IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
ORIGINAL SIDE

Present :-

THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA

I.A. No. G.A. 1 of 2022
in
W.P.O. 2186 of 2022

Ku Chih Choi

vs

Central Bank of India & Ors.

with

APPELLATE SIDE

WPA 15802 of 2022

Central Bank of India & Anr.

vs

State of West Bengal & Ors.

For the petitioner	:	Mr. Sudip Deb, Adv. Mr. Riju Ghosh, Adv. Mr. Sumitava Chakraborty, Adv. Mr. Aranyak Saha, Adv. Ms. Sayanika De, Adv
For the respondent Bank	:	Mr. A. K. Routh, Adv. Mr. Sudeep Pal Chawdhury, Adv. Ms. Diya Nandy, Adv. Ms. Ananya Mondal, Adv. Ms. Manishka Dhar, Adv.
For the State	:	Mr. Debasish Ghosh, Adv. Mr. Sayan Ganguly, Adv.
For the State in WPA 15802/2022	:	Mr. Raja Saha, Adv. Mr. Vivekananda Tripathi, Adv.
Last Heard on	:	23.12.2022.
Delivered on	:	19.01.2023.

Moushumi Bhattacharya, J.

1. WPO 2186 of 2022 was directed to be listed along with WPA 15802 of 2022 by an order dated 1st August, 2022. GA 1 of 2022 has been filed by the writ petitioner in WPO 2186 of 2022. WPA 15802 of 2022 has been filed by the respondent no. 1 after WPO 2186 of 2022. The two writ petitions and the application are being disposed of by this judgment.

2. The undisputed facts from the two writ petitions and the connected application, are these.

3. The petitioner was the successful auction purchaser of a sale conducted by the respondent no. 1 Central Bank of India pursuant to a paper publication made by the Bank on 25th May, 2014. The property for sale was described in the Auction Sale Notice and the total consideration money was indicated at Rs. 35 lacs. The petitioner initially paid 25% of the total consideration money and subsequently the entire balance amount. The communication dated 3rd July, 2014 from the Bank to the petitioner indicates that the petitioner was declared as the successful auction purchaser. A sale certificate was issued in favour of the petitioner on 29th September, 2014.

4. The respondent Bank failed to hand over physical possession of the property in question to the petitioner. The petitioner wrote several letters to the Bank which are part of records. The first writ petition, namely WPO 2186 of 2022, is a result of the failure of the Bank to hand over the physical possession of the property to the petitioner, the sale

certificate for which was also issued to the petitioner on 29th September, 2014. The relief prayed for in WPO 2186 of 2022 is for a direction on the Bank to refund the entire money to the petitioner along with interest at 10% per annum on and from 29th September, 2014, which is the date of issue of the sale certificate.

5. The Bank thereafter filed WPA 15802 of 2022 wherein the petitioner is the respondent no. 4. The Bank prayed for a direction on the District Magistrate, South 24 Parganas, to take possession of the secured asset under section 14 of the SARFAESI Act, 2002.

6. By an order dated 19th May, 2022, passed in WPO 2186 of 2022, a Coordinate Bench directed the Bank to put in a sum of Rs. 35,36,698/- together with interest at 10% p.a as on 29th September, 2014 with the Registrar, Original Side of this Court. The Court noted the conduct of the Bank in sitting on the petitioner's money and gave an opportunity to the Bank to explain its conduct on affidavits. Affidavits are complete in both the writ petitions.

7. The petitioner in WPO 2186 of 2022 has filed the present application GA 1 of 2022 for a direction on the Registrar, Original Side to permit the petitioner to withdraw the amount of Rs. 62,39,042/- which is the accumulated sum of Rs. 35,36,698/- plus interest at 10% p.a from 29th September, 2014 onwards.

8. The adjudication which is invited from the Court is whether the petitioner's claim for refund of the money paid for purchase of the property pursuant to the Auction Sale Notice should be allowed over the

relief prayed for by the Bank for a direction on the District Magistrate to take possession of the secured asset which was the subject matter of the Auction Sale Notice issued by the Bank. From the relief claimed by the Bank in the subsequent writ petition, it is clear that the Bank was not in possession of the property on the date of the Auction Sale Notice. That position has not changed till date.

9. The Auction Sale Notice categorically asserts that the Bank is in possession of the property and that the property is free from all encumbrances. The Auction Sale Notice did not contain any statement of the Bank not being in actual possession of the property as on the date of issue of the Auction Notice. There is little doubt that the contents of the Notice persuaded the petitioner to participate in the auction and the petitioner made over the entire consideration money of Rs. 35 lacs to the Bank on the basis of the Auction Notice as well as the Bank's letter of 3rd July, 2014. This letter also did not contain any statement to show that the Bank was not in possession of the property as on the date of issue of the letter i.e 3rd July, 2014. The letter in fact declares the petitioner as the successful bidder of the auction and directs the petitioner to deposit the entire bid amount of Rs. 35 lacs within fixed time frame. The only caveat given by the Bank in the said letter is that the property has been sold on *"as is where is basis, as is what is basis, whatever there is basis & without recourse basis"*.

10. Hence, the subsequent representation to the petitioner, that the Bank was not in actual possession of the property sold to the petitioner against valuable consideration, amounts to a clear act of

misrepresentation as contemplated under section 18 of the Indian Contract Act, 1872 which includes a positive assertion in a manner not warranted by the information available to the person making such assertion even if the person believes it to be true.

11. Reference in this context may also be made to Rule 8(7)(a) of the Security Interest (Enforcement) Rules, 2002 which deals with sale of immovable secured assets and requires the description of the immovable property to be sold including the details of the encumbrances known to the secured creditor to be given in every notice of sale which shall be uploaded on the website of the secured creditor.

12. The respondent Bank is the secured creditor in the present case in WPO 2186 of 2022. The 2002 Rules have been framed under the SARFAESI Act, 2002 which finds mention in the Sale Certificate dated 29th September, 2014 issues by the Bank to the petitioner. It is relevant to mention that Rule 8(7)(a) was previously Rule 8(6)(a) before the amendment brought in on 17th October, 2018. Moreover, the Bank did not respond to any of the representations/letters made by the petitioner from September, 2016 to April, 2022. The Bank in fact remained silent even before such letters from 29th September, 2014 when the sale certificate was issued to the petitioner till September, 2016 when the petitioner started writing letters to the Bank. There is no explanation offered as to the reason why the Bank sat on the consideration money of Rs. 35 lacs despite not having actual physical possession of the secured asset in respect of which prospective bidder was asked to participate in the auction sale. The Coordinate Bench, while passing the order of 19th

May, 2022 in fact noticed the reprehensible conduct of the Bank in appropriating the petitioner's money and not handing over the property to the petitioner.

13. This Court is also unable to comprehend the reason why the Bank took the petitioner's 35 lacs in September, 2014 and appropriated the sum till 19th May, 2022 when the Bank was directed to deposit the sum along with 10% interest to the Registrar, Original Side of this Court.

14. The defence of the Bank that the District Magistrate failed to ensure the delivery of possession of the secured asset to the Bank is no defence at all. This defence was raised in 2022 after eight long years of appropriating the petitioner's money and that too after the petitioner filed a writ petition in this Court seeking refund of the money.

15. The other point raised on behalf of the Bank through learned counsel is directed against the concerned District Magistrate for failing to act under section 14 of the SARFAESI Act, 2002 and the Rules thereunder. Counsel has attributed knowledge on the part of the petitioner of the nature of the possession of the property on the date of sale. Counsel also urges that the money cannot be refunded to the petitioner in the absence of a challenge to the sale certificate issued by the Bank. None of these points offer a satisfactory answer to the irresponsible and fraudulent conduct on the part of the Bank in persuading the petitioner to part with Rs. 35 lacs in July and September, 2014, for executing a Sale Certificate of the secured asset in favour of the petitioner on 29th September, 2014 but failing to deliver the property to

the petitioner for eight years thereafter. The Bank has also attempted to frustrate the recourse taken by the petitioner by filing a subsequent writ petition with reliefs which are clearly an afterthought and vexatious with reference to the conduct of the Bank in the interregnum.

16. Besides the admitted representation, the Bank also falls foul of the statutory requirements of Rule 8(7)(a) of the Security Interest (Enforcement) Rules, 2002.

17. It is also significant that the Bank has filed two affidavits-in-opposition in WPO 2186 of 2022. Since the first could not be traced in the records of the Court, the Bank was permitted to file a second affidavit. The petitioner however was served with both affidavits and learned counsel appearing for the petitioner submits that there are crucial differences in both the affidavits. According to counsel, the Bank has given up the point on *"as is where is basis"*, *"as is what is basis"* etc in the second affidavit.

18. In *S. Shanmuganathan vs. Authorized Officer, Indian Overseas Bank, Chennai; AIR 2017 Madras 228*, a Division Bench of the Madras High Court held that a petitioner who has successfully participated in an auction sale conducted by a Bank under the SARFAESI Act, 2002 is entitled to refund of the entire money with interest if there has been a misrepresentation made by the Bank. An SLP filed by the petitioner before the Supreme Court was dismissed by an order dated 25th August, 2017. In *V. Sridhar vs. Authorized Officer, Indian Bank, Chennai; AIR 2018 Madras 87*, the words *"as is where is basis"* and *"as is what is*

basis" were held against the Bank in a situation where the Bank did not make any representation relating to the encumbrances and statutory liabilities of the property. The Court held that the Bank cannot resile from its obligation in handing over the possession of the property to the auction purchaser. Both the aforesaid cases fit squarely in the circumstances of the present case particularly where the respondent Bank made a specific assertion that it is in possession of the property and that the property is free from all encumbrances.

19. As a Court of equity it is difficult to shut one's eyes to the plight of the petitioner who has remained deprived of the consideration money for eight long years as well as the property for which the consideration money was paid. The Bank is undisputedly, factually and statutorily accountable for its failure to hand over the property despite appropriating the sum. None of the points raised by the Bank merit consideration.

20. GA 1 of 2022 is disposed of with a direction on the Registrar, Original Side of this Court to hand over the sum of Rs. 62,39,042/- or the amount which is presently lying with the Registrar in respect of the sum deposited by the respondent Bank, as on the date of pronouncing of this judgment, to the petitioner within a week from date together with appropriate documentation in this regard. Since nothing remains of the two writ petitions filed by the parties by reason of the above findings, WPO 2186 of 2022 and WPA 15802 of 2022 are also disposed of in terms of this judgment.

Urgent Photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(**Moushumi Bhattacharya, J.**)