implead him in Securitisation Application No. 272/2016. This came to be rejected as per Annexure-P/8 order dated 31.10.2018 passed by the DRT for the reason that he was not a necessary party, as the sale was yet to be confirmed. Even at this point, the 1st Respondent did not choose to approach the Secured Creditor, intimating that he was no more interested to proceed with the sale and that the amount deposited might be returned to him.

15. Obviously, the 1st Respondent / Writ Petitioner elected to wait till finalization of the proceedings before the DRT, which attained finality only as per Annexure-P/9 order dated 13.12.2019, whereby the sale proceedings were set aside with liberty to the Secured Creditor to have it done afresh, in accordance with law. Only at this point of time, did the 1st Respondent / Writ Petitioner choose to move the Secured Creditor by filing Annexure-P/10 representation dated 02.01.2020, requesting to return the deposited amount. As it was not acted upon, Annexure-P/11 reminders were issued, simultaneously claiming interest as well (as per the reminders dated 28.01.2020 and 20.02.2020). This being the position, the 1st Respondent / Writ Petitioner cannot be heard to say that he was put to prejudice because of the alleged lapses on the part of the Secured Creditor in

not inferring of the pending proceedings before the DRT or for not having actual / physical possession of the secured asset with the Bank.

16. Coming to the liability to pay interest, as mentioned already, though the EMD was never to carry interest, it lost the colour and status of the 'EMD' and got transformed to form part of 'sale price', pursuant to declaration of the 1st Respondent / Writ Petitioner as the successful bidder and on deposit of the requisite amount so as to top up the amount in deposit to 25% of the sale price, particularly in terms of Clauses 5 and 9 of Annexure-A/2 Sale Notice. At the same time, it is to be noted that, since the 1st Respondent / Writ Petitioner did not raise any demand to return the said amount at any time before finalization of the proceedings by the DRT vide Annexure-P/9 dated 31.12.2019 and such a demand was raised for the first time only vide Anneuxre-P/10 representation dated 02.01.2020, the 1st Respondent / Writ Petitioner can claim interest, if there is any default on the part of the Bank in yielding to his request only from that date.

17. On considering the said issue, it is relevant to note that the Bank did not yield to the request made by the 1st Respondent / Writ Petitioner to return the deposit of Rs. 35,88,250/- as sought for in Annexure-P/10 and the reminders by way of Annexure-P/11. There is no dispute or contention for the Appellant-Bank that Anneuxre-P/10 request or Annexure-P/11 reminders were not actually received to the Bank. There is absolute silence from the part of the Bank as to

why the said amount was not returned on getting the request vide Annexure-P/10 followed by subsequent reminders Annexure-P/11. This shows that the Appellant-Bank was still interested in keeping that money with the Bank even after the sale was set aside; inspite of the fact that there was no fault or lapse in any manner on the part of the 1st Respondent / Writ Petitioner. The filing of appeal by the Bank before the DRAT against Annexure-P/9 verdict was not a matter of concern for the 1st Respondent / Writ Petitioner and the Bank ought to have acted upon the request made by the Writ Petitioner vide Annexure-P/10 then and there. Having failed to do so, we are of the view that the Appellant-Bank is liable to pay interest on the amount due, which constitutes part of the 'sale price', from the date of the representation i.e. 02.01.2020.

18. When the appeal came up for consideration before this Court on 08.10.2020, we took note of the submission made by the learned counsel for the Appellant-Bank that the Bank was ready to satisfy interest on the EMD from the date of request made by the 1st Respondent as per Annexure-A/3. Since the EMD paid by the 1st Respondent / Writ Petitioner on 19.02.2018 got converted as part of sale price, pursuant to declaration of 1st Respondent / Writ Petitioner as the successful bidder, to top up the deposit to 25% of the sale price in terms of Clause 5 of Annexure-A/2 Sale Notice and since the EMD was to be converted as part of the 'sale price' giving credit to the EMD already effected in this regard, as mentioned in Clause 5 of the Annexure-A/2 Sale Notice, we hold that the said interest requires

to be paid on the entire deposit of Rs.35,88,250/- from the date of Annexure-A/3 i.e. 02.01.2020 with interest at the maximum rate as payable for fixed deposits in the Bank, as on the date of Annexure-A/3 representation dated 02.01.2020. The interest payable shall be worked out and the same shall be disbursed to the 1st Respondent / Writ Petitioner forthwith, at any rate within 'two weeks' from the date of receipt of a copy of this judgment. It is ordered accordingly.

19. In view of the submission made by the learned counsel for the Appellant-Bank that the adverse observations made by the learned Single Judge in 'paragraphs 8 to 10' of the judgment may have a bearing in the appeal preferred by the Bank against Annexure-P/9 order passed by the DRT, which is stated as pending before the DRAT, we make it clear that the said questions, as to alleged lapse on the part of the Appellant-Bank, are left open. We also do not intend to express anything on the subsisting *lis* in the appeal pending before the DRAT or as to its scope in the given context that the successful bidder (1st Respondent / Writ Petitioner) himself has withdrawn from the proceedings and the Appellant-Bank themselves have returned the amount in deposit, pursuant to the verdict passed by the learned Single Judge, as borne by Annexure-A/4.

20. The appeal stands allowed in part. No cost(s).

Sd/- Sd/-

(P.R. Ramachandra Menon)
Chief Justice

(Parth Prateem Sahu)
Judge

Chandra