
(2018) 05 CAL CK 0053
In the Calcutta High Court
Case No : Writ PetitionNo. 128 of 2016

Poddar Commodities Pvt. Ltd. & Anr.	APPELLANT
Vs	
Arms & Anr.	RESPONDENT

Date of Decision : 01-05-2018

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 — Rule 9(4), 9(5)

Citation : (2018) 05 CAL CK 0053

Hon'ble Judges : DEBANGSU BASAK, J

Bench : Single Bench

Advocate : Saptangsu Basu, Suman Dutt, Biswajib Ghosh, Prasenjit Pal, Avirup Chatterjee, Rohit Das, K. Rahman

Final Decision : Dismissed

Judgement

DEBANGSU BASAK, J.

The forfeiture of earnest money deposit made by the first respondent is under challenge in the present writ petition. Learned Senior Advocate

appearing for the petitioner submits that, the first petitioner had participated in a sale conducted by the first respondent under the provisions of the

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act, 2002). The first respondent

had conducted the sale of the movables and the immovables separately.

The first petitioner had participated in such sale separately. The first petitioner had made an offer for the movables. Initially, such offer was not

accepted. Subsequently, negotiations were entered into between the parties in respect of both movables and immovables. He submits that, consequent

to such negotiations, a new agreement was entered into between the parties, as

appearing in the writing dated August 6, 2015. The parties had acted in terms of such agreement. The first petitioner had made payments, to the first respondent, in terms of such agreement. He submits that, the agreement dated August 6, 2015 contained a clause by which, the petitioner wanted the sale certificate for the immovable property, to be issued in favour of K.P. Commodities Pvt. Ltd. Such request was repeated in the letter dated August 18, 2015.

The first respondent initially took a stand that, the possession of the immovable property cannot be made over till such time the movable properties were sold. Such was not the terms of the agreement dated August 6, 2015. In any event, the first respondent is required to issue the sale certificate in favour of the nominee of the first petitioner in terms of the agreement dated August 6, 2015. The refusal on the part of the first petitioner to do so, is bad in law. The first respondent had, thereafter, contended that the sale cannot be effected. The first respondent should, therefore, refund the earnest money deposit along with interest. The rate of interest should be commercial as the transactions had between the parties are commercial in nature. He relies upon All India Reporter 1971 Supreme Court Cases page 33 (L. Hirday Narain v. Income-Tax Officer, Bareilly) and submits that, the writ petition was entertained by an Order dated February 10, 2016. The point of maintainability of the writ petition was not kept open. Therefore, the writ petition should be decided on merits.

Learned Advocate for the respondent submits that, the petitioners have a statutory alternative remedy available. The petitioner should be asked to avail of the same. In support of his contention that, a statutory alternative remedy is available and that, a writ petition should not be entertained when such statutory alternative remedy is available, he relies upon 2017 Volume 13 SCALE page 664 (Agarwal Tracom Pvt. Ltd. v. Punjab National Bank & Os.). He submits that, the sale was conducted pursuant to a public notice dated April 14, 2015. The terms and conditions of the sale notice do not permit the purchaser to nominate any other person as the purchaser. He submits that, the correspondence between the parties did not bring about a novation of the contract. The initial terms and conditions of the sale stand. Therefore, the respondents are entitled to forfeit the entire earnest money deposit as sought to be done. I have considered the rival contentions of the

parties and the materials made available on record.

Although the existence of a statutory alternative remedy does not oust the jurisdiction of Writ Court it should not intervene except under certain

circumstances. In *Agarwal Tracom Pvt. Ltd.* (supra) the Supreme Court after noticing that, a purchaser in respect of a property put up for sale by a

bank exercising powers under the SARFAESI Act, 2002 had issues with regard to the forfeiture of earnest money deposit, is of the view that, such

purchaser is entitled to approach the Debts Recovery Tribunal for appropriate relief. The writ petition was not entertained as the purchaser had a

statutory alternative remedy under the Act of 2002. The writ petition in that case was not entertained since inception by the Writ Court. Such decision

was upheld by the Appeal Court and by the Supreme Court.

In the present case, however, the writ petition was entertained by the Court on February 10, 2016. In contrast to the writ petition of *Agarwal Tracom*

Pvt. Ltd. (supra) not being entertained since inception, in the present case, the writ petition was entertained unconditionally. Directions for affidavits

were given by such order without retaining the point of maintainability of the writ petition to be decided later. Apparently, the respondents did not raise

the point of maintainability of the writ petition on February 10, 2016 while taking directions for filing affidavits. *L. Hirday Narain* (supra) is of the view

that, where a writ petition has been entertained, the same ought not to be dismissed as not maintainable on the ground of existence of statutory

alternative remedy. In the facts of the present case, since the respondents did not raise the point of maintainability and such point not being kept open

to be decided at a later point of time, the writ petition is required to be heard and decided on merits. It is another thing that on merits the writ petitioner

may or may not succeed. However, the consideration of the merits of the writ petition should not be denied on the ground of existence of statutory

alternative remedy when the respondents did not raise the point of maintainability and had such point kept open to be decided.

The first respondent had issued a public notice dated February 14, 2015 exercising powers under the SARFAESI Act, 2002 for sale of movable and

immovable properties in respect of one of its borrowers. The first petitioner had participated in the sale of the properties contained in the sale notice

dated February 14, 2015. The sale notice dated February 14, 2015 had two

parts. One part relates to the movables and the other to the immovables. It had offered bids for the movable and immovable properties. The petitioner was successful in the auction of both the movable and immovable properties and was declared as the highest bidder. After participation, the first petitioner had complained that, all the movables were not available. A joint inspection was held on June 20, 2015. Thereafter, the first petitioner claiming that, all the parts of the plant and machinery were not available, they refused to deposit the entire quantum of 25% of the bid amount for the movables. The first petitioner, however, evinced an intention to continue with the purchase of the immovable properties. This intention is contained in the letter dated June 24, 2015 issued by the first petitioner to the respondents.

By a writing dated June 26, 2015, the respondent wanted a sum of Rs.1,99,31,250/- as the balance amount of the purchase price. The parties apparently had various meetings thereafter. By a writing dated August 6, 2015, the first petitioner proposed to buy the movables only. The first petitioner also requested issuance of sale certificate in favour of an identified nominee. It forwarded two pay orders to the respondent. By a writing dated August 18, 2015, the first petitioner requested to make over the physical possession of the immovable property for a further issuance of sale certificate in favour of the nominee. Various electronic mails were issued on the subject between the parties. By a writing dated October 23, 2015, the first petitioner demanded refund of the entire sale consideration of the immovable along with interest. In response thereto, by a writing dated October 31, 2015, the respondent contended that, the sale confirmation letter was issued on May 6, 2015 and that, they are not agreeable to either refund the forfeited amount in order to issue the sale certificate in favour of the nominee.

The first petitioner participated in a sale conducted under the provisions of the Act of 2002. The provisions of the Security Interest (Enforcement) Rules, 2002 apply. Nothing is placed before the Court to suggest that, the Rules of 2002 permits a creditor conducting a sale under the provisions of the Act of 2002 read with the Rules of 2002 to alter the terms and conditions of the sale after the commencement of the sale. In the instant case, the sale had commenced on the issuance of the notice in sale dated February 14, 2015. Such sale notice did not contain any provision for the sale to be

made in favour of a nominee or nominees.

The Rules of 2002 govern a sale undertaken under the Act of 2002. Rule 9(5) permits forfeiture of the deposit of earnest money in default of payment

by the purchaser, within the period mentioned in Sub-rule (4) of Rule 9. Rule 9(4) of the Rules of 2002 permits payment of the balance amount of

purchase price on or before the 15th day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing

between the purchaser and the secured creditor, in any case, not exceeding three months. In the present case, extension of time to make payment

was granted. However, the first petitioner failed to pay the balance amount of purchase price within the extended period. Therefore, the first

respondent proceeded to forfeit the earnest money deposit. In the facts of the present case, I find no infirmity in the action taken by the first

respondent. W.P. No. 128 of 2016 is dismissed. No order as to costs.