BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on	Pronounced on
29.11.2022	15.12.2022

CORAM

THE HONOURABLE MR.JUSTICE R.MAHADEVAN
and
THE HONOURABLE MR.JUSTICE J.SATHYA NARAYANA PRASAD

W.P.(MD)No.20689 of 2022

PR.Thangamshiri .. Petitioner

Versus

The Chief Manager,
Punjab National Bank,
Sasthra PNB House,
Trichy. .. Respondent

PRAYER: Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, to call for the records pertaining to the rejection letter passed by the respondent dated 20.08.2022 and quash the same as illegal and consequently directing the respondent to return the deposited bid amount Rs. 29,31,568/- to the petitioner.

For Petitioner : Mr.Aayiram K.Selvakumar

For Respondent : Mr.R.Pandivel

ORDER

R. MAHADEVAN, J.

The prayer made in this writ petition is to quash the order dated 20.08.2022 passed by the respondent and to direct the respondent to return the bid amount of Rs.29,31,568/- to the petitioner.

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

(i) Pursuant to the paper publication, the petitioner participated in an e-auction conducted by the respondent/Bank on 15.02.2022 in respect of the property in Plot No.14 comprised in S.No.37/1B & 37/2, measuring an extent of 2400 sq.ft, excluding 600 sq.ft presently Plot No.14 part Town 4th Street Extension, Anaiyur, Madurai belonging to one N.Nagarajan and N.Gomathi, Madurai, by depositing 10% of the total amount of Rs.1,17,26,270/- i.e., Rs.11,52,627/- towards EMD. In the said e-auction, he was declared as successful bidder and he remitted Rs.11,00,000/- and Rs.7,00,000/- with the respondent bank on 16.02.2022.

(ii)Subsequently, the petitioner was asked to pay the remaining 75% of the sale amount, on or before 03.03.2022. Since there was a delay to mobilize the funds, vide letter dated 22.02.2022, the petitioner sought an extension of time till 25.04.2022 to make payment, which was accepted by the respondent, by letter dated 04.03.2022. Subsequently, he was granted further extension to pay the balance amount by letter dated 04.05.2022.

(iii)While so, the petitioner through encumbrance certificate dated 21.04.2022, came to aware that the subject property had already been hypothecated to Shriram Transport Finance Company Limited, Madurai, by the borrowers viz., Nagarajan and Gomathi, by an order of attachment dated 17.02.2020 for a sum of Rs.32,26,777/-. Immediately, he approached the respondent and requested to clear the encumbrance reflected in the subject property. Finding no fruitful action, he sent a notice dated 16.05.2022 to execute the sale deed in his favour without any encumbrance, to which, the respondent sent a reply dated 01.06.2022, denying the petitioner's claim. Narrating the above facts, the petitioner made further representation to the respondent on 12.08.2022, however, his claim was rejected by the respondent, by order dated 20.08.2022, which is impugned herein.

3. The respondent filed a detailed counter affidavit, wherein, it is *inter alia* stated that the petitioner was the successful bidder in the auction held on 15.02.2022 and he paid 25% of the bid amount i.e., Rs.29,31,568/- and his sale was confirmed by sale confirmation letter dated 16.02.2022, by directing him to pay the balance 75% of the bid amount on or before 03.03.2022. The counter affidavit further proceeds to state that the extension of time sought by the petitioner was granted on two occasions for making the balance 75% of the sale amount. However, the petitioner failed to pay the balance amount, but issued a lawyer notice dated 16.05.2022 stating that there is an attachment on the subject property by Shriram Transport Finance Company Limited and the same is reflected in the encumbrance

certificate and requested the bank to take steps to remove the said attachment. In response, the respondent bank sent a reply dated 01.06.2022, stating that the mortgage in favour of the bank was created on 22.05.2019 and the demand notice under Section 13(2) of the SARFAESI Act, was issued on 04.02.2020, and the attachment made was only on 17.02.2020, which is subsequent to the bank's mortgage and demand notice. However, the petitioner did not pay the remaining 75% of the bid amount, despite the grant of extension of time till 13.05.2022. Therefore, the bank concluded that it had no other option, except to re-auction the subject property and to forfeit the EMD amount already deposited by the petitioner. Thus, according to the respondent, the writ petition filed by the petitioner is liable to be dismissed.

4. The learned counsel for the petitioner submitted that it is incumbent upon the respondent-bank to bring the property to public auction free from any encumbrance, however, in this case, there is an encumbrance over the subject property in the form of an attachment by Shriram Transport Finance Company Limited due to a debt by the borrowers, and hence, the petitioner was reluctant to pay the remaining bid amount. The learned counsel would further submit that with respect to the subject property, the borrowers have got an order on 29.07.2022 in W.P.(MD)No. 16899 of 2022, in their favour. The learned counsel would also submit that it is the bounded duty of the respondent-bank to either hand over the physical possession of the auctioned property free from all encumbrances or to refund the bid amount, if they are unable to clear the encumbrances. Nevertheless, the action of the

respondent/bank in forfeiting the EMD amount is arbitrary and illegal. Therefore, the learned counsel prayed to allow this writ petition by setting aside the order impugned herein.

5. Reiterating the averments made in the counter affidavit, it is contended by the learned counsel for the respondent-bank that the 12th condition in the sale notice dated 24.01.2022 permits the bank to conduct a fresh auction/sale of the property, if the successful bidder fails to deposit the amount, and the defaulting bidder has no claim over the forfeited amount or the property. Further, Rules 9(4) & 9(5) of the Security Interest (Enforcement) Rules, 2002 state that if the 75% of the bid amount is not paid within the prescribed time, the bank is entitled to forfeit 25% of the bid amount. Notwithstanding the fact that the petitioner had obtained an encumbrance certificate dated 21.04.2022, he still requested an extension of time for making the balance 75% of the bid amount through his letter dated 22.04.2022, which shows that he was serious about buying the property and hence, his request was accepted, but the petitioner did not make the payment. The learned counsel would further submit that the respondent-bank was not aware of the attachment, while issuing the sale notice dated 24.01.2022 and, thus, the said attachment will not be binding on the bank since it is subsequent to the mortgage and issuance of the demand notice under Section 13(2) of the SARFAESI Act. Therefore, the learned counsel sought to dismiss this writ petition.

6. Heard the learned counsel appearing on either side and perused the materials available on record.

7. Admittedly, the petitioner was declared as successful bidder in respect of the subject property, in the e-auction conducted by the respondent bank on 15.02.2022 and he paid 25% of the bid amount viz., Rs.29,31,568/- as stipulated. By sale confirmation letter dated 16.02.2022, he was directed to pay the remaining 75% of the sale amount on or before 03.03.2022. The petitioner was granted extension of time till 13.05.2022 to make the said payment, but he failed to do so. It is also an admitted fact that there is an encumbrance over the subject property. The claim of the petitioner seeking to clear the encumbrance, was not considered and the respondent replied that the attachment is subsequent to the mortgage and demand notice and that, the petitioner has not paid the balance 75% of bid amount despite the extension of time till 13.05.2022 and hence, the bank has no other option except to re-auction the property and forfeit the EMD amount deposited. Therefore, this writ petition.

8. It is the main contention of the learned counsel for the petitioner that it is bounden duty of the respondent bank that if any property is brought for public auction, it should be free from any encumbrance. Whereas, in this case, there is an attachment raised by Shriram Transport Finance Company Limited, over the subject property for the loan obtained by the owners. When the petitioner sought to clear the same, the respondent rejected the same and also decided to re-auction the property

and forfeit the EMD on the ground that the petitioner did not pay the balance bid amount within the extended time. Such decision of the respondent bank is arbitrary, illegal and contrary to law. It is further submitted that in the event of refund of EMD amount to the petitioner, no prejudice would be caused to the respondent bank.

9. On the other hand, it is the stand of the respondent that Rules 9(4) and 9(5) of the Security Interest (Enforcement) Rules 2002 stipulates that if the 75% of the bid amount is not paid within the prescribed time, they are entitled to forfeit 25% of the bid amount. There is no dispute with regard to the said rule. However, it cannot be applied to the petitioner's case, since there is an encumbrance over the subject property by a finance company even prior to the auction sale notice issued by the bank. In this context, it is relevant to refer to the judgement of this Court in ***V. Sridhar v. The Authorized Officer [AIR 2018 Mad 87]***. In that case, the earnest money was forfeited due to non-payment of 75% of the sale auction consideration, as the bank could not handover the possession of the property free of encumbrances due to ongoing civil suits filed by the tenants of the said property. The respondent bank invoked the 'as is where is basis' or 'as is what is' condition, contending that the pendency of litigations concerning the property does not in any way affect the sale of the property. Placing reliance on earlier judgments, the Division Bench reiterated that the mere inclusion of 'as is where is basis' or 'as is what is' condition does not exonerate the banks from disclosing any encumbrances on the property, and directed the bank to refund the amount. For better appreciation, the relevant paragraph is extracted hereunder:

> *"19. Conjoint reading of Section 13(4) of the SARFAESI Act and Rule 9 clauses 9 and 10 would clearly show that the authorised officer, shall deliver the property to the purchaser, free from encumbrances known to the secured creditor, on deposit of money as specified in sub-rule 2. However, the above said rule does not prevent the bank to bring the property for auction, when there are encumbrances attached to the property. Hence, the contention of the petitioner that bank cannot bring the property for auction, when there is encumbrance attached to it, cannot be sustained. However, bank is duty bound to disclose the encumbrances, attached to the properties and litigations or occupation by a tenant if there is any lis or lien attached to the property. Merely by including a clause as is where is basis or as is what is condition stated in the sale notice does not obviate the bank from disclosing the encumbrance attached to the property, brought for in auction. When there is no notification or mention of encumbrance, it is difficult to accept the contention of the bank that the property was auctioned as is where is basis and as is what is condition. Though it would satisfy the Rules of Security Interest Enforcement Rules, 2002, bank cannot, in any situation, wash away the responsibility in disclosing the encumbrances, in the notification or taking clear possession under Section 14 of the SARFAESI Act 2002 and handing over possession to the auction purchaser. There is no mention neither in the counter nor by the respondent counsel that whether possession has been taken under Section 14 of the Act. Unless the bank takes possession, the question of bringing the property for e-auction under Section 13(4) is not completed. Though as a secured creditor on the assets of the borrower or mortgaged or collateral, the right of the bank on such property will assume only after taking possession under Section 14 of the Act and only thereafter, the bank can initiate steps to bring the property for auction."*

10. Though the learned counsel for the respondent made a feeble attempt to contend that the bank is not aware of the existence of such encumbrance on the property and that, the attachment is subsequent to the mortgage and demand raised by them, the same does not inspire the confidence of this court, in the light of

decision of this court in ***Jai Logistics v. The Authorized Officer, Syndicate Bank [2010 (4) CTC 627]***, in which, the Division Bench refused to accept the same and differentiating the roles and responsibility of the official liquidator as opposed to an authorized officer, held as follows:

> *"4. On the other hand, the learned counsel for the respondent-bank would submit that even when the sale notice was issued, the bank was not aware of the encumbrance and therefore only the publication did not carry the encumbrance. As far as the bank is concerned, it is entitled to forfeit the earnest money deposit in the event the balance sale consideration is not paid in time. The auction bidder cannot have any right to seek for either the amount deposited towards earnest money to be refunded or to purchase the land after the clearance of encumbrance by the bank or financial institution. The learned counsel would rely upon the judgment of the Supreme Court in United Bank of India v. Official Liquidator and others, (1994) 1 SCC 575 and particularly, paragraphs 13 and 14 in this regard.*
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> *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.

6. In that view of the matter, the challenge in the writ petition merits acceptance. Accordingly, the impugned order of forfeiture is set aside and the writ petition is allowed. The respondent is directed to refund the earnest money to the petitioner. We also take this opportunity to suggest that it is for the banks and financial institutions to indicate the encumbrance both by way of alienation in respect of the property or other statutory liabilities of the company or the individual, as the case may be, in the sale notice itself to avoid a situation like this. Equally the banks and financial institutions could also make it clear in the auction notice in the case of no other liability by the company or individual. No costs."

11. That apart, as a matter of fact, it is to be pointed out that by order dated 29.07.2022 passed in WP(MD)No.16899 of 2022 filed by the borrowers, the respondent bank was precluded from taking any coercive action by way of re-auction with respect to the property in question. In that order, this court has granted time to the borrowers for repayment of loan advanced to them by the Bank. If the borrowers fail to pay, the bank is entitled to proceed in accordance with law.

12. In the ultimate analysis, this court is of the opinion that the purpose of forfeiture is in the interest of the secured creditor to protect it from adverse loss.

When there is no alleged loss to the respondent bank, the forfeited money may be refunded. In any case, the respondent-bank will be able to recoup and not suffer a loss in the event of the return of the Earnest Money Deposit, as they could recoup the amount from the subsequent re-auction. Recently, the Apex court, in ***Alisha Khan v Indian Bank (Allahabad Bank) and Ors [C.A. Nos. 7680-7681 of 2021]***, allowed an appeal against the forfeiture of 25% of the auction sale consideration and directed the bank/financial institution to refund the same on the ground that there was no loss caused to the respondents on account of the subsequent re-auction.

13. Therefore, the order passed by the respondent which is impugned herein, is quashed and the respondent-bank is directed to return the amount of Rs. 29,31,568/- deposited by the petitioner, with interest at the rate of 6% p.a. from the date of deposit till the date of reimbursement.

14. Accordingly, the writ petition stands allowed. However, there shall be no order as to costs.

[R.M.D., J.]   [J.S.N.P., J.]
15.12.2022

Speaking Order / Non speaking order
Internet : Yes.
Index   : Yes / No

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R. MAHADEVAN, J.
and
J.SATHYA NARAYANA PRASAD, J.

r n s/ps

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