(2016) 05 DEL CK 0116

In the Delhi High Court

Case No : WP(C) 2089 of 2015

M/s Midas Electronics Pvt. Ltd. APPELLANT

Vs

Small Industries Development Bank of India & Others RESPONDENT

Date of Decision : 09-05-2016

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2)
Security Interest (Enforcement) Rules, 2002 — Rule 8(6)(a)

Citation : (2016) 7 ADDelhi 52 : (2016) 165 AIC 572 : (2016) 230 DLT 312 : (2017) 1 DRTC 94 : (2016) 136 SCL 261

Hon'ble Judges : Pradeep Nandrajog and Mukta Gupta, JJ.

Bench : Division Bench

Advocate : Ms. Maninder Acharya, Sr. Advocate instructed by Mr. Ajay Kohli, Ms. Bhumika Kapoor, Ms. Aditi Mohan, Mr. A. Pandey, Ms. Rythma Kaul, Advocates, for the Appellant; Mr. Sanjeev Sagar, Mr. Karan Bhardwaj, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.—Perpetual lease-hold rights in Plot No.4 and 5 ad-measuring 7000 sq. metres, Phase-4, Industrial Area, Gwalthi, District Bilaspur, (Himachal Pradesh) belonging to the State of Himachal Pradesh were granted by the State of Himachal Pradesh in favour of M/s Pilot Technologies (India) Ltd. on September 19, 2007. As per the grant, the lessor had the right to recover upto 50% unearned increase if lease-hold rights were transferred for consideration; upon prior permission being granted by the lessor.

2. The lessee company sought for a permission to mortgage the subject property and on September 20, 2007 i.e. a day after the perpetual lease-deed was executed, the competent authority of the State of Himachal Pradesh conveyed approval for the property to be mortgaged, but wrote in the letter that the plot demise in perpetuity cannot be sold without the prior permission of the lessor; a condition which we find conflicts with the right conferred in favour of the

mortgagee inasmuch as if the mortgagee cannot enforce the mortgage by requiring the mortgaged property to be sold, where would there be a mortgage? We shall dwell on this aspect a little later.

3. The property was mortgaged to SIDBI for a loan sanctioned which was utilised to construct an industrial shed and purchase machinery, and there was default in the return of loan. SIDBI proceeded under SARFAESI Act, 2002. It issued a notice contemplated by sub-Section (2) of Section 13 of SARFAESI Act, 2002. The outstanding amount claimed in the notice did not come under dispute. SIDBI took possession of the mortgaged asset, and issued a public notice for sale of the property which reads as under:-

"Notice For Sale of Assets Tenders-Cum-Auction

In exercise of powers contained in the "Securitisation and Reconstruction of Financial Assets and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Authorised Officer (A.O.) has taken possession of the under mentioned secured assets which is held as security in respect of credit facilities granted to borrower (detailed hereunder). It has been decided to sell the secured asset by inviting tenders cum auction from public as under:-

Name of Borrower

Amount to be recover as per notice u/s 13(2)

Description of secured

Reserve price

Earnest money

Pilot Technologies (India)Ltd.

Rs. 4,35,10,638 Plus interest

Plant & machinery/SMF batteries. Plot Nos. 4 & 5, Phase-4, Industrial Area, Rs. 190 lakh Rs. 19 lakh Gwalthai, Distt.Bilaspur, (Himachal Pradesh) having land admeasuring 7000 sq.mtrs.& factory shed 21384 sq.ft.(approx.) & double storyed admn.block etc. of 5400 sq.ft.

Rs. 190 lakh

Rs. 19 lakh

The property is being sold on "AS IS WHERE IS BASIS AND WHATEVER THERE IS BASIS."

4. The bidders had to submit the offer as per tender documents and as would be noted hereinafter certain disclaimer were put and certain cautioned were incorporated in the tender documents.

5. The petitioner was the highest bidder and deposited 25% of the bid amount.

Bid amount being Rs. 2 crores, Rs. 50 lacs were deposited on June 24, 2011. Bid was accepted on June 27, 2011 and within the time stipulated balance Rs. 1.5 crores was paid by the petitioner on July 11, 2011. On July 13, 2011 the petitioner asked for a sale certificate to be issued and possession handed over to it.

6. The lessee company filed SA No.311/2011 raising a grievance to the valuation report, the notice inviting bids and questioning the sale. The said petition was listed before DRT-III on July 14, 2011 when, in the presence of counsel for SIDBI a consent order was passed noting that counsel for the lessor stated that the lessor had a buyer who would pay a better amount. Renotifying the matter on August 11, 2011 SIDBI was directed to maintain status-quo concerning the property and ultimately SA No.311/2011 was dismissed because no defect was found in the sale or in the valuation thereof and no higher bid by any willing purchaser was submitted.

7. But the tables turned. The petitioner wanted to wriggle out of the sale and filed an application in SA No. 311/2011. It prayed that Rs. 2 crores deposited by it with SIDBI be returned because the State of Himachal Pradesh raised a demand towards unearned increase and other outstanding dues payable by the lessee. It was pleaded that said fact of there being an encumbrance on the property was not disclosed in the notice.

8. Learned DRT dismissed the application noting that to the prospective bidders the terms of the auction sale, vide clauses 8, 9, 13 and 14 (and in respect of which we may note that though not in the public notice, but in the tender documents as per which the bid had to be submitted the various clauses governing the sale were listed), informed the bidders as under:-

8.

Liability of the purchaser

The purchaser shall have to pay the statutory/government/other dues, if any, in respect of the assets/property advertised for sale.

SIDBI does not undertake any responsibility to procure any permission/license etc. in respect of the property/assets offered for sale or for settlement of any dues whatsoever in respect of the said property/assets

9.

Forfeiture of EMD

For bidders not complying with the terms and conditions specified in the Tender-cum-auction documents, the EMD amount shall be forfeited.

13.

Time and manner of payment

The successful tenderer shall pay then and there 25% of the purchase price less the sum tendered by way of EMD. The balance of the purchaser price shall be payable to the authorised officer on or before the 15th day of confirmation of sale by the secured creditor or such extended period as may be mutually agreed upon between the parties. Failure to deposit 25% or the balance amount as above would entail in forfeiture of EMD/whole money deposited respectively.

14.

Liability of the purchaser

The purchaser shall have to pay the statutory/government/other dues, if any, in respect of the assets/property advertised for sale.

SIDBI does not undertake any responsibility to procure any permission/licence etc. in respect of the property/assets offered for sale or for settlement of any dues whatsoever in respect of the said property/assets.

9. Learned DRT further noted that the bidders were called upon to increase the bids in response whereto the bidders in one voice said that Gwalthi Industrial Area had very few working units and the industrial environment was bleak. They also said that about Rs. 12 lacs have to be paid to the competent authority for change of ownership and ultimately the final price which the bidders would have to pay would be in the range of Rs. 2.25 to Rs. 2.5 crores. Highlighting that when a sale is on ''As is Where is Basis'' it was the duty of a bidder to ascertain title to the property, whether there were encumbrances thereon as also the physical measurements and the site condition, the application was dismissed by learned DRT vide order dated April 30, 2012.

10. Petitioner''s appeal was dismissed vide impugned order dated December 10, 2014 by learned DRAT holding that the application filed before learned DRT was not maintainable because remedy was to take resort to substantive proceedings. No merit was found in the order passed by learned DRAT with the opinion that it was a well reasoned order.

11. The petitioner has accordingly filed the writ petition and the fulcrum is the proviso to sub-Rule (6) of Rule 8 of the Security Interest (Enforcement) Rules, 2002, which reads as under:-

"(6) The authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5):

Provided that if the sale of such secured asset is being effected by their inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, 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, 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) Depositing earnest money as may be stipulated by the secured creditor;

(f) 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."

12. With reference to clause (a) and (f) of the proviso, learned Senior Counsel for the petitioner urged that description of the immovable property sold including the details of the encumbrances known to the secured creditor as also any other thing which is material for a purchaser to know in order to judge the nature and value of the property have to be disclosed in the public notice. Counsel states that it not having been disclosed that the title to the property was lease-hold and that there were outstanding lease rentals payable, the auction notice had to be quashed and the money deposited with SIDBI to be returned with interest.

13. Observation in the impugned order that the application filed by the petitioner was not maintainable before learned DRT has not been seriously contested by learned counsel for SIDBI and rightly so. In the Securitization Application filed by the borrower wherein intending sale was challenged, it was permissible for the purchaser to file an application and there was no necessity to take resort to a substantive remedy.

14. We thus decide the merits of the dispute.

15. As per clause (a) to the proviso to sub-Rule (6) of Rule 8 of the Security Interest (Enforcement) Rules, 2002 an encumbrance known to the secured creditor on a property has to be indicated in the public notice inviting bids. Now, a lease-hold title is not an encumbrance. To encumber means to impede or burden. Stroud''s Judicial Dictionary of Words and Phrases in the 5th Edition defines encumbrance as a claim, lien or liability attached to a property''. A lease-hold tenure is a title as is a free-hold tenure. The only difference is that the latter gives the freedom to deal with the immovable property and the former gives a restricted right to deal with the immovable property. Thus, by not informing the bidders that the title to be transferred would be a lease-hold tenure, there is no violation of the proviso to sub-Rule (6) of Rule 8 of the Security Interest (Enforcement) Rules, 2002. It needs to be highlighted that it was not conveyed to the intending bidders that the property put up for auction is a free-hold property. The advertisement remained neutral. It neither informed that the property is freehold nor informed that the property is lease-hold. But, the prospective bidders were clearly informed that property being sold is on ''As is Where is Basis''; the bidders were clearly informed, vide term 8 and 14 of the tender documents, that the purchaser shall have to pay the statutory/ government/other dues, if any, in respect of the property. We note one authority

concerning a sale which is on ''As is Where is Basis''. It is reported as 1994 (1) SCC 575, United Bank of India v. Official Liquidator & Ors., in para 14 whereof it was observed :-

"15. .... It is for the intending purchaser to satisfy himself in all respects as to the title, encumbrances and so forth of the immovable property that he proposes to purchase. He cannot after having purchased the property on such terms then claim diminution in the price on the ground of defect in title or description of the property.............."

16. Learned Senior Counsel for the petitioner had relied upon the decisions reported as (2010) 4 CTC 627, Jai Logistics rep. v. Authorized Officer, Syndicate Bank, 2013 (101) 291, Smt. Rekha Sahu v. UCO Bank & Ors. and (2013) 7 ADJ 642, Chemstar Chemicals and Intermediates v. The Commercial Tax Officer, to urge that the sale is vitiated. The first authority is by a Division Bench of the Madras High Court in which it was held that an encumbrance must be disclosed if a property is proceeded against by a secured creditor under SARFAESI Act, 2002, the second is a decision by a Division Bench of the Allahabad High Court, taking the same view and the third is a decision by a learned Single Judge of Madras High Court taking the same view.

17. What were the terms of the tender documents has not been discussed in the three judgments and thus the ratio of law thereof cannot be applied blindly to other cases. In the instant case, as noted above, there was a clear indication to the prospective bidders that encumbrances if any in the form of Goverment dues have to be paid and thus the bidders knew very well that if there were encumbrances on the property the same had to be borne by them. The fact that the bidders knew that there are encumbrances has been captured very well by the learned DRT with reference to the post tender submission and bid opening date, when the bidders were requested to increase the bid offer and they informed that they cannot do so because infrastructure in the industrial area was not conducive and additionally the highest bidder would have to pay to the Goverment authorities, before the title would be transferred in their name, and they estimated the final costs to the highest bidder to be within the range of Rs. 2.25 to Rs. 2.5 crores.

18. Thus, keeping in view the position of law concerning the obligation of a purchaser when a property is put up for sale on as is Where is Basis coupled with the various clauses of the tender documents which we have noted herein above no case is made out to interfere with the impugned order dated October 12, 2014 as regards the final destination reached by the order on this issue.

19. The other argument advanced was that the perpetual lease-deed in favour of the lessee had a negative covenant of no sale being permissible without the consent of the lessor and since consent of the lessor was not obtained, the sale is vitiated.

20. As we have noted in paragraph 2 above, the lessor granted the permission to

mortgage the property but with a condition that it cannot be sold without its permission. Now, a mortgage creates a lien on the property which is enforceable if the debt is not repaid and thus if a lessor grants permission to mortgage a lease-hold property inherent in it would be the consent that the mortgage can be enforced by the sale of the property. It is apparent that some bureaucrat, who did not understand the law, inserted the condition while granting permission for the plot to be mortgaged. That apart, an ex-post facto permission is also accepted in law. In the instant case the lessor has agreed for the sale to take place and has raised a demand towards unearned increase.

21. We dismiss the writ petition but without any order as to costs.