D/L. 10.
August 16, 2023.
MNS.

WPA No. 14484 of 2023

Mr. Subrata Bose
Vs.
Central Bank of India and another

Ms. Hasnuhana Chakraborty,
Mr. Dripto Majumder,
Mr. Dipayan Dan

… for the petitioner.

Mr. Bishwambher Jha

…for the respondent no. 1.

Learned counsel for the petitioner contends that the petitioner sought to purchase the property by way of an auction sale held by the respondent no. 1-Central Bank of India. The earnest money was deposited on November 12, 2021. It is submitted that the balance was paid on November 28, 2021. Prior to that, the sale had been confirmed by way of a communication by an e-mail on November 25, 2021, although no Sale Certificate has yet been issued.

However, subsequently it transpired that, vide order dated November 24, 2021, on an application of a third party, the DRT-III, Kolkata, had granted an order of injunction, restraining the sale of the property.

The petitioner has waited for an inordinate period. However, the said proceeding is still pending.

Due to restraint order, the petitioner is unable to have the sale in his favour. As such, the petitioner seeks a refund of the entire admitted amount of earnest money and balance paid by the petitioner for the sale to the respondent no. 1-Central Bank of India.

It is also pointed out by learned counsel for the petitioner that, by a subsequent communication, the Authorized Officer of the concerned Bank had allowed extension of period for payment of residual amount of the bid till the final order of the DRT-3, Kolkata, or three months from the date of auction, whichever is earlier.

Learned counsel for the respondent no. 1-Bank contends that in view of the petitioner having not paid the entire residual amount, the earnest money deposited by the petitioner stands forfeited in favour of the Bank.

Learned counsel cites Rule 9(5) of the Security Interest (Enforcement) Rules, 2002 on such aspect of the matter.

It is contended further that the order dated November 24, 2021 passed by the DRT-III, Kolkata, does not pertain to the property, which was scheduled to be sold to the petitioner. It is submitted that the Bank is, till date, agreeable to sell the property to the petitioner, in the event the petitioner otherwise complies with all formalities.

Learned counsel for the respondent no. 1-Bank places reliance on an unreported judgement of the Supreme Court rendered in *Agarwal Tracom Pvt. Ltd. Vs. Punjab National Bank & Ors*., where the Supreme Court held, *inter alia*, that the Writ Court and the Appellate Court were justified in dismissing the appellant's writ petition on the ground of availability of alternative statutory remedy of filing an application under Section 17(1) of SARFAESI Act before the concerned Tribunal to challenge the action of the PNB in forfeiting the appellant's deposit under Rule 9(5).

A consideration of the submission of the parties as well as the documents annexed to the writ petition shows that the petitioner is justified in arguing that an injunction order is subsisting with regard to a portion of the property sought to be sold to the petitioner by the respondent no. 1-Bank by way of auction sale.

A comparison between the property as described in the concerned sale notice annexed at page 17 of the writ petition and the order of the Tribunal indicates that the Tribunal, in no uncertain terms, observed that the third party applicant before the Tribunal was aggrieved by the sale notice published in newspapers on October 31, 2021 "concerning Flat owned by the Applicant on 1st and 2nd Floors of the building". A sale deed was also referred to in the said context. Ultimately, the Tribunal observed that the respondent can proceed with the sale process "excluding these three flats, which are part of the sale notice publication on newspaper on 31.10.2021".

On the other hand, the sale notice refers to all "that piece and parcel of land measuring about 3 cottah 5 chitak together with one five storied building (except for 2 shop rooms in the ground floor) erected thereon", situated at the property described therein. Thus, there is no manner of doubt that the first and second floors out of the entire building, which was intended to be sold to the petitioner in its entirety, are the subject matter of the injunction.

The argument of learned counsel for the respondent no. 1-Bank that there are no such flats on the first and second floors, but the said property pertains to a guest house, is neither here nor there. Such argument was never made before any forum, nor is corroborated by the language of the Tribunal's order or the sale notice.

Although learned counsel for the Bank sought to place reliance on a map, since the same was not a part of the records before any of the forums at any point of time or referred to by any of the forums, the said plea of the Bank is tuned down and the map is not looked into or taken on record.

A *prima facie* reading of the order of the Tribunal, in conjunction with the sale notice, shows that the property, including the land and five-storied building, which was initially sought to be sold to the petitioner by way of the auction sale, is undoubtedly truncated by the order of the DRT-III, Kolkata, dated November 24, 2021 to the extent of certain flats situated on the first and second floors of the said building. The petitioner agreed, by participating in the e-auction and being a successful bidder, to purchase the entire property, except for two shop rooms on the ground floor, including the first and second floors thereof.

Hence, in view of the subsisting injunction order of the Tribunal, the sale could not go through at any point of time.

The reliance of the Bank on Rule 9(5), although at the first blush attractive, does not cut ice in the present case. Clause(5) of Rule 9 of the 2002 Rules stipulates that in default of payment within the period mentioned in sub-rule (4) of Rule 9, the deposit shall be forfeited to the secured creditor and the property shall be resold and the defaulting purchaser shall forfeit all claims to the property or to pay part of the sum for which it may be subsequently sold.

However, the question of such forfeiture does not arise in the present case, since in the first place, the Bank was never in a position, during the relevant period after the sale was confirmed, to carry out the sale of the entire property, which the petitioner agreed to purchase by way of deposit of earnest money.

Hence, by its conduct, the Bank cannot be said to be entitled to a forfeiture of the claim, as there was no question of default of payment, since Rule 9(5) relates back to the earlier sub-rules of Rule 9, which contemplate that a valid sale can be conducted in favour of the auction purchaser.

Although the Bank, at the first instance, extended the time for depositing the residual amount of payment by the petitioner for a period till disposal of the DRT-III proceeding or three months from the date of auction, whichever is earlier, subsequent correspondence between the parties indicate that the bank gave an impression to the petitioner that it was attempting to ensure that the proceeding before the DRT-III was resolved at the earliest, which is, *inter alia*, reflected from the Bank's communication by an e-mail dated January 27, 2022 annexed at page 34 of the writ petition.

That apart, since there is nothing on record to indicate that the bank proceeded to forfeit the earnest money or resell the said property, it can very well be presumed that the Bank itself is not secure in the belief that the sale of the entire property, as per the sale notice, can be carried out in favour of the petitioner.

In any event, a plain reading of the order of the Tribunal clearly shows that the sale with regard to the property cannot be carried out even today due to pendency of a proceeding before the Tribunal and the subsistence of the restraint order passed by the Bank.

Thus, the belated desire of the Bank, at this juncture, to sell the property to the petitioner, is a mere paper tiger, since the Bank does not, in law, have the authority to do so in view of the clear language of the restraint order passed by the Tribunal dated November 24, 2021.

Since the petitioner cannot be compelled to wait indefinitely for the sale to go through in favour of the petitioner, having deposited substantial amounts of earnest money in contemplation of the same as long back as in the year 2021, and since there is nothing to indicate that the proceeding before the Tribunal is on the verge of completion, there is no impediment against the petitioner to claim a refund of the amount paid in favour of the Bank, and the petitioner is justified to so claim.

Accordingly, WPA No. 14484 of 2023 is disposed of by directing the respondent no.1-Central Bank of India to immediately refund the amount admittedly deposited by the petitioner for purchase of the property in terms of the notice of sale annexed at page 17 (Annexure P1) of the writ petition dated October 31, 2021. Such refund shall be given by the Bank to the petitioner, latest within four weeks from date.

There will be no order as to costs.

Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)