

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

RESERVED ON: 15.04.2024
DELIVERED ON: 24.04.2024

CORAM:

**THE HON'BLE MR. CHIEF JUSTICE T.S. SIVAGNANAM
AND**

THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

F.M.A. 437 OF 2024

I.A. NO. CAN 01 OF 2024

SOUTH INDIAN BANK LIMITED AND ANOTHER

VERSUS

JAC OLIVOL PRODUCTS PRIVATE LIMITED & OTHERS

Appearance:-

**Mr. Om Narayan Rai, Adv.
Mr. Shibmangal Singh, Adv.
Mr. Piyas Choudhury, Adv.**

.....For the Appellants

**Mr. Probal Kumar Mukherjee, Adv.
Mr. Kallol Basu, Adv.
Mr. Arnab Mukherjee, Adv.
Mr. Samik Sarkar, Adv.
Ms. Shreyasi Manna, Adv.**

.....For the Respondent No. 1

**Mr. Gopal Chandra Das, Adv.
Ms. Manisha Nath, Adv.**

.....For the Respondent Nos. 3 and 4

JUDGMENT

(Judgment of the Court was delivered by T.S. Sivagnanam, CJ.)

1. The second and third respondents in WPA 2445 of 2023 are the appellants. The first respondent herein was the writ petitioner. The facts leading to the filing of the writ petition are noted hereunder:-
2. The appellant bank exercised their power under the provision of the SARFAESI Act, 2002 and issued a tender cum auction notice 13.06.2022 for enforcement of the secured asset which is an immovable property at their reserved price of Rs. 8,27,38,000/-. The tender cum auction sale notice was published in terms of the provisions of the Act. The respondent writ petitioner participated in the auction and submitted a letter dated 17.06.2022 agreeing to abide by the terms and conditions of the tender cum auction notice. The auction was held on 29.06.2022 and the writ petitioner was declared as a successful bidder and upon deposit of the bid amount, sale certificate dated 30.06.2022 was issued. The respondent writ petitioner issued a legal notice to the appellant bank dated 15.11.2022 calling upon them to reimburse a sum of Rs. 20,94,065/- which they have paid to clear the dues payable to the Kolkata Municipal Corporation, the third respondent in this appeal.
3. The appellant by reply notice dated 14.12.2022 refused to comply with the demand by stating that the sale notice for sale of the secured assets is “as is where is”, “as is what is” and “whatever is” basis and that the writ petitioner participated in the auction unconditionally agreeing with the terms and conditions contained in the tender cum auction notice and the reimbursement claimed is not feasible of compliance. In the reply notice the

relevant clauses in the tender cum auction notice was referred to. Upon receiving the reply, the first respondent filed the writ petition. The learned Single Bench by the impugned order has allowed the writ petition.

4. The argument of the writ petitioner before the learned Single Bench was largely by referring to the decision of the Hon'ble Division Bench of this court in ***Corporation Bank and Another Versus Dr. Jayesh Kumar Jha***¹ wherein the court held that Rule 8 and 9 of the Security Interest (Enforcement) Rules, 2002 hereinafter referred to as the Rules deal with stage anterior to the issuance of the sale certificate and delivery of possession; Rule 9(8) cast a duty upon the authorised officer to deliver the property to the purchaser free from encumbrances requiring the purchaser to deposit money for discharging the encumbrances and the Rule of "Caveat Emptor" is to be replaced by "Caveat Venditor" and when a property is put to sale, the bank is under a statutory obligation to sell the secured assets with clear title free from any encumbrances. The appellant bank resisted the argument by submitting that the judgment has to be read in the context of the facts which gave rise thereto and that the relevant clauses of the auction sale notice in the present case are much more specific and direct than the facts which fell for consideration before the Division Bench. By reiterating the contention that the property will be sold on "as is where is" basis and "whatever there is" basis clearly indicates that the bank had no further liability after the sale was concluded to pay the property tax due in respect of the property. Further it was argued that although there cannot be any estoppel against the statute, there may very well be cases where a person

¹ (2019) SCC Online Cal 2279

relinquishes or waives his statutory rights. In the present case, the writ petitioner entered into the sale knowing full well that the authorised officer or bank could not be held responsible for any charge or property tax or any dues to the Government or anybody with regard to the property. That the writ petitioner signed an acknowledgement of the said terms and conditions and thus relinquished his statutory rights if any. Therefore, the writ petitioner cannot resile from such relinquishment or waiver and reiterate its claims with regard to arrears due regarding the corporation tax.

5. The learned Writ Court framed the issue arising for consideration as to whether the relevant clause in the auction document binds the writ petitioner in the light of the judgment in the case of **Corporation Bank**. Paragraph 40 of the judgment was quoted and the ratio laid down in the decision in the case of **Corporation Bank** was applied and it was held that the writ petitioner is entitled to refund of the entire amount of arrears of corporation tax paid by them for the property which was sold by the appellant bank in the public auction.

6. As mentioned above, the learned Single Bench had been guided by the decision in the case of **Corporation Bank** and applying the ratio laid down therein had allowed the writ petition. Thus, the first aspect to be considered is whether the said decision of the Division Bench reflects the correct legal position at the present time. Before we deal with the said aspect, we note the facts in the case of **Corporation Bank** where a eAuction sale notice was published mentioning that the sale would be conducted as “as is where is” and “as is what is” basis and one of the terms and conditions mentioned in the sale notice, that the intending bidder should make their own

independent enquiries regarding the encumbrances title of the property put on auction and claims/rights/dues affecting the property, prior to submitting their Bill. In the tender cum auction notice published by the appellant bank dated 30.06.2022, we find the conditions to be more specific and emphatic in contradistinction with the conditions mentioned in the eAuction notice which was subject matter in the case of **Corporation Bank**. For better appreciation, the relevant terms and conditions of the subject in the present case is quoted hereunder:-

TERMS AND CONDITIONS:-

1) *The property will be sold on "as is where is" basis and "as is what is" "whatever there is" condition and the Bank is not responsible for title, condition or any other fact affecting the property. The particulars furnished regarding the secured asset is stated to the best of information of the Bank and the Bank will not be answerable for any error, misstatement or omission.*

2) *The proposed Tenderers shall read and understand the terms and conditions mentioned in the Tender Sale Notice which is published by the Bank in its Website, Branch at P.B No:123, 1st Floor of 38 Jayasree House, Ganesh Chandra Avenue, Kolkata, Pin-700013. and Regional Office at Door No 20A Ward No 63 1st Floor Flat Nol Mother Teresa Sarani Park Street Kolkata West Bengal 700016 and also visit the scheduled property and satisfy as to its area, boundaries, ownership, title, encumbrance, statutory approvals, measurements etc. The Bank shall not entertain any dispute regarding the Tender process or the scheduled property after participating in the sale.*

3)

4)

5).....

6)

12) On the sale being confirmed and on receipt of the entire sale proceeds by the Authorised Officer, the successful Tenderer will be issued with a Sale Certificate as per the terms and conditions of the Bank and the SARFAESI Act. The successful Tenderer should pay all the existing dues etc., to the Government/ Local Authorities including charges/ fees payable for registration of sale certificate such as registration Fees, Stamp Duty etc., as applicable as per law.

13) The Authorised Officer or Bank will not be held responsible for any charge, lien, encumbrance, property Max or any dues to the Government or anybody in respect of the properties under sale.

14) The successful Tenderer shall pay all Taxes/ Electricity/ Water/ Sewerage Charges or any other charges demanded by any authority after the acceptance of the bid, even if it pertains to previous periods.

15) The Successful Tenderer shall, at his cost, get the Electricity/ Water/ Sewerage connection etc. and any other common services transferred in his name.

16)

17)

7. We have mentioned that the terms and conditions in the case on hand to be more emphatic and stringent because the conditions state that the property will be sold not only on “as is where is” basis and “as is what is” basis but “whatever there is” basis and the bank is not responsible for

title, condition or any other fact affecting the property. Further the particulars furnished in the tender cum auction notice regarding the secured asset had been stated to the best information of the bank and bank will not be answerable for any errors, misstatement or omissions. The proposed tenderer was required to read and understand the terms and conditions mentioned in the tender cum sale notice published by the appellant bank. On the sale being confirmed and on receipt of the entire sale proceeds by the authorised officer, the successful tenderer will be issued sale certificate as per the terms and conditions of the bank and SARFAESI Act and the successful tenderer should pay all the existing dues to the Government/local authorities including charges/fees payable for registration of sale certificate such as registration fee, stamp duty etc. as applicable as per law. Further the bank will not be held responsible for any charge, lien, encumbrance or property tax or any dues to the Government or anybody in respect of the property under sale. The successful tenderer was required to pay all taxes/electricity/water/sewage charges or any other charges demanded by any authority after the acceptance of the bid, even if it pertains to previous periods.

8. The writ petitioner by letter dated 17.06.2022 irrevocably undertook to abide by the terms and conditions of the auction sale and in no uncertain terms stated that they have read and understood the terms and conditions of sale and verified the other particulars regarding the property being offered for sale through auction and in token thereof had signed the bid documents as required. The writ petitioner specifically stated that they agreed to abide

by the terms and conditions for sale and are fully aware and agree that the authorised officer shall have the sole right to accept or reject their bid without assigning any reason. It appears that the Kolkata Municipal Corporation issued a “defaulter notice” by way of a fixture in the entrance of the property stating that if the outstanding of Rs. 20,94,065/- towards property tax is not paid immediately action will be taken as per the Kolkata Municipal Corporation Act, 1980. The unpaid property tax on the said premises is for the period 2006-2007 (two quarters), 2010-2011, 2011-2012, 2012-2013, 2013-2014 and 2021-2022. The writ petitioner paid the said amount to the Kolkata Municipal Corporation and thereafter issued a legal notice to the appellant bank directing them to reimburse the amount paid by them to the Kolkata Municipal Corporation. This demand was denied and disputed by reply notice dated 14.12.2022 by the appellant bank.

9. Having noted that the terms and conditions of the tender cum auction in the case of hand is more stringent and specific than the terms and conditions in the eAuction notice in the case of **Corporation Bank**. In the said case the Division Bench agreed with the findings rendered by the learned writ court holding that law imposes no obligation upon the purchaser to inquire into the liabilities other than those which would impede value of properties and since the advertisement for auction made no specific stipulation that public dues were to be paid by the purchaser, the seller (bank) themselves are required to pay pre-sale dues under Section 55(1)(g) and Section 100 of the Transfer of Property Act. After referring to a few decisions, the court held that the municipal tax is a charge within the

meaning of Section 100 of Transfer of Property Act and also Section 232 of the Kolkata Municipal Act, 1980. Rule 8(6)(a) of the Rules were referred to as also Rule 9(8) and it was held that the said rules cast a duty upon the authorised officer to deliver the property to the purchaser free from encumbrances requiring the purchaser to deposit money for discharging the encumbrances. The ignorance of the creditor regarding the encumbrance on the property is no longer a good and acceptable defence in view of the statutory provisions and various precedents by the Hon'ble Supreme Court and different High Courts on the SARFAESI Act and Rules and have replaced with the Rules of *Caveat Emptor* by *Caveat Venditor* and when a property is put to sale the bank is under statutory obligation to sell the secured assets with clear title property free from encumbrance. Further the Corporation Bank was faulted for failing to disclose the encumbrance to the purchaser therein and claim money for discharge of such encumbrance under Rule 9(7) of the said Rules.

10. Rule 8 of the Security Interest (Enforcement) Rules, 2002 deals with sale of immovable secured assets and Sub Rule 7 of Rule 8 would be relevant which reads as follows:-

(7) Every notice of sale shall be affixed on the conspicuous part of the immovable property and the authorised officer shall upload the detailed terms and conditions of the sale, on the web-site of the secured creditor, 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 of the immovable secured assets 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) deposit of earnest money as may be stipulated by the secured creditor;

(f) any other terms and conditions, which the authorized officer considers it necessary for a purchaser to know the nature and value of the property.]

11. The above rule stipulates the details which are to included in the terms and conditions of sale. Clause (a) requires the description of immovable property including the details of encumbrances known to the secured creditors to be mentioned and in terms of Clause (f) any other terms and conditions which the authorised officer considers it necessary for a purchaser to know the nature and value of the property.

12. Rule 8(7)(a) specifically uses the words “known to the secured creditors”. The terms and conditions of the public auction more particularly the condition No. 1 is in consonance with Rule 8(7)(a) in as much as the terms clearly states that the particulars furnished regarding the secured assets is stated to the best of information of the bank and the bank will not be answerable for any error, mis-statement or omission.

13. The other conditions referred above also indemnifies the bank from any charge, alien, encumbrances property tax or any dues to the

Government or anybody in respect of the property under sale. The successful tenderer was required to pay all charges demanded by any authority after the acceptance of the bid. Therefore, the terms and conditions cannot be said to be in violation of Rule 8(7)(a)(f). In the case of **Corporation Bank**, Rule 9 has been referred to and Sub Rule 9 which states that the authorised officer shall deliver the property to the purchaser free from encumbrances known to the secured creditors on deposits of the money as specified in Sub Rule (7) of Rule 9. In our respectful view, Rule 9 would have no application to the facts of the present case as Rule 9 operates at a stage “post sale” as the rules deals with time of sale, issue of sale certificate and delivery of possession.

14. As rightly contended by the learned advocate appearing for the appellant bank, that the various clauses contained in Sub Rule (7) of Rule 8 of the Rules are provisions which are intended to protect the intending purchaser or in other words conditions which are in favour of the intending purchaser. These favourable conditions are no doubt embedded in the statute. The question would be as to whether a person in whose favour there are certain statutory provisions is entitled to waive such provisions or protection. The Hon’ble Supreme Court in **Shri Lachoo Mal Versus Shri Radhey Shyam** ² held that everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy.

² 1971 (1) SCC 619

15. In ***Commissioner of Customs, Mumbai Versus Virgo Steels, Bombay and Another***³ the question which fell for consideration was; can a mandatory requirement of statute be waived by the party concerned? The Hon'ble Supreme Court referred to the judgment of the Privy Counsel in ***Vellayan Chettiar Versus Government of Province of Madras***⁴ and held that even though a provision of law is mandatory in its operation and if such provision is one which deals with the individual rights of the person concerned and is for his benefit, the said person can always waive such a right.

16. As mentioned above, Rule 8(7)(a) mandates disclosure of the description of the immovable property to be sold including the details of the encumbrances known to the secured creditors. This rule needs to be interpreted bearing in mind the terms and conditions of the subject tender cum auction notice to which the writ petitioner has irrevocably bound himself. Further we point out that Clause (a) of Rule 8(7) only mandates disclosures of the "known encumbrance". The terms and conditions of the subject tender states that particulars furnished regarding the secured assets is stated to the best of information of the bank and the bank will not be answerable for any error or mis-statement or omission. The terms and conditions also mandate that the successful tenderer has to pay all taxes to the Government and local authorities. The writ petitioner has irrevocably agreed to abide by the terms and conditions by their letter dated 17.06.2022. Therefore, even if it is argued that there was certain statutory

³ (2002) 4 SCC 316

⁴ AIR 1947 PC 197

protection given to the writ petitioner/successful bidder (which in our opinion on facts is not so), the writ petitioner is deemed to have been waived such rights.

17. In **General Manager, Sri Siddeshwara Cooperative Bank Limited and Another Versus Ikbali and Others** ⁵, the question which fell for consideration centred around Rule 9 of the Securities Interest (Enforcement Rules, 2002), the Hon'ble Supreme Court held that it is no doubt that Rule 9(1) is mandatory but this provision is definitely for the benefit of the borrower and similarly Rule 9(3) and Rule 9(4) are for the benefit of the secured creditors and that it is a settled position in law that even if a provision is mandatory, it can always be waived by a party for whose benefit such provision has been made and that the secured creditors and the borrower can lawfully waive their rights.

18. The law on the subject has now been settled by the Hon'ble Supreme Court in a recent decision in **K.C. Ninan Versus Kerala State Electricity Board and Others** ⁶ wherein the Hon'ble Supreme Court was considering several questions one of which being "implication of the sale of premises" on "as is where is" basis with or without reference to electricity arrears of the premises. The said condition was explained to mean that a sale on as is where is basis postulates that the purchaser would be acquiring assets with all its existing rights/obligations and liabilities. When a property is sold on "as is where is" basis, encumbrances on the property stands transferred to the purchaser upon sale.

⁵ (2013) 10 SCC 83

⁶ 2023 SCC Online SC 663

19. The Hon'ble Supreme Court referred to the decision in **Telangana State Southern Power Distribution Company Limited Versus Srighdaa Beverages** ⁷ wherein the Hon'ble Supreme Court was considering an auction sale under the SARFAESI Act. The court analysed Clause 24 and Clause 26 of the auction notice which stipulated an "as is where is" sale with respect to all statutory dues and absolved the authorised officer of all liabilities for any charge, encumbrances and dues including electricity dues. The Hon'ble Supreme Court concluded that the auction purchaser was "clearly put to notice" since there was a specific mention of the quantification of the electricity dues. On the liability of the past owners to bear the electricity dues when the sale is "as is where is" basis and existence of electricity dues is specifically mentioned, it was categorically held that the auction purchaser were bound to inspect the premises and provide for the dues in all respects. After referring to the other decision, it was held as follows:-

146. To conclude, all prospective auction purchasers are put on notice of the liability to pay the pending dues when an appropriate "as is where is" clause is incorporated in the auction sale agreement. It is for the intending auction purchaser to satisfy themselves in all respects about circumstances such as title, encumbrances and pending statutory dues in respect of the property they propose to purchase. In a public auction sale, auction purchasers have the opportunity to inspect the premises and ascertain the facilities available, including whether electricity is supplied to the premises. Information

⁷ (2020) 6 SCC 404

about the disconnection of power is easily discoverable with due diligence, which puts a prudent auction purchaser on a reasonable enquiry about the reasons for the disconnection. When electricity supply to a premises has been disconnected, it would be implausible for the purchaser to assert that they were oblivious of the existence of outstanding electricity dues.

20. The Hon'ble Supreme Court also examined the doctrine of "Caveat Emptor" and referred to Section 3 and Section 55(1)(a) of the Transfer of Property Act and held that in terms of Section 55(1)(a) of the Transfer of Property Act, in the absence of a contract to the contrary a seller is under an obligation to disclose material defects in the property or in the seller's title thereto of which he is aware and which a buyer could not with ordinary care discover for himself.

21. In the case of hand, there is a contract to the contrary, the writ petitioner irrevocably bound themselves to such a contract and they cannot resile from the same that to after having remitted the entire consideration and after obtaining the sale certificate and possession of the property put up for auction. The Hon'ble Supreme Court also pointed out that while examining the effect of an "as is where is" clause, the facts and circumstances of each case individually, along with the terminology of the clauses governing the auction sale must be taken into consideration to arrive at a equitable decision. The conclusions were drawn in paragraph 341 of the judgment in Sub Para (i) it was held that the implication of the expression "as is where is" is put on notice that the seller does not

undertake the responsibility in respect of the property offered for sale with regard to any liability for payment of dues like service charges, electricity dues for power connection and taxes of the local authorities.

22. The decision in **Corporation Bank** was referred to in the case of **Medineutrina Private Limited Versus District Industries Centre (DIC) and Others**⁸ in the said case there were sales tax dues and the Sales Tax Department had an earlier charge upon the property for arrears of taxes not paid. The secured creditors/bank contended that it was no aware about any claim by the sales tax department and therefore non-disclosure of something which they were unaware could not be put against them. The bank placed reliance on Section 26E which dealt with priority to secured creditors. In the said decision, the court considered the condition “as is where is” and “what is there is” basis and held as follows”-

43. Thus the purchase of the property on "as is where is and what is there is" basis, would mean that the property was being had by the auction-purchaser, with all its rights, obligations and liabilities, whatsoever they may be, which would include, all dues, impositions, restrictions as may have been imposed upon the same and consequent to acquiring title to the property, cannot be permitted to quibble out of it, on the alleged plea of not being noticed about any such liability/imposition. In case the auction-purchaser, did not want to have the property, with its liabilities, he ought to have insisted on having the same free of all encumbrances, altogether, before bidding for the same. That apart, it is equally a duty of the auction-purchaser, before bidding for

⁸ 2021 SCC Online Bom 222

the same, to make inquiries about the impositions upon the property, so that he can have it free of any encumbrances. After acquiring title to the property, the auction-purchaser cannot be heard to say that he will have the rights associated with the property and not the liabilities.

23. The court also considered Rule 8(7)(a) which requires the details of encumbrances known to the secured creditors to be part of the terms and conditions of the sale. Ultimately in paragraph 51 of the judgment directions were issued to be followed by the secured creditors.

24. The learned Senior Advocate appearing for the respondent writ petitioner placed heavy reliance on the directions issued in the said judgment which are to be followed by the secured creditors and it was submitted that the secured creditors must act fairly and they are under an obligation in law to make full and candid disclosure as to the dues and encumbrances in respect of the property put to auction and the secured creditors cannot be heard to say that it was for the bidder to obtain such information, for the reasons that being a lender it is already holding the documents of the borrower, which confer upon it a right to obtain such information. As against the said judgment, the writ petitioner therein filed an appeal to the Hon'ble Supreme Court and Kotak Mahindra Bank had also filed an appeal to the Hon'ble Supreme Court. The Hon'ble Supreme Court in the judgment reported in **2021 SCC Online SC 3159 (Kotak Mahindra Bank Limited Versus District Industries Centre (DIC) and Others)** while dealing with the appeal filed by the writ petitioner namely **Medineutrina Private Limited (Company)** dismissed their appeal and upheld the decision

of the High Court rejecting the writ petition and reliefs claimed by the writ petitioner therein. The court held that it is not necessary to examine the other aspects dealt with by the High Court in the impugned judgment. The appeal filed by **Kotak Mahindra Bank** is pending before the Hon'ble Supreme Court in Civil Appeal No. 6350 of 2021 and the various directions which were issued by the Division Bench of the High Court of Bombay in paragraph 51/41 of the judgment dated 18.02.2021 in WP No. 7971 of 2021, High Court of Bombay (2021 SCC Online Bom 222) was stayed and the order of stay is still in force. Thus, the writ petitioner before the High Court of Bombay was unsuccessful in their appeal before the Hon'ble Supreme Court as reported in 2021 SCC Online SC 3159 wherein the Hon'ble Supreme Court upheld the decision of the High Court of Bombay rejecting the writ petition and the reliefs claimed by the petitioner **Medineutrina Private Limited (Company)**.

25. The Hon'ble Supreme Court referred to a few conditions of the auction sale and held that the writ petitioner therein having agreed to the stipulations, it is too late in the day to contend that they will not be liable to pay the statutory dues so as to remove the charge on the property in question. Ultimately, the Hon'ble Supreme Court has accepted the request of the appellant therein that after they pay the sales tax dues the bank was directed to consider the request for issuance of fresh sale certificate appropriately.

26. In the light of the above, we have to necessary hold that the ratio in **Corporation Bank** is no longer good law.

27. For all the above reasons, the appellant succeeds and the appeal is allowed and the order passed in the writ petition is set aside and the writ petition is dismissed and the connected applications are closed. No costs.

(T.S. SIVAGNANAM, C.J.)

I Agree.

(HIRANMAY BHATTACHARYYA, J.)

(P.A.- SACHIN)

