

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP No.3748 of 2022 (O&M)

Reserved on 31.08.2022.

Date of Decision: 21.09.2022

LLOVEGEET DHURIA

.....Petitioner

V/s.

STATE BANK OF INDIA AND OTHERS

.....Respondents

CORAM: **HON'BLE MR. JUSTICE M.S. RAMACHANDRA RAO**
 HON'BLE MR. JUSTICE HARMINDER SINGH MADAN

Present: Mr. Mukand Gupta, Advocate
 for the petitioner.

 Mr. Rakesh Gupta, Advocate
 for the respondents.

M.S. RAMACHANDRA RAO, J.

The background facts

The petitioner is an Auction Purchaser in an e-auction held on 25.11.2021 of the subject secured asset which is a double storey residential house measuring 432 sq. yards situated in Gali No.11, Bhagu Road, Bhatinda, offered as a security by its borrower M/s Meridian Milk Products, a partnership firm.

The petitioner had quoted ₹67,37,000/- and had remitted ₹16,09,250/- i.e. 25% of the said amount, and he was to pay the balance of ₹48,27,750/- by 10.12.2021.

On 08.12.2021, the petitioner sent an e-mail to respondent No.2 stating that he came to know from the external sources that there is a stay order/litigation order in respect of the property put to sale, that the Bank had not revealed this fact in any communication, and asking respondent No.2 to confirm that there is no litigation or stay order or any other legal aspect pending against the said property.

The Chief Manager of the State Bank of India, SARB, Ludhiana (respondent No.2) replied to the petitioner stating that borrower had filed a Writ Petition against the SBI in this High Court, but there was no stay granted in respect of the subject property.

The petitioner then sent another e-mail on 09.12.2021 to respondent No.2 stating that this information was very important and had been suppressed by the Bank, that it was misusing powers given to it under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as “the Act of 2002”), and respondent No.2 should share the complete details of litigation so that the petitioner can discuss the matter with his legal advisors, and then decide whether or not to purchase the property. He further sought 30 days’ time for the said purpose while reserving his right to file criminal and civil proceedings against respondent No.2 and the Bank.

Respondent No.2 then replied to the same on 10.12.2021 stating that Writ Petition filed in the loan account relates to issues concerning two other mortgaged properties, and the petitioner has to deposit balance 75% amount by that day to avoid forfeiture 25% of the amount already deposited by him.

The petitioner replied on 10.12.2021 that he has the money and had already taken a Demand Draft but he and his family do not want to get into litigation in any way, and so the respondents ought to refund 25% consideration amount already deposited.

The Bank replied on 13.12.2021 pointing out that the petitioner had failed to deposit the balance 75% consideration within the time given to

the petitioner, but he is given one more opportunity to deposit the same, and asked the petitioner to pay the same on that day i.e. 13.12.2021 positively and threatened to forfeit the amount without any further notice.

The petitioner then replied to the same day on 13.12.2021 stating that there was a stay against e-auction of the residential property by this Court on 10.11.2021 in CM-91-CWP-PIL-2021 in/and CWP-PIL-77-2021 titled as Court on its own motion Vs. Union of India and others in view of the COVID-19 pandemic in the States of Punjab and Haryana and Union Territory of Chandigarh, and so the Bank was not authorized to put up for e-auction the residential property in question, and it had violated the orders passed by this Court, and had thus committed an contempt. It was also stated that this order was in the knowledge of the Bank and as per the provisions of the Transfer of the Property Act, 1882 (hereinafter referred to as “the Act of 1882”) and allied laws/rules, the seller has to disclose the details of litigation even if there is no stay pending before any Court of law having competent jurisdiction, but the Bank had not disclosed the same in the advertisement it got published. It was also pointed out that earlier the Bank, on 31.12.2021, had conducted e-auction of the very same asset to someone else, by name Smt. Jaswinder Kaur, who had also deposited Earnest Money Deposit (EMD) of ₹15.91 Lakhs; in the meantime, the borrower’s Writ Petition had been filed on the very same day of the auction; that notice of motion was issued and the Bank counsel appeared and accepted notice; and when the said Auction Purchaser came to know that the asset purchased by her in the auction was under litigation, she submitted a representation on 11.01.2021 for refund of her earnest money as the Bank

had concealed in the advertisement about the litigation; and the Bank admitted its fault and refunded the earnest money back to the said Auction Purchaser in January 2021. It was stated that its action in suppressing the said fact and putting the property for re-sale, and inducing the petitioner to purchase the property, which is in dispute in litigation, and compelling the petitioner to purchase the litigation, is highly improper, and it should refund the earnest money of ₹16,08,250/- with interest @ 9 % per annum.

Ignoring the same, the Bank sent an email through respondent No.2 on 15.12.2021(Annexure P-16) forfeiting the amount of ₹16,08,250/- exercising its power under Rule 9 (5) read with Rule 9(4) of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as “the Rules”).

Thereafter, the Bank put the property to sale on 24.02.2022 through e-auction again.

The prayer in the Writ Petition

The petitioner, therefore, has filed this Writ Petition seeking refund of the said amount of ₹16,08,250/- with interest, and sought quashing of the e-mail dt.15.12.2021 issued by respondent No.2 forfeiting the said amount deposited towards the earnest money by him.

Contentions of petitioner

It is the contention of the petitioner that it was the duty of the Bank to disclose about the pending litigation in the e-auction notice, and suppression of the said fact by the Bank is contrary to law because the petitioner, when participating in the e-auction held on 25.11.2021 had no intention to purchase litigation, and the petitioner was justified in seeking refund of the said amount once the petitioner came to know from the Bank

on 08.12.2021 about the pendency of the CWP No.22761 of 2020 in the High Court which had been initiated by the borrower.

We may point out that the said Writ Petition i.e. CWP No. 22761 of 2020 was withdrawn only on 21.02.2022 by the borrower/Writ Petitioner with liberty to avail remedy under Section 17 of the Act of 2002 before the DRT-II, Chandigarh.

Reply filed by the Bank

In the reply filed by the respondent, it is firstly contended that the petitioner has an efficacious remedy before the Debt Recovery Tribunal under Section 17 of the Act, and reliance is placed on the decision of the Supreme Court in the case of M/s. Aggarwal Tracom Private Ltd. Vs. Punjab National Bank and others¹. It is, therefore, contended that Writ Petition is not maintainable and should be dismissed on that ground.

Next it is contended by the Bank that as per the sale notice dt.07.11.2021 for the auction to be held on 25.11.2021, a bidder like the petitioner should deposit 10% as EMD, and thereafter the balance payment making the amount of 25% of the bid amount should be deposited within 24 hours after being declared as a successful bidder, and the rest of 75% of the bid amount should be deposited within 15 days as per Rule 9(2) and 9(4) of the Rules.

It is contended that the petitioner participated in the e-auction and deposited the earnest money in terms of the sale notice and also deposited the 25% amount after being declared as a successful Auction

¹ 2017 AIR (SC) 5562

Purchaser in terms of the Rule 9(3), but did not deposit the rest of 75% of the balance amount in 15 days as per the Rules.

It is contended that the petitioner requested for further time, invoking Rule 9(4) of the Rules, and the Bank granted the extension till 10.12.2021 for depositing of the balance of 75% sale consideration. It is stated that the petitioner having failed to deposit the same, the Bank was within its rights to forfeit the earnest money.

It is stated that the property was sold on '*as is where is basis*', '*as is what is basis*' and '*whatever there was basis*', and so the petitioner is not entitled to any relief since the pendency of the litigation cannot be an excuse for the petitioner not to make payment within the statutory time frame work provided under the Rules.

It is also contended that the petitioner was aware about the earlier auctions conducted by the Bank, and till date there was no hindrance in the sale or stay of the sale being conducted by the Bank.

It is also stated that the CWP No.22761 of 2020 has been dismissed as withdrawn on 21.02.2022.

It is also contended that the petitioner had knowledge of the earlier successful bid made by Smt. Jaswinder Kaur and the documents thereto pertaining to the said sale, and so the petitioner cannot take shelter that he was unaware of the previous litigation, and refuse to deposit the balance sale consideration.

It is, however, admitted in the later sale notice dt.24.02.2022, the Bank did mention about CWP No.22761 of 2020 by way of abundant caution.

It is also contended that the petitioner cannot place reliance on the order dt.10.11.2021 in CWP-PIL-77-2021 as no Bank would take property from the defaulter during the pendency of COVID period. It is also contended that this Court had clarified in the said PIL that the Bank is restrained from taking coercive action only on residential properties in the occupation of the guarantors, borrowers themselves, and in the instant case, the property was neither occupied by the guarantor nor to the borrower, and so the order in the PIL is not applicable.

The consideration by the Court

We have noted the contentions of both the parties.

We shall first consider the point of maintainability of Writ Petition raised by the respondent- Bank on the ground that there is an alternative remedy available to petitioner to approach the Debt Recovery Tribunal under Section 17 of the Act.

In our opinion, if there is a violation of the provisions of the Act by the respondent-Bank while taking steps to recover it's dues under the Act, the Writ Petition can be entertained by this Court, and it is not necessary to relegate the parties to avail alternative remedy.

Though counsel for respondents have placed reliance on the decision of the Supreme Court in the case of **Aggarwal Tracom Pvt.Ltd. vs. Punjab National Bank**² to contend that the Writ Petitions under Article 226 of the Constitution of India cannot be entertained when effective statutory remedy is available to the aggrieved person, in a later judgment rendered in the case of **Authorized Officer, State Bank of Travancore and**

² Order in SLP No.33514 of 2016

Another Vs. Mathew K.C³, the Supreme Court held that there are well defined exceptions to the rule of exhaustion of alternative remedy as laid down in decision of **Commissioner of Income Tax and Others vs. Chhabil Dass Agarwal⁴** and one of such exceptions mentioned in Para 15 of the said judgment is “*where the statutory authority has not acted in accordance with the provisions of the enactment in question.*”

Similar view has been taken by this Court also in the case of **M/s Skytone Electricals (India) Limited vs. Canara Bank and Others⁵** and **Joginder singh v. Punjab National Bank and another⁶** in which one of us was a member (M.S. Ramachandra Rao, J.).

Therefore we reject the plea of the respondent that the Writ Petition ought to be dismissed in view of existence of alternative remedy under Sec.17 of the Act.

From the facts narrated above, it is clear that the subject property belonging to the borrower M/s. Meridian Milk Products was initially auctioned on 31.12.2021 through an e-auction, but prior to the said date on 29.12.2020, the borrower had filed CWP No. 22761 of 2020 in this Court alleging that the borrower wanted to settle the matter under the OTS but the Bank was keen to sell the property.

In the auction held on 31.12.2020, Smt. Jaswinder Kaur became the successful bidder, and deposited the EMD of ₹15.91 Lakhs with the respondent-Bank.

³ 2018 (3) SCC 85

⁴ 2014 (1) SCC 603

⁵ Passed in CWP No.12301 of 2020 on 14.07.2020, Division Bench of Punjab and Haryana High Court.

⁶ CWP No.22743 -2019 dt.19.7.2022 of Division Bench of Punjab and Haryana High Court

Later on 11.01.2021, she came to know that the property for which she had bid in the e-auction held on 31.12.2020 was under litigation, and given a representation for refund of the earnest money alleging that the Bank concealed the fact about the litigation in the advertisement issued for the e-auction.

It is not in dispute that the Bank refunded the entire earnest money to her in January 2021.

It then proceeded to conduct a re-auction of the property on 25.11.2021 through an e-auction but even in the said e-auction sale notice, it did not mention about the pendency of the litigation.

It is stated that the sale was on *as is where is* basis, *as is what is* basis and *whatever there is* basis. The petitioner participated in the auction and became the highest bidder and also deposited ₹16,09,250/- being 25% of the bid amount.

Thereafter, the petitioner did ask through an e-mail dt. 30.11.2021 for 45 days' time to pay the balance amount ₹48,27,750/-

Admittedly, the Bank extended the time for payment initially upto 10.12.2021, but in the meantime, the petitioner came to know about the Writ Petition filed by the borrower i.e. CWP No. 22761 of 2020, and sought a confirmation from the Bank that there is no such litigation by sending an e-mail dt.08.12.2021 to respondent No.2. Respondent No.2 confirmed that such a Writ Petition had been filed in this Court but stated that there was no stay as regards this property.

The petitioner then accused the Bank of suppressing details of litigation, and sought refund of money deposited by him through emails dt. 09.12.2021 and 10.12.2021.

The Bank sent an e-mail dt.13.12.2021 through respondent No.2 saying that they are granting time to the petitioner till 31.11.2021 and if he did not do so, it would forfeit amount and it forfeited the same.

The next question which arise for consideration in this Writ petition is :

“Whether it was proper for a secured creditor like SBI to suppress from persons intending to participate in the e-auction being conducted by it under the SARFAESI Act, 2002, the factum of the pendency of litigation in respect of the secured asset being put to sale by it ?”

Under the Act of 2002, any security interest created in favour of a secured creditor being enforced without the intervention of the Court or Tribunal by such creditor has to be in accordance with the provisions of the Act as per Sub-Section (1) of Section 13 thereof. Therefore, it is necessary that the secured creditor must enforce its security interest only in the manner provided in the Act.

The manner in which the security interest is to be enforced is set out in the Rules.

Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 directs the Authorized Officer to serve to the borrower a notice of 30 days for sale of the immovable secured assets under Sub-Rule (5). Proviso to Sub-Rule (5) of Rule 8 thereto states that if the sale of such secured asset is

effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers one in vernacular language having sufficient circulation in the locality by setting out the terms of the sale which shall include:-

- (a) the description of the immovable property to be sold, including *the details of the encumbrances known to the secured creditor*;
- (b) the secured debt for recovery of which the property is to be sold;
- (c) reserve price, below which the property may not be sold;
- (d) time and place of public auction or the time after which sale by any other mode shall be completed;
- (e) depositing earnest money as may stipulated by the secured creditor;
- (f) *any other thing which the authorized officer considers it material for a purchaser to know in order to judge the nature and value of the property.*

Thus, it is clear that in the sale notice, it is incumbent on the secured creditor to disclose the details of the ‘*encumbrances*’ known to it as per Clause (a), and also any other thing which the Authorized Officer considers it material for a purchaser to know in order to judge the nature and value of the property as per Clause (f).

After considering provisions by the Act of 2002 and the Rules, the Supreme Court held in *Mathew Varghese v. M. Amritha Kumar*⁷ that the secured creditor acts as a trustee while taking steps to realize the dues by bringing the property entrusted to it for sale to realize the money advanced without approaching any Court or Tribunal, and that it cannot deal with the

⁷ (2014) 5 SCC 610

said property in any manner it likes, and the asset can only be disposed of in the manner prescribed under the Act.

This was reiterated in *J. Rajiv Subramaniyan v. Pandiya*⁸ and the Court held that the secured creditor cannot sell the secured asset for a song, and it must ensure that the sale provides maximum benefit to the borrower. It held that the secured creditor must take *bona fide* measures to ensure that there is maximum yield from the sale of the secured asset.

This was also reiterated in *Bajarang Shyamsunder Agarwal v. Central Bank of India*⁹.

It is settled law that persons holding positions of trust have to act in a bonafide manner and transparently and cannot mislead persons sought to be affected by their actions by suppressing material facts and circumstances.

The decision in Gowrishankar and another (1996)

In the case of *Gowrishankar and Another Vs. Joshi Amba Shankar Family Trust*¹⁰, the respondent-Trust was created by a deed of declaration dt.15.01.1934 by one Amba Shankar Joshi in relation to his three immovable properties for the benefit of his poor relations and for charitable and pious purposes. As the trustees were finding it difficult to carry out the purposes of the trust for paucity of funds, they moved High Court in the year 1979 for modification of the terms of the trust deed so as to empower them to sell the above properties. By order dt.28.11.1983, the High Court granted such power subject to the condition that it would be exercised only with the

⁸ (2014) 5 SCC 651

⁹ (2019) 9 SCC 94

¹⁰ (1996) 3 SCC 310

permission of the Court and the concurrence of 3/4th of the total number of trustees in office.

After the said order was passed, the trustees invited offers for purchase of property, and on receipt of some offers, sought permission of the High Court to sell the same at the highest price offered. Such permission was also granted on 09.02.1984.

Thereafter, they entered into an agreement for sale with respondents No.10 to 15 on 15.12.1989 agreeing to sell the property for ₹9 Lakhs after receiving a sum of ₹1.50 Lakhs as earnest money. They then applied on 15.01.1990 to the Income Tax authorities for a clearance certificate for sale of the property.

The appellants, who had been in occupation of the premises, and were running a hotel therein, and also residing therein and were paying rents to the Trust regularly, sent a letter on 23.01.1990 to the Trustees offering a higher amount of ₹14,20,000/-. Thus, the offer of the appellants is higher than that of respondent No.10 to 15.

The Trustees informed the appellants vide letter dt.26.02.1990 that their offer to purchase the property for ₹14.20 Lakhs would be placed before the meeting of the Trustees, and the decision taken would be communicated to them, and asked them to wait for the result of the meeting.

Thereafter, on 16.03.1990, the Trust through its Managing Director filed an application in the High Court seeking permission to sell the property to the purchasers for ₹9 Lakhs as according to them, it was the highest offer, and to execute and register the necessary deed of sale. Such permission was granted by the High Court on 19.03.1990, and sale deed was

also executed in favour of the purchasers on 12.04.1990, and then the appellants were informed about the sale.

The appellants then sent a notice to the Trust, the Trustees, and to the purchasers alleging that they played a fraud on the Court, the Registration Department and the Income Tax Department when they declared that the property fetched a highest offer of ₹9 Lakhs as it's price, and suppressing the fact the appellants had offered to purchase the same for ₹14.20 Lakhs.

They also filed an application in the High Court for setting aside the order permitting the same in favour of the purchasers i.e. respondents No.10 to 15.

A learned Single Judge of the High Court allowed the application on the ground that the Trustees had played a fraud on the Court by not disclosing the highest offer of the applicants and colluding with the purchasers, and directed the trustees to execute a register sale deed in respect of the property in favour of the appellants for ₹19.40 Lakhs (which higher amount they had offered during the hearing of their application in the High Court). But the said order of the learned Single Judge was set aside in appeal by the Division Bench.

The appellants then approached the Supreme Court.

The Supreme Court held that the Trustees in their application dt.10.03.1990 seeking permission to sell the property did not disclose the offer made by the appellants on 23.01.1990; that the Trustees had informed the appellants on 26.02.1990 that the offer of the appellants would be placed before the meeting of the Trustees, and they would also inform the

appellants about the decision of the Trustees, but instead of informing the appellants about the decision, if any, taken as promised, the Trustees filed, within fortnight of the above reply, an application for seeking permission to sell the property without disclosing the appellants' offer.

It held that the Trustees had not acted *bona fide* because it was expected from them to first disclose the offer of the appellants, and then plead their inability, if any, to accept the same by giving detailed reasons, but they did not do so.

Therefore, the Supreme Court confirmed the findings of the learned Single Judge, and set aside the order of the Division Bench on the ground that the Trustees has played a fraud upon the Court, and obtain permission to sell the asset in favour of respondents No.10 to 15, and remitted the matter to the High Court to call for a fresh offers from the appellants. The plea of the trustees that the sale was on *as is where is* condition was not accepted by the Supreme Court.

The decision in Haryana Financial Corporation and Another (2010)

In **Haryana Financial Corporation and Another** Vs. **Rajesh Gupta**¹¹, an advertisement had been issued by the State Financial Corporation for sale of various units including the land of the defaulting unit for which respondent made an offer of ₹25 Lakhs and deposited ₹2.5 Lakhs by way of earnest money.

On the very next day, the respondent wrote a letter to the Corporation stating that on visiting factory, he had noticed the premises did

¹¹ (2010) 1 Supreme Court Cases 655

not have any independent appropriate passage from the road, and requested the Corporation to apprise him in that matter.

Meanwhile, at the instance of the Corporation, the amount of bid was doubled.

Raising the same grievance again, the respondent requested the State Financial Corporation to supply him the copy of the approved building plan/site plan for the mortgaged building. But there was no specific reply by the Corporation.

The Corporation informed its Branch Manager that as per the documents submitted by the defaulting unit at the time of availing loan, a clear cut passage/*rasta* had been provided to the unit. The Branch Manager then wrote a letter to the Head Office and confirmed the grievance of the respondent. In such circumstances, the respondent did not pay the balance amount. Consequently, the Corporation forfeited the deposited amount of earnest money and invited fresh tenders.

The High Court quashed the order of the Corporation by which the earnest money had been forfeited, and directed the Corporation to refund the amount alongwith interest and also imposed costs.

The Corporation then approached the Supreme Court contending that having accepted the plots on “as is where is basis”, the respondent could not wriggle out from a confirmed bid, on the ground that there was no independent approach road to the Unit. It contended that it was for the respondent to make necessary enquiry with regard to the existence of the passage with the Revenue and other authorities; that the documentation submitted by the defaulting unit at the time of availing loan, affirmed the

existence of the necessary passage from the road to the unit; and having visited the site, the respondent was aware of the exact nature of the land being purchased by him as required by Section 55 of the Act of 1882, and so the Corporation could forfeit the security amount in view of Clause 5 of the terms and conditions for the sale of the property as contained in the advertisement as well as under Section 29 of the State Financial Corporations Act, 1951.

The Supreme Court rejected these contentions. It held that without any independent passage, the plot of land would be not more than an agricultural plot and not suitable for development as a manufacturing unit, and the Corporation had acted unfairly by insisting that there was a clear cut passage when there was none, and it cannot be allowed to take advantage of its own wrong.

It held that in view of the Sections 55 (1) (a) and (b) of the Act of 1882, it was incumbent upon the Corporation to disclose to the respondent about the non-existence of an independent passage to the Unit, and it was also the duty of the Corporation to inform the respondent that the passage mentioned in the revenue record was not fit for the movement of vehicles.

It also held that the Corporation did not provide to the buyer the entire documentation as required by Section 55 (1) (b) of the Act of 1882. It therefore, directed to refund of the forfeited amount with interest @ 12 % per annum to the respondent.

Though the Corporation pleaded that the sale was on *as is where is* basis, the said plea was not accepted on the ground of suppression

of facts by the Corporation. The Court held that the Corporation was an instrumentality of the State and so shall act fairly.

Existence of litigation in respect of an asset sought to be sold by a secured creditor would fall within the definition of the term ‘encumbrance’

We shall now look at the issue from another perspective.

We had earlier pointed out that in the sale notice, it is incumbent on the secured creditor to disclose the details of the ‘*encumbrances*’ known to it as per Clause (a) of Proviso to Rule 8(6), and also any other thing which the Authorized Officer considers it material for a purchaser to know in order to judge the nature and value of the property as per Clause (f) of Proviso to Rule 8(6).

The Supreme Court had an occasion to consider the meaning of “encumbrance” in **State of H.P. v. Tarsem Singh**¹². The Supreme Court held that said term means *the burden or charge upon property or a claim or lien upon estate or on the land*. According to the Supreme Court, “encumber” means burden of legal liability on property, and, therefore, *when there is an encumbrance on a land, it constitutes a burden on the title which diminishes the value of the land*. Thus, the term “encumbrance” includes a “claim” over a property.

We may point out that there is no denial by the bank in it’s reply that in CWP No.22761 of 2020 filed by the borrower, the subject asset was the subject matter and it is merely asserted that there was no stay order operating as hindrance for the auction and that the since the auction was on *as is where is* basis, *as is what is* basis and *whatever was is* basis, petitioner cannot raise any grievance. But in it’s reply dt.10.12.2021 (P12) sent by

¹² (2001) 8 SCC 104, at page 107

email to petitioner's email dt.9.12.2021(P-11), a false impression was sought to be given that this asset was not subject matter of the said Writ Petition. This conduct is not bonafide and fair.

The plea of the Bank that petitioner was aware of the previous litigation CWP No.22761 of 2020 and so relief ought to be denied to petitioner also cannot be accepted because the material placed on record shows that he came to know of the said fact *after* the auction was held on 25.11.2021. No evidence was placed on record by the Bank that the petitioner is aware of the same prior to the said date.

Since the borrower in the instant case had sought to retain the secured asset by offering an OTS by filing CWP No.22761 of 2020, such a claim made by the borrower amounts to an *encumbrance* on the secured asset. The same has, therefore, to be disclosed by the Bank which is aware of the same as per Clause (a) of the proviso to Rule 8(6).

Since, the Supreme Court in **Tarsem Singh** (12 Supra) has also held that an *encumbrance* would diminish the value of the property under Clause (f) of the proviso to Rule 8 (6), pendency of litigation would be a thing which the purchaser needs to know because it has effect on the value of the secured asset which he is offering to purchase.

We are also of the view that the absence of a stay order in the said CWP No.22761 of 2020 or its subsequent dismissal on 21.2.2022 are wholly irrelevant.

In view of the suppression about the litigation in the sale notice dt.7.11.2021 by the Bank of the pending litigation in regard thereto *as on the*

date of the sale/e-auction i.e. 25.11.2021, the action of respondent-Bank is vitiated.

We may point out that Rule 8(6)(f) of the Rules protects the interest of the intending purchaser to be put on notice as to encumbrance as otherwise, he or she would be purchasing property, and simultaneously buying litigation as well, and the intending purchaser may not bid in the event, if he or she came to know any encumbrance over the property. That is why the Rules specifically contemplate a provision for the Authorized Officer, while notifying the sale, to specifically state as to the *encumbrance*. Merely by mentioning in the e-auction notice that the sale is on *as is where is* basis, *as is what is* basis and *whatever there is* basis, the Bank is not absolved of its statutory obligation of disclosing the “encumbrances” attached to the property brought for sale by way of tender or any auction or sale by public auction.

A similar view has been taken by this Court in the case of **Joginder Singh** (6 Supra). In the said judgment, this Court had placed reliance on the decisions (a) ***Rakesh Kumar Kaushal Vs. State of UP and Others***¹³ rendered by the Division Bench of the High Court of Allahabad, (b) ***Mandava Krishna Chaitanya Vs. UCO Bank, Asset Management Branch***¹⁴ rendered by the Division Bench of the Telangana and Andhra Pradesh High Court and (c) ***Shaik Janimiya Vs. State Bank of India, SAM Branch II, Rep by its Authorized Officer, Kachiguda, Hyderabad.***¹⁵

¹³ Manu/UP/4944/2018

¹⁴ 2018(2) ALT 640; passed in Writ Petition No.39084 of 2017

¹⁵ 2020(4) Andh LD 397

In **Joginder Singh** (6 Supra) also there was civil litigation pending in respect of the secured asset which was not disclosed in the tender/public notice issued the Bank, and this Court has held that if such a fact had been disclosed, the petitioner might not have participated in the tender issued by the Bank at all as no intending purchaser wants to buy a fresh litigation or take on other unknown liabilities against third parties, and the action of the Bank was arbitrary and contrary to the provisions of the Act of 2002.

One other factor is to be considered is the fact that the Bank had refunded the earnest money deposited by Smt. Jaswinder Kaur, who had participated in the e-auction conducted by the Bank for the same subject secured asset on 31.12.2020, when she complained that the pendency of the litigation was not disclosed by the Bank.

Since, the petitioner is also placed in a similar situation, on parity, the Bank ought to have granted the refund of the earnest money deposited by the petitioner and ought not to have forfeited it. By doing so, it has discriminated against the petitioner and has acted arbitrarily in violation of Articles 14 and 300 A of the Constitution of India.

So we hold that it was not proper for a secured creditor like SBI to suppress from persons intending to participate in the e-auction being conducted by it under the SARFAESI Act, 2002, the factum of the pendency of litigation in respect of the secured asset being put to sale by it; and that it ought to have refunded the amount deposited by petitioner, instead of forfeiting it.

CONCLUSION and RELIEF

Therefore, the Writ Petition is allowed; email dt.15.12.2021 (Annexure P-16) issued by respondent No.2 to the petitioner is set aside; and respondents 1 to 3 are directed to refund within 4 weeks ₹16,08,250/- to the petitioner with interest @7 % per annum from the date such deposit(s) were made till the date of refund. The respondents shall also pay a cost of ₹50,000/- to the petitioners within 4 weeks.

(M.S. RAMACHANDRA RAO)
JUDGE

(HARMINDER SINGH MADAAN)
JUDGE

September 21, 2022.

Ess Kay

<i>Whether speaking / reasoned</i>	:	<i>Yes /No.</i>
<i>Whether Reportable</i>	:	<i>Yes/No</i>