

(2013) 03 JH CK 0048
In the Jharkhand High Court
Case No : Writ Petition (C) No. 860 of 2010

Choudhary Construction

APPELLANT

Vs

Allahabad Bank and Others

RESPONDENT

Date of Decision : 08-03-2013

Acts Referred:

Constitution of India, 1950 — Article 226
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(4), 17

Citation : AIR 2013 Jhar 73 : (2013) 2 AJR 569 : (2013) 4 JLJR 42

Hon'ble Judges : Aparesh Kumar Singh, J

Bench : Single Bench

Advocate : P.C. Tripathy, for the Appellant; A.R. Choudhary, Advocate for the Bank and Mr. K.P. Deo, Advocate for the Respondent No. 5, for the Respondent

Final Decision : Dismissed

Judgement

Aparesh Kumar Singh, J.

I.A. No. 2231/2012

1. Heard counsel for the parties. The respondent Bank has brought to the notice of the court the order dated 26th November 2012 passed in L.P.A. No. 453/12 which was preferred against the interim order dated 19th September 2012 passed in the instant case. The learned Division Bench of this court, by the said order, has observed as follows:

Since the appellant-Bank was directed to accept Rs. 40.00 lakhs and, therefore, that is not voluntary acceptance in view of the order passed by the learned Single Judge dated 19.09.2012 then obviously that acceptance is without any prejudice to the right of the appellant-Bank and, therefore the appellant-Bank should not have any grievance against such direction.

So far as merit of the writ petition is concerned that is required to be looked into by the learned Single Judge at the time of hearing of the matter, instead of

entertaining this L.P.A. we are disposing it of with request to the learned Single Judge to decide the writ petition expeditiously. Learned Single Judge may also consider I.A. No. 2231/2012.

2. The respondent Bank had earlier preferred an I.A. No. 2231/2013 seeking dismissal of the writ petition on the grounds that the property in question which is the subject matter of the instant writ application, had been auction sold through a public auction notice dated 16th December 2009 and a sale certificate has been issued on 20th January 2010 in favour of the private respondent herein before filing of the writ petition i.e. on 24th February 2010. Counsel for the respondent Bank had sought to press the instant I.A. after bringing to the notice of this court the order passed by the Division Bench on 26th November 2012.

3. The petitioner sought time to file response to the instant I.A. and the matter was adjourned and thereafter, it has been listed today and has been heard and is being decided after hearing the parties.

4. In the present writ application, the auction notice dated 11th September 2009 issued by the respondent-Bank, contained at annexure-3 to the writ application, is under challenge and the petitioner had also sought consequential prayers restraining the respondents from proceeding with the auction sale of the properties in question.

5. The petitioner claims to be a Partnership Firm which had taken cash credit facilities from the respondent-Bank for doing its business of construction work and had mortgaged the properties indicated at para-5(a) & (b) which is quoted hereunder:

a. Landed property situated at Thok Nos. 385 & 395, Thana no. 95, Khebat no. 1, Tauji no. 15/11, Ward no. 2 (old) & 5 (new) and Holding no. 326 (part) of Giridih.

b. Land and structure situated at Khata no. 36, Plot no. 153, Tauji no. 20, Mauja Madhuban, Thana Pirtand, Giridih, admeasuring 3 decimals.

6. It is the contention of the petitioner that it had deposited substantial amount in the said account against the outstanding dues till 30th December 2008. However, thereafter one of the partners namely, Manoj Choudhary was arrested in a criminal case and remanded to jail custody and the transaction of the Bank became irregular. The Bank in exercise of powers u/s 13(2) of the SARFESI Act, directed the petitioner to repay the outstanding loan of Rs. 54,39,215.00 vide letter dated 16th January 2009. The request of the petitioner with the respondent-Bank to settle the account, however, was not heeded to by the respondent-Bank and ultimately, the sale notice was published in the newspaper on 11th November 2009 which is annexure-3 to the writ application. It is the contention of the petitioner that the reserve price shown in the auction sale notice in respect of the property mentioned in para-6(a) mentioned herein-above, i.e. Rs. 55.00 lakhs, was under valued as the Bank had itself indicated in

its letter dated 16th January 2009 that the outstanding dues of the petitioner was Rs. 54,39,215.00. Thereafter, the petitioner also served a legal notice upon the respondent-Bank showing its intention to settle such claim and pay the outstanding dues which was not accepted by the respondent-Bank. It is the contention of the petitioner that the property had arbitrarily been put on auction sale and the petitioner had approached this court by filing this present writ application with the relief (s) indicated herein-above.

7. During the pendency of the writ application, on 6th May 2010, an interim order was passed after hearing the petitioner directing it to deposit a sum of Rs. 40.00 lakhs by 10th of May 2010 and if the amount is deposited, the unit of the petitioner shall not be auction sold, if not already auction sold. It has also been mentioned in the order that if the amount in question is not deposited by the petitioner, this writ petition would be treated as dismissed. However, the Bank had not appeared till then. It appears that the said order was not complied by the petitioner and thereafter, an interlocutory application no. 2054/2010 was preferred by it with a prayer to modify the said order for extending the period to deposit the aforesaid amount. By order dated 24.05.2010, order dated 06.05.2010 was modified by directing the petitioner to get a Bank Draft of Rs. 40.00 lakhs and deposit the same before the Registrar General, Jharkhand High Court by Friday i.e. 28.05.2010. It was indicated that if the aforesaid Bank Draft is deposited by the petitioner within the said period, the same shall be kept in a sealed cover with the Registrar General, Jharkhand High Court in a safe deposit. Again it was observed that the matter be posted on 28th June 2010 if the petitioner may come ready to deposit the balance amount of Rs. 14,39,215.00. Till that date, the petitioner's Unit shall not be auction sold, if not already auction sold. When the order was passed on 24th May 2010, the Bank had not entered its appearance. It appears from the order dated 22nd July 2010 that the interim orders dated 06.05.2010 and 24.05.2010 were vacated as no one had appeared on behalf of the petitioner and from the office notice, it appears that the order dated 06.05.2010 had not been complied with.

8. However, on 19th September 2010 on the request of the petitioner, private respondents were added as respondent nos. 5 & 6 in the writ petition and notices were issued against them. In the meantime, it was observed that if the petitioner deposits Rs. 40.00 lakhs in one go, as directed earlier, within four weeks, the auction sale said to be held on 16th December 2009, shall not be given effect to and the petitioner's possession shall not be disturbed from the residential premises in question, until further orders. The respondent Bank had appeared in the meantime by filing I.A. No. 2231/2012 taking a stand that the sale certificate had already been issued on 20.01.2010 in favour of the Auction Purchaser i.e. private respondents. The respondent Bank however preferred Letters Patent Appeal being LPA No. 453/2012 against the order dated 19th September 2012. From perusal of the order passed by the learned Division Bench in the said LPA, it appears that it was stated by the respondent; Bank before the Division Bench in the said LPA also that the auction notice dated 16th December 2009 had been

given effect to by passing the final order for auction sale after acceptance of the bid and it was submitted on their behalf that nothing survives in the writ petition as the auction sale has not been challenged. In these circumstances, the petitioner had prayed that the Bank should not be forced to accept the amount of Rs. 40.00 lakhs against more dues and that too in the facts situation where property has been auctioned, sale certificate has already been issued and possession has been handed over to the successful bidder.

9. As already stated above, the writ petition is being heard today after giving opportunity to the petitioner to file its response to the instant I.A. filed on behalf of the respondent Bank.

10. It is the contended by the petitioner that the valuation of the property ought to have been done in rightful manner so that the property of the petitioner fetches the maximum revenue, which has not been done in the instant case by the Bank before proceeding with auction sale. In order to buttress his aforesaid contention, he has relied upon a judgment rendered by the Hon'ble Supreme Court in the case of Ram Kishun and Others Vs. State of U.P. and Others, . It is submitted that in public auction sale, authorities or instrumentalities of the State are required to undertake a proper valuation before fixing the reserve price and thereafter, proceed for auction sale in the matter. Counsel for the petitioner has submitted that the entire auction sale has been done in a collusive manner without any notice to the petitioner who is the owner of the premises in question and the private respondents are its tenants. It is therefore submitted that the auction sale should be set aside and the matter may be remanded before the respondent authorities to give the petitioner as well as other intending bidders equal opportunity to participate in a fresh auction sale. Counsel for the petitioner submits that the property ought to have been valued at Rs. 2.00 crores keeping into regard the locality and the size of the property in the locality. It is further submitted that the petitioner has already deposited Rs. 30,90,000.00.

11. Counsel for the respondent Bank, on the other hand, submits that in the present case, in the first place, the petitioner had himself brought on record the auction sale notice vide annexure-3 dated 11th November 2009 which is a public notice wherein not only the petitioner's property but other's properties were put on auction sale by the respondent Bank after fixing the reserve price against each of them in exercise of powers conferred upon it u/s 13 of the SARFESI Act read with rules framed thereunder. It is submitted that before issuance of the public auction notice, mandatory notice u/s 13(2) & 13(4) of the SARFESI Act were issued against the petitioner which is brought on record as annexure to the writ petition itself. It is submitted that in any case, after the public notice, auction sale was held and auction sale certificate dated 20th January 2012 was issued in favour of the private respondents which has been annexed to the I.A. No. 2231/2012 itself Counsel for the respondent Bank therefore vehemently submits that when the auction sale of the properties had been concluded, even before filing of the writ application on 24th February 2010 and the same were

not even the subject matter of challenge, the writ petitioner had obtained the interim order in his favour by suppressing the facts. It is submitted that therefore, in such circumstances, when the auction sale notice is not under challenge and the same has been confirmed in favour of the private respondents, the petitioner has not been able to make out a case for interference in the writ jurisdiction of this court.

12. Counsel for the private respondents, on the other hand, submits that pursuant to the auction sale and the sale certificate issued in their favour, the property had subsequently been registered in their name.

13. I have heard learned counsel for the parties at length and gone through the relevant materials brought on record and also the judgment relied upon by the petitioner.

14. The facts which are relevant for consideration in the instant case, are as follows:

Under the Auction Sale Notice dated 11th November 2009 apart from the properties of the petitioner, other properties were also put on auction sale by the respondent Bank and the reserve price was quoted at Rs. 55.00 lakhs in respect of the property with which the petitioner is now concerned. After the auction sale notice, the successful bidder who are the private respondents herein, had been issued sale certificate on 20th January 2010 having been found the highest bidder in the auction sale, by the respondent Bank in exercise of powers conferred u/s 13 of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 read with the rules framed thereunder. The petitioner however did not challenge the sale certificate issued to the private respondents by which auction sale notice had been given effect to. However, during the pendency of this writ application, interim orders were passed which have already been referred to herein above, stating that if the Unit has not already been auction sold, the same shall not be auction sold if the petitioner deposits an amount of Rs. 40.00 lakhs in the respondent Bank. The facts which are already on record and have been referred to herein above show that on the date on which interim orders were passed i.e. 06.05.2010 and thereafter on 24.05.2010, the Unit had already been auction sold in favour of the private respondents in whose favour sale certificate has already been issued.

15. Therefore, interim orders were passed on the submission that the petitioner that the property may not have been auction sold in the meantime. Once the property has been auction sold, the remedy available under the law is to approach the appropriate forum under the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 itself i.e. section 17 which provides that any person aggrieved by any of the measures referred to in sub-section (4) of section 13 may prefer an application before the Debts Recovery Tribunal having jurisdiction in the matter within specified period. Section 17 of the aforesaid Act is quoted hereunder:

17. Right to appeal.- (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application alongwith such fee, as may be prescribed, to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:

provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in subsection (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the business to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the creditors assets as invalid and restore the possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under subsection (4) of section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under subsection (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any party to the application

may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder.

The aforesaid section provides adequate Forum to the persons aggrieved by the impugned action of the creditor Bank or Financial Institution wherein the property has either been auction sold or the Management has been taken over or such other recourses have been taken against it. If the petitioner alleges that the property has (sic) under valued and parties have colluded in exercise of auction sale in order to defeat the valuable rights of the petitioner who is the owner of the property in question, these questions of fact can only be established in a proper Forum where determination of questions of fact raised by the concerned parties can be done in a manner provided under the law.

16. In the present case, I find that the property in question has been auction sold on 22nd January 2010 and the same is not under challenge in this writ application. The petitioner cannot claim to be entitled to any discretionary relief in the present writ application on the basis of the interim orders passed during the pendency of this writ application which were however conditional, as indicated herein above.

17. A perusal of the judgment relied upon by the petitioner in the case of Ram Kishun and others (Supra) shows that the matter had undergone the hierarchy of recovery proceedings and revision to the Board of Revenue before it was agitated before the High Court and thereafter agitated before the Supreme Court. The said judgment reiterates the position that in such matters, the adequate remedy is before the appellate Forum where findings of fact can be ascertained, so far as question of collusion, fraud or under valuation are concerned. In such circumstances, the allegation made by the petitioner relating to collusion, undervaluation, etc. are grounds which may be raised by the aggrieved person before the appellate Forum before straightaway seeking redressal of his grievances in a writ jurisdiction before the High Court under Article 226 of the Constitution of India on questions of fact alleged by it. Therefore, this court refrains from expressing anything on the merits of the case. However, the petitioner may have the opportunity to avail the alternative remedy of appeal, as provided under the Act in question if it is available in law. In that view of the matter, I do not find any reason to interfere in the writ application. It is accordingly dismissed. I.As. also stand disposed of.

Counsel for the petitioner submits that the appellate remedy may be barred by

limitation. However, the Appellate Forum may consider the question of limitation in accordance with law in view of the fact that the petitioner has been pursuing the remedy before this court.