(2011) 09 MAD CK 0297

In the Madras High Court

Case No : Writ Petition No. 21987 of 2010 and M.P. No. 1 of 2010

Palpap Ichinichi Software International Limited — APPELLANT

Vs

Indian Bank — RESPONDENT

Date of Decision : 16-09-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 72
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 13(4)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Rules, 2004 — Rule 9, 9(2)

Citation : (2011) 09 MAD CK 0297

Hon'ble Judges : K.K. Sasidharan, J;D. Murugesan, J

Bench : Division Bench

Advocate : AR.L. Sundaresan, for Mr. B. Natarajan, for the Appellant; M. Balachander, for the Respondent

Final Decision : Allowed

Judgement

The Hon''ble Mr. Justice K.K. Sasidharan

Introductory:

1. This case is a classic example of misuse of the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 by the secured creditor, by purchasing the secured asset in the absence of bidders, after reducing and refixing the market value and upset price, notwithstanding the offer made by two bidders in the earlier auction quoting substantial amount.

2. The Petitioner challenges the sale notice dated 21 April, 2010 and the subsequent sale certificate issued in favour of the Respondent Bank on 9 July, 2010 on the ground that the Bank deliberately reduced the market value and the upset price of the secured asset for the purpose of snatching away the valuable property for a paltry sum.

The Background Facts:

3. The Petitioner is a Software Development International Company started in the year, 1997. The Petitioner provides services in the Internet, Wireless, ERP and E-Government Technologies for Japanese Companies and Indian Educational Institutions including Anna University, Dr. M.G.R. Medical University, Stanley Medical College, Kilpauk Medical College and JIPMER Medical College at Pondicherry. The Petitioner, for the purpose of their business, took financial assistance from the Respondent. Since the Petitioner company suffered losses on account of general recession, the loan amount was not re-paid as per schedule. This resulted in initiating action by the Bank to recover the amount.

4. The Bank by invoking the provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI Act") issued a notice u/s 13(2) on 29 November, 2007 claiming a total amount of Rs. 4,26,43,519/- . Though the Petitioner submitted a reply to the said notice, the Bank took further action by issuing possession notice u/s 13(4) of the Act on 29 January, 2008.

5. The Petitioner unsuccessfully challenged the proceedings before the Debts Recovery Tribunal. The Bank in the meantime took steps to auction the property by fixing the reserve price at Rs. 3,10,00,000/- . Though the successful bidder offered Rs. 3,15,00,000/- , the amount was not paid and as such, the auction was cancelled. Thereafter, the Bank reduced the reserve price from Rs. 3,10,00,000/- to Rs. 2,42,00,000/- . The auction was thereafter scheduled to be held on 26 May, 2010. There were no bidders. Therefore, the Bank by quoting a sum of Rs. 2,42,00,000/- purchase the property. The said auction is challenged in this writ petition.

6. The Bank filed a counter in answer to the contentions raised in the writ petition. The Bank admitted that the property was purchased by quoting the reserve price. According to the Bank, there was no fraud or illegality in the matter of sale and it was a bona fide transaction. The subsequent valuation and fixation of reserve price cannot be termed as arbitrarily.

7. The Bank subsequently filed an additional counter affidavit wherein it was indicated that before taking part in the auction, intimation was given to the Petitioner about their intention.

Submissions:

8. The learned Senior Counsel for the Petitioner contended that the Bank deliberately obtained a fresh valuation certificate indicating a lesser market value and the reserve price was fixed at a still lower price. The low amount was fixed deliberately, as their intention was to purchase the property for a song. No notice was issued to the Petitioner before effecting the sale in favour of the Bank. The sale was in violation of first proviso to Rule 9 (2) of the Security Interest (Enforcement) Rules, 2002. According to the learned Senior Counsel the

Authorised Officer has no authority to sell the property, in case, he fails to obtain the price higher than the reserve price. It was further contended that in the event of not getting the price higher than the reserve price, the consent of the borrower is absolutely necessary for the purpose of effecting sale at such price.

9. The Learned Counsel for the Bank justified the sale made in favour of the Bank. According to the Learned Counsel there were no bidders and as such the Bank took part in the action and purchased the property for the reserve price. It was contended that the Authorised Officer was fully justified in selling the property for the reserve price in view of the first proviso to Rule 9 (2) of the Security Interest (Enforcement) Rules, 2002. It was his further contention that the reserve price was fixed to indicate that the property will not be sold for a lesser price meaning thereby, the property could be sold for the reserve price. Therefore, there is no illegality in the sale.

Discussion and conclusion:

10. Though the learned Senior Counsel for the Petitioner has taken substantial contentions with regard to the interpretation of Rule 9 and the illegality of the sale in question on account of the same being made for the reserve price without obtaining the consent of the borrower, we are of the view that it is not necessary to consider the said contention, in view of our finding that the sale in favour of the Bank was a malafide exercise of power.

11. The subject property is situated abutting G.S.T. Road which is one of the arterial roads passing through the Chennai International Airport. The property admeasuring 3867 sq.ft. of land and a building having 1860 sq.ft., was used as the office of the I.T. Company. The Bank took possession of the property u/s 13(4) of the SARFAESI Act. The Bank originally obtained a valuation report on 29 January, 2008. The Authorised Valuer fixed the market value of the property at Rs. 308.12 lakhs and published the auction notice. The reserve price was fixed at Rs. 3,10,00,000/- . The bid submitted by M/S.A.K.R. Viyapaar Limited, Guindy for a sum of Rs. 3,15,00,000/- was found to be the highest and as such, the bid was confirmed in their favour on 25 July, 2008. Though the successful bidder was directed to pay the bid amount, no deposit was made. The Authorised Officer on 15 December, 2008 once again directed the successful bidder to pay the amount on or before 22 December, 2008. The file does not contain any indication as to what had happened subsequently.

12. The Authorised Officer thereafter obtained a fresh valuation certificate on 18 April, 2010. In the said valuation report, the market value of the property was shown at Rs. 268.69 lakhs. The forced/Distress Sale value was shown at Rs. 201.52 lakhs. The Authorised Officer published the sale notice fixing the sale on 26 May, 2010. The reserve price was fixed at Rs. 2,42,00,000/- . The Bank submitted their offer quoting Rs. 2,42,00,000/- . Since there were no other bidders, the auction was confirmed in favour of the Bank.

13. The core question is whether the sale was conducted in a fair and

transparent manner, fixing the fair market value and upset price strictly in accordance with the provisions of SARFAESI Act.

14. The valuation certificate dated 29 January, 2008 shows that the market value of the property was a sum of Rs. 308.12 lakhs. Taking into account the said market value, the Authorised Officer fixed the reserve price at Rs. 3,10,00,000/- . The successful bidder quoted Rs. 3,15,00,000/- followed by a second offer from another bidder for a sum of Rs. 3,10,00,000/- . In case the successful bidder failed to pay the bid amount, nothing prevented the Authorised Officer from calling upon the second highest bidder to pay the amount quoted by him. The file produced by the Bank does not contain any material subsequent to 15 December, 2008 to indicate as to what had happened there after. Similarly, there is nothing on record to show that the money deposited by the successful bidder was forfeited on account of his failure to pay the balance amount.

15. The subsequent valuation report was prepared by the very same valuer, who originally issued the valuation report on 29. January, 2008. The second valuation report dated 18 April, 2010 drastically reduced the market value from Rs. 308.12 lakhs to 268.69 lakhs. The land value is increasing day by day in and around Chennai. The subject property is situated in a very covetable locality abutting the main road. Though in the original valuation report nothing was mentioned about the distress value, very strangely the subsequent valuation report contains a statement about the forced/distress value and it was fixed at Rs. 201.52 lakhs. Strangely the Bank purchased the property by quoting the distress value.

16. When the land value is increasing day by day, it is strange on the part of the Authorised Officer to obtain a valuation report by reducing the market value by about Rs. 60 lakhs that too, after a period of two years and one month from the date of issue of earlier valuation report. There is no question of distress sale in a matter like considering the fact that the purchaser is none other than the secured creditor.

17. The counter originally filed by the Bank does not contain any indication that an intimation was given to the Petitioner about the decision of the Bank to participate in the public auction to be conducted on 26 May, 2010. It was only by way of additional counter, the Bank has come up with a case that prior intimation was given to the Petitioner regarding their participation. Though notice u/s 13(2) and possession notice u/s 13(4) were all sent by registered post, there is nothing on record to indicate that the notice dated 24 May, 2010 intimating the Petitioner about the participation of the Bank in the auction was sent by registered post. Therefore, the case now projected in the additional counter affidavit that the Petitioner was given prior intimation about the intended participation of the Bank in the auction is clearly an after thought. The records were prepared after filing counter affidavit to appear as if it was only with the knowledge of the Petitioner, the Bank participated in the auction.

18. The course of conduct adopted by the Bank clearly gives an indication that

the market rate was deliberately reduced in the subsequent valuation report. The forced/distress value was shown only for the purpose of fixing a lesser amount as reserve price. In case there were no bidders during the second auction, the Authorised Officer in all fairness should have postponed the auction. It is not the case of the Bank that several attempts were made earlier to dispose of the property. Given the location of the property, there would be no difficulty to get higher price as indicated in the earlier valuation report.

19. It is true that the there is no provision akin to that of Order XXI Rule 72 of the CPC in SARFAESI Act dis-entitling the decree holder from participating in the auction without the express permission of Court. However, in a matter like this, when there were no bidders, the Bank should not have knocked down the property for a paltry sum.

20. The Petitioner is still liable to pay the balance amount to the Bank, in spite of losing the property.

21. The Bank is a responsible body. The SARFAESI Act gives wide powers to the Bank to take action to recover the amount and for the purpose of such recovery, to take possession of the property and to sell the same, without reference to Court. Therefore the Bank is expected to conduct the procedure in a bona fide manner. The dealings of the Bank should be fair and transparent. When the amount due from the borrower is more than Rs. 4 cores, the attempt of the Bank should be to auction the property for the maximum amount and to adjust it towards the dues and in case of any excess amount after meeting the liability, to refund the same to the borrower. By reducing the market value and the reserve price and by purchasing the property for the alleged distress value by the secured creditor themselves, the public sale has become a mockery.

22. The Authorised Officer is none other than the officer of the Bank. The auction was conducted at the premises of the Respondent Bank. Admittedly there were no other bidders. In case the Bank was having an idea to purchase the property, they should have given prior intimation to the borrower. The fact that there is no statutory prohibition against the secured creditor taking part in the auction, will not enable them to purchase the property by re-fixing the market price as well as the reserve price and to purchase the property at such reduced rate. This is absolutely not the intention of the law makers while enacting the SARFAESI Act.

23. In Kerala Financial Corporation Vs. Vincent Paul and Another, the Supreme Court found that there were no rules or guidelines framed by the Kerala Financial Corporation for sale of properties. Therefore, the Supreme Court indicated certain guidelines in the matter of sale of properties owned by the Corporation till such formation of rules, guidelines or orders. The relevant norms are extracted below:

(v) In the matter of sale of public property, the dominant consideration is to secure the best price for the property to be sold. This can be achieved only when there is maximum public participation in the process of sale and everybody has an opportunity of making an offer. It becomes a legal obligation on the part of the authority that property be sold in such a manner that it may fetch the best price.

(vi) The essential ingredients of sale are correct valuation report and fixing the reserve price. In case proper valuation has not been made and the reserve price is fixed taking into consideration the inaccurate valuation report, the intending buyers may not come forward treating the property as not worth purchase by them.

24. In Eureka Forbes Limited Vs. Allahabad Bank and Others, , the Supreme Court while considering the concept of public accountability and performance, indicated that the same would apply to the banks as well. The Supreme Court observed:

82. Principle of public accountability is applicable to such officers/officials with all its vigour. Greater the power to decide, higher is the responsibility to be just and fair. The dimensions of administrative law permit judicial intervention in decisions, though of administrative nature, but are ex facie discriminatory. The adverse impact of lack of probity in discharge of public duties can result in varied defects not only in the decision-making process but in the decision as well. Every public officer is accountable for its decision and actions to the public in the larger interest and to the State administration in its governance.

25. There is no dispute that judicial review is concerned only with the decision making process. Courts and Tribunals are not expected to sit in appeal over the decisions taken by the authorities including banks. However, when a case of grave miscarriage of justice is made out, necessarily, the Court has to come to the rescue of the affected party. The Court of equity is expected to advance justice. When it is made out that substantial injustice has been done to a party, the Court should not shirk its responsibility. Technicality has no say in such matters.

26. The authority given to the Bank to recover the dues without recourse to legal proceedings will not give them the right to snatch away the property from the borrower. The very fact that in spite of the steep rise in land value, the market value was shown at a low rate after a period of about two years itself shows the mala fides in the matter. The subject sale effected by the Authorised Officer of the Bank cannot be treated as a valid public sale. Therefore we are constrained to set aside the sale made in favour of the Bank.

27. The Authorised Officer is directed to issue fresh auction notice and conduct the auction as per statute in a fair and transparent manner, without giving room for complaints.

28. In the upshot, we allow the writ petition. Consequently, the connected MP is closed. No costs.

