(2010) 09 DEL CK 0352

In the Delhi High Court

Case No : Writ Petition (C) No. 6400 of 2010

Canara Bank — APPELLANT

Vs

Harpreet Fashions Pvt. Ltd. and Others — RESPONDENT

Date of Decision : 21-09-2010

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 17(1)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Rules, 2004 — Rule 9(3)

Citation : (2010) 09 DEL CK 0352

Hon'ble Judges : Valmiki J Mehta, J;Sanjay Kishan Kaul, J

Bench : Division Bench

Advocate : Pradeep Dewan and Rajiv Samaiyar, for the Appellant; Nemo, for the Respondent

Judgement

Sanjay Kishan Kaul, J.

CM No. 12664/2010

Allowed subject to just exceptions.

WP(C) No. 6400/2010

1. The petitioner-Bank granted loan facility to R-1 which was secured by equitable mortgage of immovable asset of the R-1/Company being plot No. 362, Sector MIE, Bahadurgarh, District: Rohtak (now District: Jhajjar), Haryana admeasuring 2377.05 square yards apart from hypothecation of stocks etc.

2. It is the case of the petitioner-Bank that R-1 and R-2 failed to maintain the financial discipline and thus the petitioner initiated proceedings exercising its rights and powers under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (''the said Act'' for short). The R-1 invoked the jurisdiction of DRT u/s 17(1) of the said Act, but interim relief

was declined and that order was sustained by the DRAT. This Court is stated to have granted certain interim reliefs subject to conditions, but undisputedly those conditions were not fulfilled resulting in the takeover of the physical possession of the factory premises and the same being put to auction.

3. In the auction held on 06.11.2009, R-3 made a bid for Rs. 2,02,99,999/- for the mortgaged property. R-3, however, did not deposit 25 per cent of the amount immediately at the fall of the hammer as per Rule 9(3) of the Security Interest (Enforcement) Rules, 2002 (''the said Rules'' for short), but on the other hand sought an extension of one week to deposit the balance 15 per cent of the amount as only 10 per cent of the amount was deposited. The petitioner-Bank favourably considered this request but the amount was deposited on the next date of 07.11.2009. The amount so deposited was, however, not encashed in view of the covering letter dated 07.11.2009 by R-3 making a grievance that though it was claimed by the petitioner-Bank that ''title of the said property was clear & was transferable'' and that ''there are no dues & lien of any government authorities'', it had been found on checking-up that a sum of Rs. 25,62,386/- was owed to the Excise & Taxation Office, Bahadurgarh, Haryana. Not only that, the said Department had asked HUDA vide letter dated 28.07.2009 not to transfer /sale /lease out the said property till recovery of outstanding dues. It was thus apprehended that there may even be some other unknown/unassessed dues of the R-1/company with a lien on the property. Thus apart from the deposit of Rs. 20,00,000/- at the fall of the hammer, a cheque of Rs. 30,75,000/- was given subject to clearing of outstanding dues of all the government authorities and other State authorities who have any interest in the property in question.

4. R-1 approached DRT-II with an application challenging the auction inter alia on the grounds of irregularities in the conduct of the auction which was liable to be declared null and void. The various grievances raised by R-1 were, however, rejected by DRT in terms of Order dated 18.11.2009 including arising from the claim of the Excise & Taxation Department. However, the conclusion was that since it was only a single bid which had been received, fresh auction should be held. This is also keeping in mind that R-3 had sought further two months time to deposit the balance 75 per cent of the amount. The Earnest Money Deposit (''EMD'' for short) deposited by R-3 was directed to be retained.

5. R-1 and R-2 preferred an appeal before DRAT against the order dated 18.11.2009. It is noted in the first paragraph itself that the only question which was really involved in the appeal was whether it was incumbent upon the petitioner- Bank to forfeit the EMD deposited to the extent of 25% by the auction purchaser.

6. The grievance of R-1 and R-2 that 25% of the amount was not deposited in time as only 10% was deposited and the balance amount of 15% was deposited on the next date as also the factum of the balance price not being deposited within 15 days of the confirmation of sale was noticed. It was also urged that the public notice for the proposed sale to be held on 06.11.2009 nowhere stipulated

that the authorized officer had power to extend the time to make the payment. Such extension was stated to be an colourable exercise of power. The DRAT as per the impugned order dated 23.08.2010 has noticed that the sale was yet to be confirmed and thus the question of paying the balance consideration did not arise. The R-3/auction purchaser on the other hand submitted that he had brought a sum of Rs. 1 crore representing 75 per cent of the balance amount and requested the court that sale should be confirmed in its favour or the money returned, but it was recorded that no such request had been made before DRT at the appropriate time.

7. The DRAT came to a finding that the notice of auction dated 06.11.2009 itself was defective as it had not given a clear public notice. The factum of the liability towards the Excise and Taxation Department had not been mentioned and the petitioner-Bank had no authority to extend the time. In such a situation, the money of the auction purchaser could not have been withheld and a direction should have been issued to return the money after setting aside the sale. Simultaneously, the DRAT put some fault at the door of the auction purchaser as proper enquiry should have been made by the auction purchaser as a vigilant person since the sale was on ''as is where is'' basis and thus enquiry should have been made about the encumbrances. The amount of Rs. 3,00,000/- out of the deposit made by the auction purchaser was directed to be forfeited.

8. The present writ petition under Articles 226 and 227 of the Constitution of India has been filed by the petitioner-Bank impugning this order making the following prayers:

a) issue a writ of certiorari or any other appropriate writ/ order / direction for quashing / setting aside the impugned order dated 23.08.2010 passed by the learned Debts Recovery Appellate Tribunal, New Delhi in Misc. Appeal No. 342 of 2009 quashing the auction of the secured asset held on 06.11.2009 and directing the petitioner to refund the EMD and forfeiting a sum of Rs. 3,00,000/- therefrom.

b) Direct that the secured asset consisting of land and factory building bearing plot No. 362, Sector MIE, Bahadurgarh, Haryana having an area of 2377.05 square yards be sold in favour of R-3 in terms of the auction held on 06.11.2009 on receipt of the balance 75% of the sale price.

9. We put to learned Counsel for the petitioner at the inception itself that prayer (b) could not be entertained as it would amount to a specific performance in favour of the petitioner-Bank and against R-3/auction purchaser even though there were defects in the advertisement. The prayer (a) really arose out of the findings as to whether the petitioner-Bank was blameworthy and whether any blame could be laid at the door of the R-3/auction purchaser.

10. We are in agreement with the findings contained in the impugned order to the effect that the advertisement dated 06.11.2009 itself was defective. When it is stated that the sale is on ''as is where is'' basis, it does not imply that known

liabilities are not to be disclosed. The petitioner-Bank cannot claim ignorance about the liability towards the Excise and Taxation Department. The advertisement dated 06.11.2009 also contained an assurance by the petitioner-Bank that there were no dues and lien of any government authorities. The defect thus lay with the advertisement itself.

11. The second irregularity in the process of auction was the failure of R-3 to deposit the 25% of the amount at the fall of the hammer.

12. Learned Counsel for the petitioner sought to contend that Rule 9(3) of the said Rules only requires deposit to be made ''immediately'' and this would not amount to deposit to be made at the fall of the hammer and thus the deposit made on the next date would suffice.

13. We are unable to accept this plea as the phraseology used is very clear in the said Rule 9(3) of the said Rules that the purchaser "shall immediately pay/ deposit 25% of auction price". This is also as per the normal practice of such amount being deposited at the fall of the hammer. The deposit made by R-3 of 10% of the auction price thus did not conform to Rule 9(3) of the said Rules and the auction should have been declared unsuccessful since R-3 did not have the requisite funds to deposit 25% of the auction price at the fall of the hammer. The petitioner-Bank, in fact, granted one week''s extension to R-3/auction purchaser to make the deposit of balance 15% which had to be deposited at the fall of the hammer though the amount was deposited on the next day i.e.07.11.2009.

14. We are, however, unable to appreciate as to why a part of the blame lay at the door of the auction purchaser in respect of the petitioner-Bank not disclosing the liability towards the Excise and Taxation Department as it is not incumbent upon the auction purchaser to presume that tax liability would be hidden from it. The enquiry would be for purposes of title and "as is where is" basis can only imply the location and situation of the land and plant & machinery. Thus no blame can be laid at the door of the auction purchaser in this behalf as is sought to be apportioned by the DRAT and there was thus no real reason for penalizing the auction purchaser.

15. We are, however, not required to pass any direction in this behalf as the auction purchaser has not filed any petition as yet challenging the order of DRAT dated 23.08.2010 insofar as the retention of Rs. 3,00,000/- is concerned. The fact, however, remains that no action should have been taken in pursuance to the earlier auction in view of the failure of the sole unsuccessful party failing to deposit 25% of the amount immediately at the fall of the hammer. The fact that a second auction has been unsuccessful cannot be a ground to re-validate the first auction as is sought to be urged by learned Counsel for the petitioner. It is open to the petitioner-Bank to re-auction the property in accordance with law.

16. There is no reason to exercise jurisdiction under Articles 226 & 227 of the Constitution of India in favour of the petitioner-Bank insofar as its grievance is concerned.

17. Dismissed.

CM No. 12663/2010 (Stay)

Dismissed.