



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 14.12.2021

CORAM

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**THE HONOURABLE MRS. JUSTICE PUSHPA SATHYANARAYANA
AND
THE HONOURABLE MR. JUSTICE P. VELMURUGAN**

W.P. (MD)No.22355 of 2019
and W.M.P. (MD)No.19129 of 2019

P.Arockiyasamy

.. Petitioner

Vs.

1.The Authorised Officer/Chief Manager,
Indian Bank,
Zonal Officer - Chennai,
"Vairam", 112, Sir Thyagaraya Road,
T.Nagar, Chennai - 600 017.

2.The Branch Manager,
Indian Bank,
Kochadai Branch,
2/3, G.V.Towers, Opp. Fenner India,
Near Passport Office, Melakkai Main Road,
Kochadai, Madurai.

3. N.Subburaj,
Proprietor,
M/s.RMS Flour Mill,
No.2/32C, Raja Mill Compound,
Workshop Road, Madurai-624 001.

.. Respondents

(R1 & R2 cause title amended as per the order
dated 14.12.2021 made in
W.M.P(MD)No.17595 of 2021)

* * *

Prayer : Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus calling for the records relating to the impugned communication Ref.No.ZO/LEGAL/SARFAESI/ KOCHADAI/465, dated 19.09.2019 issued by the first respondent and quash the same and consequently direct the first and second respondents to pay the amount of Rs.3,77,500/- along with interest up to date.

* * *



For Petitioner : Mr.V.Veerapandian,
for M/s.Vastlaw Associates
For Respondents : Mr.Jawahar Ravindran,
Standing Counsel for RR 1 and 2

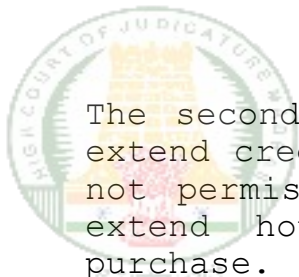
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O R D E R**PUSHPA SATHYANARAYANA, J.**

The communication of the respondents Bank dated 19.09.2019 rejecting the request of the petitioner to refund 25% of the sale auction amount deposited by him or to offer loan for the balance 75% of the sale consideration for the action conducted on 24.08.2018 under the SARFAESI Act and also forfeiting the amount so deposited by him, is under challenge in this writ petition.

2. The case of the writ petitioner is that he is running a small road side eatery and with the fond hope of buying a property, he participated in the e-auction brought out by the respondents Bank on 24.08.2018 with respect to the property at No.6, Iswaryam Nagar, Narasingham village-IV Bit, owned by the third respondent, which was brought to auction for committing default in repayment of credit facilities, pursuant to the notice dated 20.07.2018 and emerged as a successful bidder, by tendering a sum of Rs.15.10 lakhs against the upset price of Rs.12.85 lakhs. In terms of the conditions of the said notice, he remitted 25% of the bid amount on 27.08.2018, which was pegged at Rs.3,77,500/- and agreed to pay 75% of the amount, which was Rs.11,32,500/- within 15 days thereafter. Thus, the sale was confirmed in his favour. Based on the same, the title documents were furnished to him, so as to enable him to avail housing loan facilities. When the same were furnished to the Banks and subjected for legal opinion, it came to light that the third respondent has no valid title over the subject property. The petitioner brought these facts to the knowledge of the second respondent and sought for credit facilities to pursue further in the matter, to which, the second respondent also agreed upon and assured to arrange for credit facilities. The petitioner also submitted a representation on 28.02.2019 to the second respondent in this regard. But he was issued with the impugned notice dated 19.09.2019. Hence, the present petition.

3. The second respondent filed a counter-affidavit dated 19.11.2019 resisting the prayer of the writ petitioner. The second respondent questioned the maintainability of the writ petition on the ground that the petitioner has to invoke the appellate jurisdiction of the Debts Recovery Tribunal under Section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short, 'the SARFAESI Act') against the action of the secured creditor under Section 13(4) and prayed for dismissal of this writ petition. It is also contended



The second respondent has given no assurance to the petitioner to extend credit facility for the subject e-auction purchase, which is not permissible under the SARFAESI Act, but they only assured to extend housing loan facility for constructing building after purchase. The second respondent claimed that there was no dispute with regard to the title of the third respondent, as loan was sanctioned only after obtaining legal opinion. The second respondent alleged that the petitioner could not secure any loan or mobilize funds to deposit the remaining 75% amount and thus, only to get refund of 25% of the amount deposited by him, he started to spin a yarn, which fact is evidenced by non-production of the legal opinion allegedly obtained by the petitioner qua the title of the property.

4. Heard the learned counsel on either side and perused the materials placed before this Court.

5. When this petition came up for hearing on 22.10.2019, this Court passed the following order :

"3. According to the petitioner this communication is anti-dated. The petitioner's case is that on receipt of the documents of title from the respondent bank after payment of Rs.3,77,500/- they obtained legal opinion and found that the title was defective. It is not the case of the respondent Bank that the borrower had defective title to the property. However, they seek to rely on Rule 9(4) of the Security Interest Enforcement Rules, 2002 to justify their forfeiture.

4. In our considered view, if there is a defective title, no person can be compelled to purchase a property especially when the respondent bank is a nationalised bank. If there is a defective title, it is not clear as to how loan was sanctioned to the third respondent. These are all issues which we need to consider in the writ petition. Thus, considering the conduct of the respondent Bank, we direct the respondent bank to deposit Rs.3,77,500/- to the credit of this Writ Petition in W.P.[MD]No.22355 of 2019, before the Indian Bank, Madurai Bench of Madras High Court branch within one week from the date of receipt of a copy of this order. On such deposit, the same shall be retained by the Bank in an interest bearing account and abide by the orders that may be passed in the writ petition.

5. Learned Counsel who accepted notice for the respondent Bank seeks time to file counter. The respondent bank after complying with the above direction is directed to file counter affidavit before the next hearing date.

6. List the matter for hearing on 18.11.2019."

The said direction was complied with and the same was recorded in the order dated 07.07.2021.



6. From the above, it is clear that this Court entertained the instant writ petition on the premise that the title of the property is not clear, which was not disclosed to the petitioner. In the counter-affidavit also, it is not the stand of the respondents Bank that the title documents were given to the petitioner earlier to satisfy himself about the title of the property. When the petitioner is not satisfied with the title of the property, the respondents Bank, having not shown the title deeds to him earlier, cannot compel him to purchase the property. Thus, the claim of the respondents Bank qua the maintainability need not be gone into.

7. The second respondent relied upon Rule 9(5) of the Security Interest (Enforcement) Rules, 2002, to pass the impugned order and the said provision reads as follows :

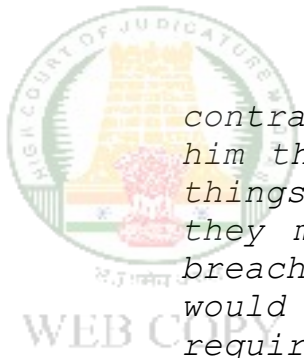
"9. Time of sale, issue of sale certificate and delivery of possession, etc. -

(1)

(5) In default of payment within the period mentioned in sub-rule (4), the deposit shall be forfeited and the property shall be resold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold. "

8. The learned counsel for the petitioner relied on a recent order of the First Bench of this Court in **Shanmugavelu V. The Authorised Officer, Central Bank of India**, reported in **2021-5-L.W. 289**, to contend that the impugned order is erroneous. In the said case, the original auction-purchaser, who deposited the initial bid amount, questioned the order of forfeiture passed by the Bank before the Debts Recovery Tribunal II, Chennai (DRT), which, in turn, while setting aside the order permitted the Bank to retain a portion of the amount, i.e., five lakh, towards the expenses incurred in conducting the sale for the second time. When the Bank took it on appeal before the Debt Recovery Appellate Tribunal, Chennai (DRAT), it enhanced the retention of amount by the Bank to fifty five lakhs. Both the secured creditor - bank and the original auction-purchaser of the property questioned the propriety of the order passed by the DRAT enhancing the forfeiter originally ordered by the DRT before this Court. While setting aside the order of the DRAT and restoring the order of the DRT, the First Bench held as follows :

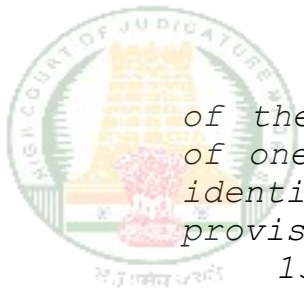
"10. Section 74 of the Contract Act, 1872 provides for compensation for breach of contract where the penalty is stipulated. Section 73 of the Contract Act is the general rule that provides for compensation for loss or damage caused by breach of contract and Section 74 is where the quantum is specified. What Section 73 of the Contract Act mandates is that a party who suffers as a result of a breach committed by the other party to the contract "is entitled to receive from the party who has broken the



contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it". Any detailed discussion on such provision would be beyond the scope of the present lis and may require many more sheets that may be conveniently expended in the present exercise. Indeed, Section 73 of the Contract Act is in the nature of a jurisprudential philosophy that is accepted as a part of the law in this country. In short, it implies that only such of the loss or damage suffered by the party not in breach, may be recovered from the party in breach, as a consequence of the breach. It is possible that as a result of the breach, the party not in breach does not suffer any adverse impact. It is also possible, as in the present case, that as a consequence of the breach, the party not in breach obtains a benefit. In such cases, where no loss or damage has been occasioned to the party not in breach, such party cannot extract any money merely on account of such breach, as the entitlement in law to compensation is not upon the commission of breach, but only upon any loss or damage being suffered as a consequence thereof. That is elementary.

11. Even in cases of liquidated damages, where the quantum specified is regarded as a genuine pre-estimate by parties to the contract, there needs to be some loss or damage suffered for the party not in breach to even be entitled to claim the amount quantified in the contract itself. The factum of having suffered damages in such a situation has to be established, though the quantum of the loss need not be, since the contract contains a genuine pre-estimate thereof.

12. Rule 9(5) of the said Rules of 2002 has to be seen as an enabling provision that permits forfeiture in principle. However, such Rule cannot be conferred an exalted status to override the underlying ethos of Section 73 of the Contract Act. In other words, Rule 9(5) has to yield to the principle recognised in Section 73 of the Contract Act or it must be read down accordingly. Thus, notwithstanding the wide words used in Rule 9(5) of the said Rules, a secured creditor may not forfeit any more than the loss or damage suffered by such creditor as a consequence of the failure on the part of a bidder to make payment of the consideration or the balance consideration in terms of the bid. It is only if such principle, as embodied in Section 73 of the Contract Act, is read into Rule 9(5) of the said Rules, would there be an appropriate answer to the conundrum as to whether a colossal default



of the entirety of the consideration or the mere default of one rupee out of the consideration would result in the identical consequence of forfeiture as indicated in the provision.

13. In any event, notwithstanding the reference to Section 35 of the Act of 2002, the apparent overriding effect of the provisions of the Act of 2002 has to be tempered in the light of Section 37 of the Act. Though Section 37 of the Act refers to several statutes by name,

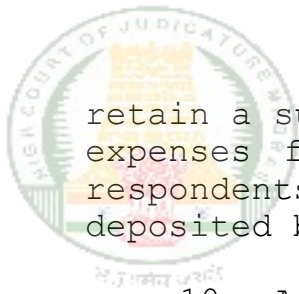
the residual limb of such provision recognises "or any other law for the time being in force", which would embrace the Contract Act within its fold. It is completely unacceptable that by virtue of the delegated legislation as in the Rules of 2002, the fundamental principle envisaged in the Contract Act would get diluted or altogether disregarded.

.....

20. Before parting, there is another aspect that has to be referred to for the completeness of the discussion. The purpose of the Act of 2002 is to ensure speedy recovery of the debt due to secured creditors covered by such statute. Towards such end, the provisions of the said Act and the Rules made thereunder give primacy to the secured creditor in initially assessing the quantum of debt due and in proceeding against the securities furnished for realising such debt due. However, no secured creditor, not even by embracing the provisions of the said Act of 2002, can unjustly enrich itself or obtain any more by way of resorting to any of the measures contemplated under Section 13(4) of the Act or otherwise than the debt that is due to it and the costs that may have been incurred in course of trying to recover the debt due. In a sense, if the forfeiture provision in Rule 9(5) of the said Rules is ready to imply what the secured creditor in this case seeks to, it may result in a secured creditor unjustly enriching itself, which is not permissible."

Applying the ratio enunciated in the above judgment, without any semblance of doubt, this Court has to arrive at a conclusion that the order impugned, as it is, is bad in the eye of law. This Court in the said judgment observed that "for any quantum to be awarded on account of the damages, there is a twin exercise which has to be undertaken : the first limb of the exercise is to ascertain the factum ; it is only upon the factum being established that the quantum may be assessed.

9. Admittedly, the respondents Bank brought the property for auction, sold it and adjusted the sale proceeds in the default account of the third respondent. Considering factual position, we



retain a sum of Rs.50,000/- (Rupees fifty thousand only) towards the expenses for conducting the auction for the second time and the respondents Bank has to necessarily refund the balance of the amount deposited by the petitioner.

10. Accordingly, the respondents Bank are permitted to encash the deposit made by them for a sum of Rs.3,77,500/- to the credit of this writ petition before the Indian Bank, Madurai Bench of Madras High Court, along with interest accrued as on the date of encashing it, and after retaining a sum of Rs.50,000/-, are directed to refund the remaining sums of money to the petitioner on the same day.

11. With the above observations and direction, the writ petition stands allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(T & P)

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/ /2022

Sub Assistant Registrar(CS)

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To

1. The Authorized Officer/Chief Manager,
Allahabad Bank,
Zonal Office-Chennai,
"Vairams", 112, Sir Thyagaraya Road,
T.Nagar, Chennai-600 017.
2. The Branch Manager,
Allahabad Bank, Kochadai Branch,
2/3, G.V.Towers, Opp. Fenner India,
Near Passport Office, Melakkal Main Road,
Kochadai, Madurai-625 016.

+1 CC to M/s.VAST LAW ASSOCIATES, Advocate (SR-39180[F] dated 16/12/2021)

W.P. (MD)No.22355 of 2019
14.12.2021

MMS (CO)

TR(03.02.2022) 7P 4C