
(2017) 03 MAD CK 0149

In the Madras High Court

Case No : 452 of 2017 and C M P (MD) Nos 376 and 377 of 2017

R.Devarasan

APPELLANT

Vs

The Authorized Officer, Indian Bank Main Branch, Trichy, &
Anr.

RESPONDENT

Date of Decision : 03-03-2017

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Section 13(4) -
Enforcement of security interest
Security Interest (Enforcement) Rules, 200

Citation : (2017) 03 MAD CK 0149

Hon'ble Judges : R.Subbiah, J.Nisha Banu

Bench : DIVISION BENCH

Advocate : R.Subbiah, J.Nisha Banu

Final Decision : Allowed

Judgement

1. The petitioner has come up with this Writ Petition challenging the order passed by the first respondent dated 05.12.2016 forfeiting 25% of the bid amount deposited by the petitioner in respect of item No.4 of the schedule mentioned property in sale notice dated 20.07.2016 and also for a consequential direction to the 1st respondent to refund 25% of the bid amount (Rs.15,65,000/-) with interest.

2. It is stated in the petition that due to non payment of loans obtained from the second respondent Bank by the borrowers viz., (i)Thahir Ahamed S/o.S.A.Hafeez Sahib, (ii) T.Faridha Begam W/o.Thahir Ahamed, (iii) Thaibunnisha Begam W/o.Ahamed Mohideen @ Anwar, the first respondent brought seven item of properties mortgaged by them under auction. The petitioner has participated in e-auction and deposited EMD to a tune of Rs.28.02 lakhs for all the seven items of properties described in the schedule. Then, he became successful bidder for all the seven items and paid 25% of the bid amount for all the seven items immediately as per the conditions of the auction notice. When the petitioner

applied for encumbrance certificate, he came to know that the property mentioned as item No.4 in the schedule of sale notice was sold by Faridha Begam to one Nasurulla through registered sale deed dated 21.03.2011. But the above said encumbrance was not mentioned in the e-auction notice dated 20.07.2016. Though the petitioner intimated the same to the respondents, there was no response to the same. In the meantime, the petitioner has paid balance 75% amount in respect of the four items of properties.

3. It is also stated in the petition that while so, he came to know that the said Nasurulla filed a writ petition in W.P.No.20438 of 2016 before this Court challenging the auction sale notice. Hence, the petitioner prayed for 15 days time to deposit the balance amount in respect of item No.4. On 19.11.2016 the 1st respondent sent a communication granting further 15 days time to deposit the remaining 75% of the bid amount in respect of item No.4. In the meantime, the petitioner received a notice in the said writ petition. On receipt of the said notice, the petitioner again approached the first respondent and informed about the notice and asked for further extension of time to deposit remaining 75% of bid amount through a representation dated 04.12.2016. But, without considering the same, the first respondent passed the impugned order dated 05.12.2016 forfeiting 25% of the bid amount in respect of item No.4 and also issued fresh sale notice in respect of the above said property.

4. It is further stated in the petition that the act of the first respondent forfeiting 25% of the bid amount paid by the petitioner is arbitrary, illegal and against the principles of natural justice. Further, the act of the first respondent issuing the sale notice dated 20.07.2016 without stating the encumbrance in respect of item No.4 of the property is against the rules framed under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act). Hence, the petitioner has come up with this writ petition.

5. The main submission of the learned counsel for the petitioner is that in the e-auction notice, the encumbrance created in item No.4 of the schedule property was not mentioned as per Rule 8(6) of the Security Interest (Enforcement) Rules, 2002. The first respondent is duty bound to mention about the encumbrance of the property which sought to be brought for sale. But, the first respondent had clearly suppressed the encumbrance created by the said Nasurulla by way of registered sale deed dated 21.03.2011. Hence, under such circumstances, the respondents are not entitled to forfeit 25% of the amount deposited by the petitioner and the respondents are bound to repay the said amount. Thus, he sought for quashment of the impugned order and also the consequential direction to refund the forfeited amount.

6. The learned counsel appearing for the Bank by filing a detailed counter affidavit submitted that the sale is made on "As is where is and as is what is" basis and no representations and warranties are given by the Bank relating to encumbrances, statutory liabilities, etc. In fact, the petitioner, even after knowing about the encumbrances made in item No.4 of the property through the

encumbrance certificate No.6783/2016, dated 06.10.2016, has sought time to remit balance 75% of the bid amount. After dismissal of the writ petition filed by the said Nasurulla, the petitioner has again submitted a representation seeking extension of time to pay balance 75% of the bid amount, which means that the petitioner has been dragging the matter purposefully. Hence, the first respondent has passed the impugned order forfeiting 25% of the bid amount deposited by the petitioner and also issued a fresh auction sale notice dated 24.12.2016 in respect of the 4th item of property. Thus, he prayed for dismissal of the writ petition.

7. Keeping the submissions made on either side, we have carefully gone through the entire materials available on record.

8. Admittedly, the bank has not mentioned in the e-auction sale notice dated 20.07.2016 about the encumbrance created by the said Nasurulla in the 4th item of property. After declaration of successful bidder, the petitioner had applied for encumbrance certificate and obtained the same on 06.10.2016. Then, only he came to know about the encumbrance. As per Section 13(4) of the SARFAESI Act, whenever the secured creditor contemplates a sale of immovable property, they will have to follow Rule 8 of the Security Interest (Enforcement) Rules 2002. As per Rule 8(6)(f) of the said Rules, the secured creditors has to set out in the terms of sale notice 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. From the said Rule, it is clear that the authorised officer is empowered to notify the thing which would be useful to the purchaser to judge the nature and value of the property. But, that does not mean that the authorised officer can pick and choose the materials which would be favourable to the Bank and notify the same. It cannot be disputed that the documents relating to encumbrance over the property is one of the important materials to judge about the property. In such circumstances, the same ought to have been notified by the respondents. But, in this case, the first respondent has not mentioned about the encumbrance of the 4th item of property in the auction sale notice. After coming to know about the encumbrance, according to the petitioner, he asked the respondents to clear the same, but they did not given any response. However, they have given only extension of time.

9. In the similar circumstances, a Division Bench of this Court in the case in *Jai Logistics Vs. The Authorised Officer, Syndicate Bank*, reported in 2010(4) CTC 627 has held as follows; "5.We have considered the submissions. Of-course, in the aforesaid judgment, the Supreme Court, while considering a sale by the Official Liquidator, has held that it is the duty of the intending purchaser to satisfy himself as to the encumbrance before participating in the bid. Having participated in the bid, the intending purchaser cannot later on turn around and question the Official Liquidator on the ground that the encumbrance was not notified. In that case, the provisions of the Rules as applicable in the present case are not applicable to the Official Liquidator. But, in the case on hand, once

possession is taken over under Section 13(4) or under Section 14 of the SARFAESI Act, whenever the secured creditor contemplates a sale of immovable property, they will have to follow Rule 8 of the Security Interest (Enforcement) Rules, 2002. Rule 8(6)(f) mandates the secured creditors to set out in the terms of sale notice 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. A reading of the said rule, in our opinion, would also include the encumbrance relating to the property. We are inclined to read the rule in that way keeping in mind the interest of the intending purchaser to be put on notice as to the encumbrance, as otherwise he/she will be purchasing the property and simultaneously buying the litigation a well and an intending purchaser may not bid in the event he/she came to know of any encumbrance over the property. That is why the Rule specifically contemplates a provision for the authorised officer, while notifying the sale, to specifically state as to the encumbrance. It will be a different issue in the event the auction notice indicated that it is the duty of the intending purchaser to verify not only the encumbrance by way of alienation of the property, but also the other statutory liabilities and in that case, the intending purchaser cannot later on turn around and seek for either the refund of the earnest money deposited or insist the Bank to clear the encumbrance. In the absence of such indication in the sale notice, in our considered view, the respondent-Bank would not be justified in compelling a purchaser to go ahead with the sale by depositing the balance sale consideration together with the encumbrance.

6. In that view of the matter, the challenge in the writ petition merits acceptance. Accordingly the impugned order of forfeiture is set aside and the writ petition is allowed. The respondent is directed to refund the earnest money to the petitioner. We also take this opportunity to suggest that it is for the Banks and financial institutions to indicate the encumbrance both by way of alienation in respect of the property or other statutory liabilities of the Company or the individual, as the case may be, in the sale notice itself to avoid a situation like this. Equally the Banks and financial institutions could also make it clear in the auction notice in the case of no other liability by the Company or individual."

10. The dictum laid down in the above case is squarely applicable to the facts of this case, as in this case also, without making any indication about the encumbrance in the property, the first respondent brought the property for auction and hence, now the first respondent cannot compel the petitioner to go ahead with the sale by depositing the balance sale consideration together with the encumbrance. Further, when the petitioner was under hesitation, the first respondent forfeited the amount deposited. Due to the fault committed by the respondents, now the petitioner cannot be made to suffer. Hence, this Court is inclined to allow this writ petition.

11. In the result, this Writ Petition is allowed and the impugned order, dated 05.12.2016, passed by the first respondent is set aside and the first respondent

is directed to refund the amount forfeited forthwith. No costs. Consequently, connected miscellaneous petitions are closed.