IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Before:
The Hon'ble Justice Harish Tandon
and
The Hon'ble Justice Hiranmay Bhattacharyya

MAT 107 of 2024
With
CAN 1 of 2024
Smt. Kaberi Chakraborty &Anr.
Vs.
UCO Bank, Jalpaiguri Branch&Ors.

For the Appellants :Mr. Ranjan Kali
Mr. SurajBhattacharjee
....advocates

For the Respondents : Ms.Zeba Khan
Mr. Santosh Kr. Ray
Ms. AntalinaGuha
Mr. DeborshiDhar
...advocates

Heard on : 29.11.2024

Judgment on :29.11.2024

Hiranmay Bhattacharyya, J.:-

1. This appeal is at the instance of the borrowers and is directed against the orders dated 13.11.2024 and 14.11.2024 passed by a learned Single Judge sitting in the Jalpaiguri Circuit Bench of the High Court at Calcutta in WPA 2366 of 2024.

2. The appellant no. 1 is the wife of the appellant no. 2. The appellants are the partners of a partnership firm under the name of M/s Kushal Tea Factory having its place of business at Torulpara, PandaparaKalibari, P.O.- PandaparaKalibari, P.S.- Kotwali, District - Jalpaiguri (hereinafter referred to as the 'said partnership firm'). The partnership firm availed a the term loan of Rs. 1,49,40,000/- from UCO Bank, Thana Road, Jalpaiguri Branch, District - Jalpaiguri. The said partnership firm in order to secure the loan provided a one storied dwelling house in the name of appellant no.2 situated at PandaparaKalibari being R.S. plot no.1792/3194, R.S. plot no.1792/3195, 1792 under Khatian No. R.S.6945/1/9, 6945/1/0, 6945/1/11, 2 6945/1/12, 6945/1/13, 6945/1/14, 6945/1/17-27 for J. L. No.07 under Mouza – Kharia, District Jalpaiguri measuring about 12.00 cottahs (hereinafter referred to as the 'said property') as a security asset by depositing the Title Deeds bearing nos.I-3533, I-5936, I-5937, I-1077 (hereinafter referred to as the 'said Deed').

3. The partnership firm defaulted in repaying the said term loan and as a consequence whereof the account was declared as a non-performing asset (for short 'NPA'). Since the appellants failed to repay the debt in spite of sufficient opportunity being given to the appellants, the bank invoked the provisions of Section 13 of the Securitisation& Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 (for short 'the SARFAESI Act'). Notice under Section 13(2) was followed by the steps being taken under Section 13(4) of the SARFAESI Act by the bank. The appellants did not offer to liquidate the loan amount at that stage. Bank/SecuredCreditor,thereafter published a

sale notice under the provisions of the Security Interest (Enforcement) Rules, 2002 (for short 'the 2002 Rules'). The property was put up for sale through e-auction. The auction took place on 30.10.2024. The successful bidder, according to the bank, has put the initial payment and further time was provided as per the statutory requirement to pay the balance sale price.

4. The appellants filed this writ petition on 7.11.2024, *inter alia*, praying for a direction upon the bank to accept the proposal for one time settlement submitted by the appellants before the bank.

5. The appellants claim to have deposited a sum of Rs.13,50,000/- just prior to the property being put up into auction and offered to pay the balance amount of Rs. 1,21,50,000/- within seven days after receiving the acceptance of such OTS.

6. Before the learned Single Judge, the Bank raised a preliminary objection as to the maintainability of the writ petition.

7. The learned Single Judge took note of the decision of the Hon'ble Supreme Court in the case of ***CELIR LLP vs. Bafna Motors (Mumbai) Pvt. Ltd. & Ors.*** reported at ***(2023) 13 SCR53*** and by an order dated 13.11.2024, the learned Single Judge thought it fit to adjourn the matter in order to give a special chance to the appellants to enable them to show *bona fide* by either transferring the balance sum of Rs. 1,21,50,000/- or to bring a demand draft for such amount. The writ petition was directed to appear in the list on the very next day that is on 14.11.2024. The learned Single Judge after noting that the appellants herein in spite of being given an opportunity to show their *bona*

*fide*did not avail the same, dismissed the writ petition by the order dated 14.11.2024.

8. The borrowers have approached this court with this intra Court appeal challenging the orders dated 13.11.2024 and 14.11.2024.

9. Mr. Kali, learned advocate appearing for the appellants submits that in the meantime the appellants have already deposited the balance amount. The total amount of Rs.1.35 crores was deposited by the appellants and the bank has accepted the same. He submits that the property, which was put up for auction sale is the residential property and the appellants and the successful bidder quoted an amount, which is equal to that of the reserve price and no consent of the borrowers were taken prior to confirmation of the sale. He, therefore, submits that this Court should set aside the sale conducted by the authorized officer and should also direct the secured creditor to deliver possession of the secured assets of the appellants forthwith.

10. Ms. Khan, learned advocate appearing for the bank/secured creditor submits that the writ petition at the instance of the borrower challenging the sale notice is not maintainable. She further submits that the object behind the second proviso of Rule 9(2) of the 2002 Rules is to make the borrower aware of the price at which the bid is accepted. She placed reliance upon the decision of the Kerala High Court in the case of ***Varghese UkkenVs. State Bank of India*** reported at ***AIR 2011 Kerala 41*** and an unreported decision of the Delhi High Court in the case of ***Mahipal Singh Yadav Vs. Union of India***reported in ***WP(C) No.357 of 2022*** in support of such contention.

11. Heard the learned advocates for the parties and perused the materials placed on record.

12. The following questions arise for consideration in this appeal.

    i) Whether the appellants should be relegated to the statutory remedy provided under Section 17 of the 2002 Act?

    ii) Whether the right of redemption of the borrower can be said to have extinguished with the publication of notice for public auction?

13. This Court shall first decide the issue whether the appellants should be relegated to the statutory remedy.

14. The appellants have alleged that the sale failed for non-compliance of the statutory requirements and, therefore, the right of redemption stood revived.

15. After hearing the learned advocates for the respective parties, this Court finds that the facts are not in dispute and the matter relates to interpretation of the provisions laid down under the 2002 Act and the Rules framed thereunder. That apart, the learned Single Judge granted liberty to the appellants to pay off the entire dues. Though the petitioner could not avail of such opportunity within the time limit allowed by the learned Single Judge but the fact remains that the appellants have already deposited the entire amount due and the bank has also accepted the same. The bank has neither preferred any appeal nor filed any cross-objection against the liberty granted by the learned Single Judge to the appellants, to deposit the balance amount.

16. In the light of the aforesaid facts, this Court is not minded to relegate the appellants to the remedy provided under the 2002 Act as the same would only prolong the litigation.

17. The first issue is answered accordingly.

18. This Court shall now proceed to decide the second issue which runs thus –

> Whether the right of redemption of the borrower can be said to have extinguished with the publication of notice for public auction?

19. Section 13(4) of the 2002 Act states that in case the borrower falls to discharge his liability in full within the period prescribed in Section 13(2), the secured creditor may take recourse to one or more of the measures as specified in Clauses (a) to (d)thereof to recover his secured debt. Section 13(8) of the 2002 Act states that where the amount of dues of the secured creditor together with all costs, charges and expenses incurred by him is tendered to the secured creditor at any time before the date of publication of notice for public auction or inviting quotations or tender from public or private treaty for transfer by way of lease, assignment or sale of the secured creditors, the secured assets shall not be transferred by way of lease, assignment or sale by the secured creditor and in case, any step has been taken by the secured creditor for transfer by way of lease or assignment or sale of the assets before tendering of such amount under Sub-Section 8 of Section 13, no further step shall be taken by such secured creditor for transfer by way of lease or assignment or sale of such secured assets.

20. Sub-Section 8 of Section 13 was substituted by Act 44 of 2016 with effect from 1st September, 2016.

21. The Hon'ble Supreme Court in the case of ***Celier LLP Vs. Bafna Motors*** (supra) held that in fact the right of redemption available to the borrower under the present statutory regime is drastically curtailed and would be available only till the date of publication of notice under Rule 9(1) of the 2002 Rules and not till the completion of the sale or transfer of the secured assets in favour of the auction purchasers.

22. The sale notice in the case on hand was published on October 30, 2024. Therefore, it is not in dispute that the amended provision of Section 13(8) of the 2002 Act shall apply to the case on hand.

23. The larger issue would be whether the right of redemption of the borrower stood extinguished with the publication of notice.

24. Rule 8 of the 2002 Rules deals with sale of immovable secured assets. Sub Rule 5 of Rule 8 specifies the steps to be taken by the authorized officer for sale of immovable property. Sub Rule 6 of Rule 8 states that the authorized officer shall serve borrower a notice of 30 days for sale of immovable secured assets, in Sub Section 5. A reading of Rule 8(7)(c) makes it evidently clear that the property may not be sold below the reserve price of the immovable secured assets. Rule 9 deals with the time of sale, issue of sale certificate and delivery of possession. Sub Rule 2 of Rule 9 states that the sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid or tender or quotation or offered to the authorized officer and shall be subject to

confirmation by the secured creditor. The proviso to Rule 9(2) states that no sale under this Rule shall be confirmed if the amount offered by sale price is less than the reserve price specified under sub-rule (5) of Rule 8. The said proviso starts with the expression "no sale under this Rule shall be confirmed". Therefore, if the amount offered by an intending auction purchaser is less than the reserve price, the statute prohibits confirmation of such sale. The second proviso states that if the authorized officer fails to obtain a price higher than the reserve price, he may, with the consent of the borrower and the secured creditor effect the sale at such price. The second proviso casts an obligation upon the authorized officer to effect the sale only with the consent of the borrower and the secured creditor at such price if the authorized officer fails to obtain a price higher than the reserve price.

25. Upon a harmonious reading of Rule 9(2) along with the provisos thereto, this court is of the considered view that if the amount offered by the auction purchaser is less than the reserve price, the sale cannot be confirmed. If the authorized officer fails to obtain a price higher than the reserve price, then the consent of the borrower and the secured creditor is necessary to effect the sale at such price. This Court holds that the expression "such price" would refer to the price which is equal to that of the reserve price and cannot be less than the reserve price as there is an embargo to confirm sale at a price less than the reserve price.

26. The circumstance under which the sale shall fail and the secured creditor can take fresh steps for sale of the secured asset has been specifically provided

under various sub-rules of Rule 9. The proviso to Rule 9(1) states that if sale of immovable property by any one of the methods specified by sub-rule (5) of Rule 8 fails and the sale is required to be conducted again, the authorized officer shall serve, affix and publish notice of sale of not less than 15 days to the borrower, for any subsequent sale.

27. Upon a conjoint reading of all the sub-rules of Rule 9, it is evident that in case the sale fails for any of the reasons mentioned under Rule 9 and the sale is required to be conducted again, the authorized officer is under an obligation to serve, affix and publish fresh notice of sale to the borrower.

28. The process of auction that commences with the publication of notice comes to a logical end either with the completion of sale or when the sale could not be effected by the authorized officer for want of consent as contemplated under second proviso to Rule 9(2).

29. In the light of the aforesaid observations, this court holds that the restriction imposed on the right of redemption under Section 13(8) of the 2002 Act is lifted once the sale fails or could not be effected by the authorized officer. The secured creditor has wide powers under the 2002 Act for recovery of dues even by sale of the secured asset but such powers have to be exercised strictly in terms of the provisions of the 2002 Act and the 2002 Rules. The powers under the 2002 Act and the Rules cannot be exercised arbitrarily. If the auction sale is conducted dehors the provisions, it would nullify the ultimate sale.

30. In the event the action of the authority in conducting the sale is contrary to the provisions of the statute and the Rule, the sale conducted shall be declared to be null and void.

31. In the light of the above observations, this court holds that the right of redemption remains in suspended animation upon the publication of notice for auction under Section 13(8) and the same shall revive only when the sale shall fail or the sale could not be effected due to want of consent. Once the sale is completed in all respect, the right of redemption shall stand extinguished.

32. The second issue is answered accordingly.

33. In the case on hand, the reserve price fixed for the immovable secured asset was Rs. 1.10 crore. The bid of the only bidder was also for Rs. 1.10 crore. Therefore, the successful bidder as a single bidder quoted a price which is equal to that of the reserve price. No material has been produced before this court to show that consent of the borrower and secured creditor was taken for confirmation of sale.

34. This Court holds that the sale that took place pursuant to the impugned auction was in violation of the second proviso to Rule 9(2). Such sale in favour of the successful bidder is accordingly declared to be null and void.In view thereof, the restriction on the right of redemption automatically got lifted. The right of the borrower to redeem his debt stood revived.

35. Since the borrower has repaid the dues, this court is of the view that the secured creditor should be directed to deliver possession of the property to the borrower.

36. Accordingly, the secured creditor is directed to deliver possession of the property to the borrower within the time limit stipulated hereinafter.

37. The learned Advocate appearing for the bank submitted that a further sum of Rs.75,000/- is lying due and payable on account of legal expenses from the borrower.

38. The learned Advocate appearing for the appellant undertakes to pay the said amount within the time limit to be fixed by the Court.

39. The Hon'ble Division Bench of the Madras High Court in ***K. Raamaselvam vs. Indian Overseas Bank*** reported at ***AIR 2010 Madras 93***, held that if the bid offered was the same as the reserved price, the authorized officer could confirm such sale only with the consent of the borrower and the secured creditor. It was further held that by no stretch of imagination it could be construed that even if the authorised officer fails to obtain a price higher than the reserved price, he may, confirm the sale without obtaining any consent from the borrower and the secured creditor. The view of the Madras High Court in ***K. Raamaselvam*** (supra) supports the view taken by this Court.

40. In ***Mahipal Singh*** (supra) and ***Varghese Ukken*** (supra) it was observed that the word "such price" appearing in the second proviso of Rule 9(2) means the highest bid price which is lesser than the reserve price. Though the said judgments only have a persuasive effect upon this Court, this Court is not inclined to follow the same in view of the findings rendered herein before.

41. The learned advocate for the Bank would submit that the hearing of the appeal be adjourned as today is the last day for deposit of the balance amount by the

bidder. This Court has already held that since the bid of the successful bidder is equal to that of the reserve price, the authorised officer could not have effected such sale without the consent of the borrower and the secured creditor. The action taken to sell the property in favour of the successful bidder has already been held to be null and void. To the mind of this Court, no right in respect of the property in question vested in the successful bidder and therefore no useful purpose would be served in adjourning the hearing of this appeal.

42. For all the reasons as aforesaid, the appeal stands allowed. The impugned order stands set aside. There shall be however no order as to costs.

43. The borrower is directed to pay the aforesaid amount of Rs. 75,000/- within 7 days from this date by way of Demand Draft or by way of electronic transfer of funds.

44. Immediately upon payment of the aforesaid sum by the borrower, the Bank shall deliver possession of the property to the appellants but not later than 24 hours from such payment. Bank shall also take all consequential steps relating to foreclosure of loan including release of title deeds immediately upon making such payment.

45. Urgent photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

I agree.

(Harish Tandon, J.) **(Hiranmay Bhattacharyya, J.)**