

(2012) 07 DEL CK 0142

In the Delhi High Court

Case No : Writ Petition (C) No. 4441 of 2011

M/s. Pragati Builders and Promoters and Others

APPELLANT

Vs

M/s. Ram Murty Pyara Lal and Others

RESPONDENT

Date of Decision : 03-07-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 92, Order 34 Rule 5, Order 7 Rule 11

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 13(3A)

Citation : (2012) 3 BC 835 : (2012) 191 DLT 193

Hon'ble Judges : Vipin Sanghi, J;Sanjay Kishan Kaul, J

Bench : Division Bench

Advocate : Jaswinder Singh, for the Central Bank of India, Mr. C. Mohan Rao and Mr. Lokesh Kumar Sharma, for M/s. Pragati Builders and Promoters, for the Appellant; Dhruv Mehta, with Mr. Rohit Nagpal and Mr. Sriram Krishna for M/s. Ram Murty Pyare Lal, Ms. Shruti Aggarwal and Mr. Amit Aggarwal, for the Respondent

Judgement

Sanjay Kishan Kaul, J.—These writ petitions have been preferred by M/s Pragati Builders and Promoters and its partners (W.P. (C.) No. 4441/2011 and 4954/2011) and the Central Bank of India (W.P. (C.) No. 6141/2011 and 6810/2011) to assail the common order dated 07.06.2011 passed by the Debts Recovery Appellate Tribunal, Delhi (DRAT) in Appeal Nos.256/2010 (arising out of S.A. No. 50/2005 preferred before the DRT-II by M/s Ram Murty Pyare Lal and Sh. Subhash Aggarwal) and Appeal No. 444/2010 (arising out of S.A. No. 204/2005 preferred before DRT-II by Smt. Shruti Aggarwal, Smt. Anjana Aggarwal and Shri Gaurav Aggarwal). Whereas the petitioners in W.P. (C.) No. 4441/2011 and 4954/2011 are aggrieved by the direction of the DRAT setting aside the auction sale in their favour, the Central Bank is aggrieved by the direction that the amount deposited by the auction purchasers be refunded with interest @ 6% p.a. from the date of deposit till realization. The factual conspectus may first be noticed. M/s. Ram Murty Pyare Lal (a partnership firm)

and its partners, late Shri Subhash Kumar and his son Mr. Amit Aggarwal (hereinafter referred to as "the borrowers") availed of credit facility from the Central Bank of India (hereinafter referred to as "the Bank"). This loan was secured by equitable mortgage of property bearing No. BN-34, Shalimar Bagh West, New Delhi. It appears that the defaults on the part of the borrowers started at an early stage and though the credit facilities were sanctioned on 25.8.2003, the account was declared as an NPA on 31.8.2004.

2. The Bank thereafter issued notice u/s 13 (2) of The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the "SARFAESI Act") on 9.9.2004 calling upon the borrowers to pay the outstanding amount of Rs. 98,64,986.99 within sixty (60) days. The amount was, however, not paid.

3. It appears that in order to frustrate the efforts of the Bank to recover the dues on 09.09.2004, a suit was filed by Ms. Shruti Aggarwal, sister of the wife of Mr. Amit Aggarwal, and Mr. Harish Aggarwal, father-in-law of Mr. Amit Aggarwal, for permanent injunction before the learned Senior Civil Judge impleading Mr. Subhash Kumar and Mr. Amit Aggarwal as the defendants. It was alleged in the plaint that the said two parties were tenants in respect of the two portions of the property, being the ground and the first floors, and the rents were stated to be Rs. 2,800.00 per month & Rs. 2,500.00 per month respectively w.e.f 01.09.1998. Thus, a case was sought to be made out of statutorily protected tenants under the Delhi Rent Control Act, 1958. Mr. Subhash Kumar and Mr. Amit Aggarwal appeared and gave undertakings that the said tenants will not be dispossessed except by due process of law. Thus, third party interest was sought to be created in the mortgaged property, purportedly dating back to a date even prior to the grant of the loan facility against equitable mortgage. Pertinently, Mr. Subhash Kumar had submitted an affidavit on 25.8.2003 that the property was under his self-occupation.

4. We may add that an independent valuer had valued the property at the behest of the Bank wherein the property was recorded as in self-occupation as per the valuer's report dated 10.7.2002, and the market value of the property was assessed at Rs. 159.29 lakhs, while the realizable value in the eventuality of the sale by the Bank was determined at Rs. 145.00 lakh. The borrowers, while apparently resorting to these diversory tactics requested the Bank for grant of three (3) months' time on 20.10.2004 to pay the dues. At that stage, for the first time, sought to also raise the issues about the tenancy. The Bank responded to this letter on 6.11.2004 granting one (1) month's extension of time for payment of dues subject to deposit of 40 per cent of dues, and naturally denied the claim of any alleged tenancy. The fact remains that the dues of the Bank were not cleared.

5. The borrowers filed objections to the notice u/s 13 (2) of the SARFAESI Act on 9.11.2004, which was responded to by the Bank on 21.12.2004 as, in the interregnum period, the SARFAESI Act was amended by inserting Section 13

(3A), requiring that the objections of the borrowers, if not acceptable, would require a communication from the Bank giving reasons.

6. It appears that the Bank, once again, got the property valued taking into consideration the impending auction for recovery of dues and a valuation report was obtained from an approved valuer on 21.3.2005. As per this report the fair market value of the property was determined at Rs. 1,79,66,700.00 but the realizable value was assessed at a 30 per cent discount i.e. at Rs. 1,26,00,000.00. The possession notice was stated to have been pasted by the Bank at site on 6.4.2006 and was published in Veer Arjun, a vernacular language newspaper, on 13.4.2005 - though surprisingly, the notice was published in English language. On 05.05.2005, the notice was published in an English Daily, i.e., Business Standard.

7. The borrower is also stated to have obtained a valuation report dated 8.6.2006 from an independent valuer, valuing the property at Rs. 2.38 crore, though, there is a controversy over this report inasmuch, as, it is stated to have seen the light of the day only along with the affidavit of evidence filed by the respondent dated 14.1.2010.

8. A public auction was conducted on 11.6.2005. It is the common case of the parties that there were obstructions created in the participation of the prospective and interested purchasers/bidders in the auction. Only one party was able to make a bid, i.e., M/s. Pragati Builders & Promoters (Petitioner in W.P. (C.) No. 4441/2011 in W.P. (C.) No. 4954/2011), which is a partnership firm of three partners, engaged in the business of purchase, sale and development of properties. A bid was made, which was Rs. 30,000.00 over the distress sale price, amounting to Rs. 1,26,30,000.00. 10 per cent of the amount was deposited for participation in the auction, and the balance amount towards 25 per cent of the amount was deposited on 13.6.2005, two days later after obtaining extension of time. (We may notice that the owners objected to this grant of extension of time in the proceedings before the tribunals below).

9. The most important aspect to our mind, in the present dispute, is that the auctioneer's report itself stated that there were endeavours made to persuade the prospective and interested bidders not to participate in the auction and that because of this effort, alleged to have been of the borrowers, prospective bidders refrained from participating in the auction. This is reflected in the auction report dated 14.6.2005. The auction purchaser also has common cause with this and states that every effort was made not to permit the auction to go on smoothly but despite that, the auction purchaser managed to participate. The auction purchaser paid the balance amount on 25.6.2005 and the sale certificate was issued in favour of the auction purchaser on 28.6.2005.

10. It is the aforesaid auction which has given rise to the disputes through various proceedings and has culminated in the present writ petitions before us, filed by the auction purchaser as well as the Bank aggrieved by the action of the

appellate tribunal in setting aside the auction and directing the bank to refund the amount with interest @ 6% p.a.

11. Insofar as the borrowers are concerned, the OTS submitted by them dated 11.07.2005 was rejected by the Bank on 07.09.2005, on the ground that the property already stood auctioned. The bank took symbolic possession of the premises. The borrowers, thus, filed SA No. 50/2005 on 26.09.2005 before Debt Recovery Tribunal-II (for short "DRT-II") when status quo orders were issued. S.A. No. 50/2005 was eventually dismissed by the DRT on 24.05.2010.

12. The ostensible tenants initiated CS (OS) No. 1472/2004 on the Original Side of this Court to prevent the Bank from taking any coercive steps to evict them and claimed rights to occupy the property as tenants. In those proceedings a Local Commissioner was appointed who submitted a report on 30.4.2008 which did not favour the tenants. The sum & substance of the report of the Local Commissioner suggested that actually the borrowers were in possession of the property and the creation of the tenancy was only a ploy to affect the rights of the Bank. The plaint in this suit was rejected under Order 7 Rule 11 of the Code of Civil Procedure, 1908 (hereinafter referred to as the "said Code") on 23.12.2009 and the appeal filed by the tenants also failed on 28.1.2010 as it was disposed of with the consent of the parties that the findings recorded, while rejecting the plaint, would be without prejudice to the rights & contentions of the tenants in view of a third set of proceedings initiated by them before the DRT. However, the proceedings initiated by the tenants before the DRT also failed, as the S.A. No. 204/2005 filed by them was dismissed on 28.07.2010.

13. An unfortunate controversy arose even qua the alleged lease deeds sought to be produced by the tenants. It is the case of the auction purchaser that the stamp papers on which these lease deeds are drawn were alleged to have been issued by the Stamp Vendor prior to the date of grant of license to him on 31.3.1999, as the deeds were alleged to have been executed on 1.9.1998. In fact, in the proceedings before the appellate tribunal (DRAT), the stamp vendor was examined and it is stated that the matter be referred to the CBI by the appellate tribunal on 12.4.2010. However, on 18.5.2010, the appellate tribunal remanded the matter back to the DRT granting further opportunity to the tenants to lead evidence. This application was, once again, dismissed on 24.5.2010 but in appeal the appellate tribunal stayed further proceedings. The SA filed before the DRT by the borrowers was dismissed on 28.7.2010 giving a finding that the tenancy was fictitious. There were multiplicity of proceedings arising from appeals filed by the borrowers and the alleged tenants.

14. The present writ petitions arise out of the impugned common order of the appellate tribunal dated 7.6.2011. The appellate tribunal took note of the fact that the borrower had paid off the entire debt.

15. We may add here that though the notice was for an amount of Rs. 98,64,986.99, further interest became due and payable qua the same. Thus,

when the auction purchaser deposited the amount, the account of the borrower was settled at Rs. 1,11,57,445.99. There appears to be some discrepancy in the stand of the Bank and the borrowers qua the amount deposited by the borrowers as, according to the borrowers, a sum of Rs. 87,00,000.00 was deposited at various stages up to 23.8.2010 and as per the directions of the appellate tribunal the said amount was to be released to the Bank to be kept in the FDR. The discrepancy arises as, according to learned counsel for the Bank, the amount lying in FDR with the Bank is Rs. 83,64,986.99, which has earned interest. The second discrepancy arises as, according to the borrower, a sum of Rs. 11,64,986.99 was deposited on 26.8.2010 of which the learned counsel claims ignorance. This aspect, apart from other issues, has to be reconciled as, according to the borrowers, the full notice amount of Rs. 98,64,986.99 has been deposited and ought to have been released to the Bank in pursuance of the directions of the appellate tribunal. This is also stated to be recorded in the impugned order in the form of an undisputed fact of the borrower having paid off the entire debt.

16. A reading of the impugned order shows that one of the pleas raised was qua the non-fulfillment of the requirement of the proviso to Rule 8 (6) of the Security Interest (Enforcement) Rules, 2002, providing that 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. As noticed above, in the present case both the notices were published in the English language albeit one of the notices was published in a vernacular language paper. The appellate tribunal has discussed this issue at length and referred to the judgements cited by the parties. The basis of the opinion formed by the appellate tribunal is the judgement of the Orissa High Court in *Swastik Agency and Others Vs. State Bank of India, Main Branch and Others*, The Division Bench held that the statutory requirement in this behalf has to be mandatorily fulfilled. The requirement to cause publication in vernacular language newspaper is fundamental and the statutory requirement cannot be compromised. The SLP against the judgement was dismissed on 9.4.2009. The appellate authority has, thus, opined that on this short ground alone the auction was liable to be set aside.

17. It also found that the advertisements were published neither in leading newspapers nor do they have sufficient circulation in Delhi. It also has taken note of the fact that the market value of the property was much higher, and a distress value of 30 per cent below the market value was fixed as the reserve price, and the auction purchaser obtained success by paying only Rs. 30,000.00 over the minimum price - where he alone participated. The property is stated to have a prime location. There are defects found in the service of notice.

18. We may notice that there are some adverse observations made even against the Bank in the conduct of the auction and while setting aside the auction, the appellate authority has directed the Bank not only to refund the amount to the

auction purchaser but to pay 6 per cent interest from the date of deposit till date of realization necessitating the Bank to also file writ petitions challenging the same order.

19. We have recorded these facts in detail on account of the strenuous contentions made by learned counsel for the auction purchaser, pointing out that the conduct of the borrowers was such that a judicial forum should not come to its aid. It is his plea that every trick in the trade, legitimate or illegitimate, has been used by the borrowers to prevent auction of their property. It is his further submission that the fixation of the minimum price was in accordance with the norms, as the distress sale never gets the market value of the property and that the auction purchaser should not be deprived of the benefit of the purchase of the property at the price at which they bid. It is his further plea that, subsequently, they have also availed of a loan from a Bank of Rs. 50.00 lakh and have fought the litigation throughout in order to get the auction sustained.

20. The submissions of learned counsel for the Bank are in a limited compass. Learned counsel states that in either eventuality, according to him, the Bank's interest must be protected and the amount due to the Bank has to be taken as inclusive of interest, i.e., Rs. 1,11,57,445.99, and not Rs. 98,64,986.99. It is his further submission that there have been unnecessary adverse comments in the impugned order on the conduct of the Bank, which ought to be expunged.

21. Learned senior counsel for the borrowers, on the other hand, seeks to sustain the impugned order but, at the same time, submits that the most important aspect this Court should take note of is that the notice amount stands deposited by the borrowers, and the owner should not be deprived of the property. It is his submission that there cannot be a finality to the auction when appeals are pending, and whatever may be the view of the Court regarding the conduct of the borrowers/alleged tenants, it should not result in deprivation of the property as, apart from any other reason, it would have effect on other family members. He concedes that the borrowers should certainly make up the differential amount to the Bank, i.e, the Bank should be paid Rs. 1,11,57,445.99, so that the public money is not affected and the claim of the Bank is settled - that being the amount at which the loan account was closed post deposit of the amount by the auction purchaser. He further makes a concession that, since the borrowers were unable to clear the outstandings earlier, the imposition of 6 per cent interest on the Bank should be borne by the borrowers.

22. On having bestowed our due consideration to the rival contentions of the parties, we are of the view that the most important aspect to be examined by us is the mode and manner of the conduct of the auction. It is trite to say that the process of auction should be fair with meaningful participation in order to ensure that the best price is obtained. The fact that a borrower has been a defaulter should not result in lesser proceeds being realized from the sale of a mortgaged property. If the price realized is less than the debt due, even the financial institutions suffer. If it is more, but yet below a realizable price, the balance

available for the owner which he/she can appropriate, becomes less. If the facts of the present case are analyzed in this perspective, we find that it is a common case, including of the auction purchaser, that the scene at the auction purchase site was far from what was desirable. It is their case, as also the report of the auctioneer, that there were number of prospective and interested customers/bidders, who were all prevented from participating in the auction - though the finger is sought to be pointed at the borrowers. As to how only one particular auction purchaser could participate, who made a bid just Rs. 30,000.00 over the minimum price is a moot point. We have already noticed that even when the loan was availed of, the property was assessed at Rs. 1,59,29,000.00 and the realizable price was assessed at Rs. 1,45,00,000.00. The valuation report obtained by the Bank prior to the sale assessed the fair market value at Rs. 1,79,66,700.00. This was sought to be discounted by 30 per cent to fix the price at Rs. 1,26,00,000. We have set out these figures to show that while, at the stage of grant of loan, the difference between the market value and the realizable value was much less, this difference got enlarged when the price of the property had increased prior to the sale, and a distressed value was sought to be put as the minimum price. We do not consider it necessary to look into the valuation of the borrowers as the aforesaid facts itself suffice in the present case.

23. There is also merit in the conclusion of the appellate tribunal that there appears to be other irregularities in the process of auction, including the publication of notice in English language, in a vernacular newspaper. This is apart from the fact that the auction notice was published in a newspaper which is not well-circulated (a tendency noticed in more than one matter). The object, it appears, was merely to complete a formality though the real object is to give the auction sale wide publicity to generate competition.

24. We may draw strength from the observations made by the Supreme Court in *U. Nilan Vs. Kannayyan (Dead) Through Lrs.*, which has referred with approval to the earlier judgements of the Supreme Court in *Maganlal Vs. Jaiswal Industries, Neemach and Others*, for coming to the conclusion that a sale does not become absolute or irrevocable merely on passing an order confirming the sale under Order 21 Rule 92 but it would attain finality on the disposal of the appeal, if any, filed against an order refusing to set aside the sale. The finality to such an auction would only be after the disposal of the appeal and for this purpose reference has been made to the observations in AIR 1934 134 (Privy Council)

25. Another interesting observation is made in para 40 of *U. Nilan Vs. Kannayyan (Dead) Through LRs*. Case (supra) qua such situations to conclude that adversity of a person is not a boon for others. The said para reads as under:

40. Adversity of a person is not a boon for others. If a person in stringent financial conditions had taken the loan and placed his properties as security therefore, the situation cannot be exploited by the person who had advanced the loan. The Court seeks to protect the person affected by adverse circumstances from being a victim of exploitation. It is this philosophy which is followed by the

Court in allowing that person to redeem his properties by making the deposit under Order 34 Rule 5 C.P.C.

26. The duty of a Court to oversee the conduct of an appropriate sale has been emphasized by the Supreme Court in *L. Moolchand and Others Vs. Fatima Sultana Begum and Others*,

27. We have referred to the aforesaid observations to meet with the plea advanced by learned counsel for the auction purchaser that the borrowers not only defaulted in the account, but have used every trick in the trade to defeat the auction. This plea, in fact, in a way supports our conclusion because it is the own case of the auction purchaser that prospective and interested customers/bidders were prevented from participating in the auction and, thus, certainly the auction stands vitiated.

28. The auction purchasers are builders. They are in the trade and bid at the auction, knowing fully well that their success would depend on the ultimate fate of all the proceedings which may emanate thereafter. The auction purchaser, thus, cannot make a grievance that they have invested monies and are not realizing the proceeds from the sale. Every business venture may not result in a profit. Despite this, the interest of auction purchaser has been taken care of by not only directing refund of the full auction amount but also granting them 6 per cent interest which, now, the borrowers have agreed to bear.

29. We are, thus, of the view that the conclusion arrived at in the impugned order to set aside the auction cannot be faulted. We do not find any infirmity in the impugned order in this regard.

30. Simultaneously, we are also of the view that it was hardly a case where the Bank should have been burdened with interest on this account, even though there were undisputedly some infirmities, irregularities and failure to adherence of rules qua holding of the auction. The matter has got complicated on account of the own conduct of the borrowers and, thus, learned counsel for the borrowers fairly stated that the borrowers must bear the consequences and should pay the interest to the auction purchaser at the specified rate of 6 per cent from the date of deposit, till date of payment, instead of the Bank being burdened with this liability.

31. We are also of the view that it must be ensured that the Bank is in pocket of a sum of Rs. 1,11,57,445.99 and the refund by them to the auction purchaser should not result in loss to the public exchequer. As stated above, on the issues of discrepancies between the amount deposited with the appellate tribunal and stated to have been released to the Bank, both the Bank and the borrowers will inspect the records of the tribunal and obtain necessary directions to ensure that the Bank is in pocket of the amounts stated to have been deposited by the borrowers of Rs. 98,64,986.99. The borrowers will pay the balance amount - being the differential between this amount of Rs. 1,11,57,445.99, less the actual principal amount of the FDR alongwith accrued interest on the FDR with the

Bank, within a period of thirty (30) days.

32. On receipt of the aforesaid amount, the Bank will refund the full amount received from the auction purchaser, i.e., within forth-five (45) days from today. The interest of 6 per cent per annum would be paid by the borrowers directly to the auction purchaser within the same period of time from the date of deposit till date of refund of the amount by the Bank to the auction purchaser.

33. We are informed that the auction purchaser obtained the title documents of the property in question from the Bank and has utilized the same for obtaining loans from ICICI Bank. The auction purchaser should either clear the loan or replace the security and is directed to return the title documents to the borrowers/owners within a period of fifteen (15) days of receipt of the amount from the Bank/borrowers.

34. We do not, however, want to put an end to the issue of any action which may be taken in law qua the allegation of any fabricated tenancy agreement being produced before the courts. The appellate authority had directed the CBI to look into the matter. But that has not happened. Unfortunately, out of the two original persons, who were borrowers, one has already passed away. However, Mr. Amit Aggarwal is there, as also Ms. Shruti Aggarwal (the alleged tenant, Mr. Harish Aggarwal, also having passed away).

35. We call upon DRT-II to look into these aspects and take the matter to its logical conclusion, as the fact that the owners have saved their property from auction sale should not be a license for having used fabricated documents, if any.

36. The writ petitions are accordingly disposed of leaving the parties to bear their own costs. A copy of the order be sent to DRT-II.