IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.06.2023

CORAM :

THE HON'BLE MR. JUSTICE R. MAHADEVAN
AND
THE HON'BLE MR. JUSTICE MOHAMMED SHAFFIQ

W.P.No.35513 of 2019

D.Karthikeyan ... Petitioner

Vs.

1.The Chairman,
Indian Bank,
Indian Bank Corporate Office,
Avai Shanmugam Salai-Peters Road,
Royapettah,
Chennai - 600 014.

2.The Authorized Officer,
Indian Bank,
ARM Branch-II,
4th Floor, Ethiraj Salai,
Egmore, Chennai - 600 008. ... Respondents

Writ Petition filed under Article 226 of the Constitution of India seeking to issue a Writ of Mandamus, directing the second respondent-Bank to refund the sale consideration amount of Rs.55,50,000/- (Rupees Fifty Five Lakhs and Fifty Thousand only) paid towards the Tender-cum-Auction sale dated 17.09.2012 along with 24% interest from the date of deposit of Earnest Money Deposit till the present.

For Petitioner : Mr.Naveen Kumar Murthi
for M/s.S.Varsha

For Respondents : Mr.P.M.Surender

ORDER

(Order of the Court was made by R. MAHADEVAN, J.)

The relief sought in this writ petition is to issue a writ of mandamus, directing the second respondent Bank to refund a sum of Rs.55,50,000/- paid towards tender-cum-auction sale dated 17.09.2012, to the petitioner along with interest at 24% from the date of deposit of Earnest Money Deposit till refund.

2. According to the petitioner, he is the auction purchaser in respect of the land admeasuring 3250 sq.ft together with the building with a built up area of 1075 sq.ft. in ground floor at Door No.9, Jesudasan Street, Radha Nagar, Chrompet, Chennai 600 044, comprised in S.No.432/9 of Zameen Pallavaram Village, pursuant to the public auction conducted by the second respondent Bank on 17.08.2012. The bid amount was Rs.55,50,000/-. Originally, he deposited a sum of Rs.4,22,091.48 towards EMD on 16.08.2012 and an additional of Rs.9,68,000/- on 17.08.2012. After emerging him as a successful bidder, he deposited the remaining bid amount of Rs.41,62,000/- with the second respondent Bank on 24.08.2012. The respondent Bank issued the sale certificate

in favour of the petitioner for the said property on 17.09.2012, however, possession was not handed over to him, till date, despite several requests made by the petitioner.

3. It is further stated by the petitioner that while so, on 02.05.2014, the second respondent sent a letter to the District Collector, Kanchipuram, requesting to initiate action under Section 14 of the SARFAESI Act, 2002 in respect of the subject property. The District Collector forwarded the said letter to the Tahsildar, Alandur and directed him to conduct an inspection, ascertain the details regarding the auctioned property and submit a report. At the time of inspection, it was found that the auctioned property belonged to the Government and was classified as a water body; and that, the original owners viz., Shanmugam and his wife Sumathi, who had mortgaged the property with the second respondent Bank, had illegally encroached the said Government land. The Tahsildar, Alandur, filed a report dated 06.11.2014 to the District Collector, to that effect. Upon coming to know about the same, the petitioner made a request to the respondent bank to refund the amount deposited by him and the same was not considered, which compelled him to file a complaint before the Judicial Magistrate Court, Tambaram against the Bank as well as the original owners of the subject property. The complaint was taken on file by the criminal court, but only against the original owners of the property and not against the bank. In such circumstances, finding

no other alternative, the petitioner has preferred this writ petition for the aforesaid relief.

4. Adding further, the learned counsel for the petitioner would contend that as per Rule 8(6)(f) of the Security Interest (Enforcement) Rules, 2002, it is the bounden duty of the Bank to comply with the terms and conditions stipulated in the auction notice and hand over the property to the auction purchaser without any encumbrances. Whereas, in the present case, the respondent bank failed to disclose the vital factor to the petitioner that the subject property belongs to the Government and is classified as a water body, which renders the sale of the property as void. That apart, they did not make any attempt to ascertain the actual position of the property, take physical possession and hand over the same to the petitioner, even after issuance of sale certificate in the year 2012. Thus, according to the learned counsel, the respondent bank has completely failed to adhere to a *sine qua non* to be followed while inviting bids from the public for the sale of secured assets and hence, they are liable to refund the amount deposited by the petitioner. It is also submitted that instead of purchasing the subject property from the respondent bank, had the petitioner invested such a huge amount in some other property with a valid and marketable title, the value of the same would have increased multifold for these years. Therefore, the learned counsel sought for a direction to the respondent bank to refund the amount

deposited by the petitioner with interest at 24% from the date of deposit till refund.

5. Refuting the allegations made in the writ petition, the second respondent filed a detailed counter affidavit, *inter alia* stating that the said R.Shanmugam is the principal borrower and he had availed various loan facilities mentioned in the demand notice from the second respondent Bank and mortgaged the subject property as collateral security, but he did not repay the loans borrowed, despite repeated requests. As a result of the same, the loan account was classified as Non-Performing Asset on 30.09.2001 and the second respondent issued a statutory demand notice under Section 13(2) of the SARFAESI Act, directing the borrower to pay the dues of Rs.20,33,492/- (as on 31.08.2002) with interest, within 60 days from the date of notice, which was not responded by the borrower. Hence, the respondent Bank initiated the proceedings under section 13(4) of the SARFAESI Act by issuing a possession notice dated 24.06.2004 to the borrower.

6. The counter affidavit filed by the second respondent further proceeds to state that following the possession notice, the second respondent issued an auction sale notice dated 24.03.2006, which was challenged by the borrower in S.A.No.88 of 2007 before DRT-III, Chennai, but the same was dismissed on

29.01.2008. Thereafter, the respondent bank issued the second auction sale notice, but the auction did not happen due to want of bidders. Finally, on the third occasion, the sale notice was issued, consequent to which, auction was conducted on 17.08.2012, in which, the petitioner was declared as a successful bidder in respect of the subject property for the total sale consideration of Rs.55,50,000/-. Subsequent to the said auction sale, the borrower once again challenged the auction sale conducted on 17.08.2012 before the DRT, by filing S.A.No.121 of 2012, which was ultimately, dismissed, by upholding the validity of the auction sale conducted by the second respondent on 17.08.2012. The said order of the Tribunal was further challenged by the borrower before the DRAT, Chennai in R.A. (SA) No. 65 of 2018, which also ended in dismissal. Thereafter, the second respondent proceeded to take physical possession of the subject property by filing Section 14 application under the SARFAESI Act, which is pending. Thus, according to the respondent bank, they have taken all the steps to hand over the possession of the property to the auction purchaser i.e., the petitioner herein.

7. It is further stated in the counter affidavit filed by the second respondent Bank that however, the petitioner, in collusion with the borrower, has filed the petitions with baseless allegation that the auctioned property was classified as a water body. He had initially filed an application in S.I.A. No. 43 of 2015 for refund of sale consideration before the DRT, which was dismissed on the

ground that the SARFAESI proceedings are pending and the said fact was suppressed by the petitioner in this writ petition.

8. Reiterating the averments made in the counter affidavit, the learned counsel for the respondents submitted that the writ petition filed by the petitioner is nothing but a collusive effort with the borrower to impede the second respondent's lawful recovery. It is further submitted that the validity of the auction sale was upheld by the DRAT, however, the petitioner and the borrower have been engaging in a game of "hide and seek" by repeatedly challenging the same with false grounds and abusing the process of law. The learned counsel also submitted that the allegation of the petitioner that the auctioned property belongs to the Government and is classified as a water body, is baseless and false. During the pendency of the Section 14 application before the District Collector, Kanchipuram, the petitioner at the instance of the borrower, had made false representation to the Tahsildar that the auctioned land was in a lake area and was a poramboke land, but, according to the respondents, the same is situated in the prime location of Chrompet and is classified by the Revenue Authorities as Residential Type I Class II area and hence, the subject property is neither poramboke nor lake area. That apart, it is submitted by the learned counsel that the auctioned property is the borrower's self-acquired private property and has been in his possession for more than 35 years, and is certainly, free from

encumbrance. Originally, the said property was purchased by the borrower from one S.B. Govindasamy Chettiyar vide sale deed dated 04.11.1985 registered as Document No. 3682/1985 and the copies of the mother documents from 1971 for the said property were made available and patta was also issued in the name of R.Shanmugam by the Revenue Authorities. All these facts and documentary evidence have been placed by the second respondent before the DRT in S.A.No.121 of 2012 and based on the same, the respective petitions filed by the borrower and the petitioner alleging that the subject property belongs to the Government, were dismissed by the DRT. Therefore, the learned counsel submitted that the writ petition filed by the petitioner will have to be dismissed as devoid of merits.

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

10. Concededly, the petitioner is the auction purchaser of the subject property. Though he was issued with a sale certificate on 17.09.2012, possession of the property on "as is where is" and "as it what is" basis, was not handed over to the petitioner. Therefore, the petitioner is before this court for a direction to the respondent bank to refund the amount deposited by him, with interest.

11. According to the learned counsel for the petitioner, after purchase of the property through auction sale, the petitioner came to aware that the auctioned property belonged to the Government and was classified as a water body. In support of the same, he placed reliance on the report submitted by the Revenue Officer, Pallavaram dated 06.11.2014, the relevant passage of which is usefully extracted below:

> "ஜமீன் பல்லாவரம் கிராமத்தில் சர்வே எண்.432/9 ல், M/s.Indian Bank, Chennai-08 என்ற நிறுவனத்தினர் SARFAESI Act 2002-கீழ் மனு கொடுத்துள்ளார்கள் என தெரிய வருகிறது. மேலும் விசாரணை மேற்கொண்டதில் மேற்கண்ட நிறுவனத்தினர் கூறியுள்ளள இடமானது ஜமீன் பல்லாவரம் II கிராமத்தில் சர்வே எண் 432/9 ஆகும். இப்புலமானது கிராம கிராமக்கணக்குகளை 'அ' பதிவேட்டில் சர்க்கார் புறம்போக்கு வகைப்பாட்டில் "பெரிய ஏரி" மொத்த விஸ்தீரணம் 2.00 (ஏக்கரில்) என்று உள்ளது, அடங்களின படி 432/9 பரப்பு 0.81.0 ஹெறு.ஏர்ஸ் பெரிய ஏரி 17 நபர்கள் தலா 0.01.0 ஹெற ஏர்ஸ் தளம் போட்ட வீடு மூலம் ஆக்ரமணம் செய்துள்ளார்கள் என்பதும் மேற்படி புலமானது சர்க்காருக்கு சொந்தமான நீர்நிலை புறம்போக்கில் வருவதால் மேற்படி நடிவடிக்கைக்கு பரிந்துரைக்கப்டுகிறது."

Thus, according to the learned counsel, the respondent bank is duty bound to hand over the property to the auction purchaser, without any encumbrance, subsequent to the issuance of sale certificate and their failure to do so, would render the transaction as void and consequently, entitle the purchaser to get back his deposited amount, that too, with interest.

12. On the other hand, it is the stand of the respondent Bank that right from the beginning of the auction sale, they have strictly followed the existing rules and regulations framed and there is no deviation / delay in execution of the

same in respect of the subject property. However, the petitioner with the aid of the original owner / borrower, has created problem to thwart the process of auction sale by filing various petitions before the DRT on the ground that the subject property belonged to the Government and was classified as water body. Thus, according to the respondent bank, the subject property is neither poramboke land nor a water body, but is situated in the residential area, as per the records maintained by the Revenue officials; that, the validity of the auction sale was already upheld by the DRAT; that, the SARFAESI proceedings relating to possession of the subject property alone, are pending; and therefore, the petitioner is not entitled for any relief in this writ petition.

13. We do not agree with the submissions so made on the side of the respondent Bank. As already stated above, possession of the auctioned property was not handed over to the petitioner, even though sale certificate was issued in his favour on 17.09.2012. The sale consideration of the property is Rs.55,50,000/- which was paid by the petitioner at the time of auction sale itself. The petitioner sought for refund of the sale amount on the ground that the auctioned property belonged to the Government and was classified as a water body in the revenue records, which fact was not disclosed by the bank at the time of auction sale. Though the respondent bank denied the said allegation as baseless by stating that the subject property is in the residential area, the truthfulness of the same would

be ascertained only after conducting proper enquiry. It may be true that the DRAT has upheld the validity of the auction sale, but that itself would not confer / convey any right or title over the subject property to any one. Therefore, the reasons putforth by the respondent bank for not complying with the terms and conditions of the auction sale, cannot be countenanced by this court.

14. The legal position with respect to the auction sale of the mortgaged property is that as per Rule 8(6) of the Security (Enforcement) Rules, 2002, it is the duty of the bank to provide the description of the property, including all encumbrances and pertinent information, to the purchaser; more particularly, Rule 8(6)(f) states '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'. The Hon'ble Apex Court in ***Mandava Krishna Chaitanya v. Uco Bank, Asset Management Branch*** [***2018 SCC Online 196]*** after referring to the provisions of Rules 8 and 9 of the Security Interest (Enforcement) Rules, 2002, which deal with sale of immovable secured assets, time of such sale, issuance of the sale certificate and delivery of possession, etc., it was held as under:

> *"10. The aforestated statutory scheme demonstrates that the secured creditor may also sell a secured asset which is not free from encumbrances. However, an endeavour must necessarily be made by the secured creditor to know as to whether any encumbrances attach to the secured asset, as the rules stipulate delivery of the property to the purchaser free from encumbrances known to the secured creditor. The secured creditor cannot therefore blindly accept any property as security and go on to sell the same without even*

enquiring as to what encumbrances attach to it. Be it noted that a secured creditor and more particularly, a bank, offers loan facilities on the strength of such secured assets and, in most cases, such loan facilities are sourced from public funds garnered from the exchequer/common man and therefore, a high level of responsibility attaches to the secured creditors, especially banks, to ensure that the secured assets, on the strength of which they offer tax payers monies or customer deposits to borrowers, are worthy of being mortgaged as security for such loans. It is not open to a bank, such as the UCO Bank, to baldly state that it obtained the subject property as security for the loan sanctioned by it to a borrower and that once it proposed to sell it on an as is where is and as is what is basis, it is freed from all responsibility."

15. Further, the Allahabad High Court in ***Rekha V. Uco Bank [(2014) BC 221 (DB)]*** held that a duty is cast upon the authorized officer of the bank to disclose to the auction purchaser any material defect in the title, failing which it could be construed that the purchaser was misled. Reference was also made to Rule 9(10) of the Rules of 2002, which provides that the sale certificate must mention whether the purchaser purchased the immovable secured asset free from encumbrances, and it was observed that a duty was cast upon the Bank to disclose those encumbrances which were known to it to exist on the property which was being sold by it. The Bench further observed that it is evident that the immunity claimed by the Bank on the pretext of 'as is where is' and 'as is what is' basis was dying a slow death and the secured creditor has to make to due diligence/through search of the property before proposing its sale.

16. In the light of the aforesaid legal proposition, this court is of the opinion that the petitioner / auction purchaser should be put on specific notice about all the encumbrances and other materials so as to enable him to take a

conscious decision with regard to his participation in the auction and the amount to be quoted in the bid; and that, the respondent's failure to comply with this statutory mandate, would amount to violation of the petitioner's right and constitute a breach of trust. In these circumstances, the petitioner has no other option except to seek refund of the sale amount deposited with the respondent bank.

17. In the decision in ***Mandava Krishna Chaitany's case*** referred to above, the Hon'ble Supreme Court in similar circumstances, has allowed the writ petition in favour of the auction purchaser and directed the Bank to refund the sale consideration with interest at 18%p.a. The relevant passage of the same is profitably extracted below:

> *"23.Further, the concept of as is where is and as is what is basis has lost its significance in the current commercial milieu and the principle of caveat venditor is more on the rise as compared to the outdated principle of caveat emptor. The Transfer of Property Act, 1882, requires the seller to own up to certain duties and it is not open to a responsible bank to take an innocent auction purchaser for a ride by selling to him a tainted property and thereafter claim protection under the principles of buyer beware. The counter- affidavit filed by the bank clearly demonstrates that the bank undertook no exercise whatsoever to verify and ascertain as to what encumbrances attached to the subject property at any stage. No details are forthcoming of any efforts having been made by the bank, be it before the registration authorities or any other authority at any stage. Now, it has come to light that the property in question is tainted on grounds more than one. It falls within the full tank level of a lake and, surprisingly, it is also treated as a ceiling surplus land. That apart, the possession of the property cannot even be handed over by the bank to the petitioner as the sale was effected without the bank securing actual physical possession thereof and the bank does not deny the factum of a lease having been created by the borrower in relation thereto. The bank therefore cannot comply with the statutory mandate of delivering actual possession of the property sold under the sale certificate. The decisions of various Courts referred to supra would come to the aid of the petitioner in this regard. That apart, the registration authorities already indicated*

to the petitioner that the subject land is noted as a ceiling surplus land. Therefore, even if they do entertain the sale certificate issued by the bank for registration, it would be subject to this cloud and would not amount to clear conveyance of title. It is therefore manifest that the bank made the innocent petitioner a victim by failing to exercise due diligence, not only in terms of the statutory scheme of the SARFAESI Act and the Rules of 2002, but also in its own commercial interest, let alone public interest, when it accepted this property as security for the loan sanctioned by it. This utter carelessness on the part of the bank in sanctioning loans, by use of public monies, on the strength of secured assets which are not even worthy of being mortgaged, requires to be deprecated in the strongest terms. Banks necessarily have to exercise more care and caution while using public monies available with them, be it through deposits by customers or otherwise, when sanctioning loans without caution or worse and cannot be permitted to claim protection under outdated legal principles so as to victimize innocent auction purchasers, such as the petitioner. This Court therefore has no hesitation in holding that the auction sale held by the bank, without even exercising minimum care to ascertain the encumbrances attaching to the subject property and without informing the petitioner or other bidders of the same, vitiates the sale proceedings, culminating in issuance of the sale certificate which is yet to be registered.

24.The writ petition is accordingly allowed setting aside the said sale. The bank shall refund the sale consideration of Rs.4,80,44,000/- paid by the petitioner, with interest thereon at 18% per annum from the date of the deposit till the date of realization, within two weeks from the date of receipt of a copy of this order. As the bank is itself at fault for this entire imbroglio and the petitioner was made to part with his valuable monies with no consequential benefit therefor and the bank enjoyed the custody of these monies all through, the rate of interest as applied by the Supreme Court in like circumstances in MATHEW VARGHESE vs. M.AMRITHA KUMAR is adopted."

18. In the case at hand, the petitioner with a fond hope that he would be in a position to enjoy the property, made his offer which was accepted by the bank and deposited the amount on 14.09.2012, with the expectation that the bank would hand over the vacant possession of the property within a reasonable time. However, even after a lapse of 11 years, the bank has failed to deliver the vacant possession. Throughout these years, the petitioner patiently awaited for favourable response from the bank, but nothing progressed. While so, the revenue officials reported that the subject property is classified as waterbody. However, the bank, instead of taking responsibility of delivery of the property free

from encumbrance, dragged on the petitioner from pillar to post and finally compelled him to seek a direction to refund the sale amount already deposited. In such circumstances, following the legal proposition as stated above, this court deems it appropriate to direct the respondent bank to refund the sale amount deposited by the petitioner with interest. Considering the date of sale certificate i.e., on 17.09.2012, the rate of interest shall be at 9% p.a.

19. Accordingly, the writ petition stands disposed of by directing the respondent bank to refund the sale consideration of Rs.55,50,000/- along with interest at 9%p.a. from the date of deposit till the date of refund. No costs.

[R.M.D,J.] [M.S.Q, J.]
07.06.2023

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

To
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