

(2013) 08 AHC CK 0164

In the Allahabad High Court

Case No : Writ Petition No. 11774 (M/B) of 2010

Rekha Sahu

APPELLANT

Vs

Uco Bank and Others

RESPONDENT

Date of Decision : 20-08-2013

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 9

Citation : (2013) 7 ADJ 642 : (2013) 101 ALR 291 : (2014) 1 BC 221 : (2013) 121 RD 24

Hon'ble Judges : Rajiv Sharma, J and Satish Chandra, J

Bench : Division Bench

Advocate : Ravindra Nath Pandey, Shashi Prakash Singh, Prashant Arora, Umesh Chandra Srivastava

Final Decision : Allowed

Judgement

Satish Chandra, J.

In compliance of the order dated 19.8.2013, the officers of the UCO Bank, who had participated in the process of auction, namely, Sri Aarti Prasad, Assistant General Manager, UCO Bank, Main Office, Kolkatta, Sri J.S. Sana, Senior Manager, UCO Bank, Sujatganj Branch, Sri Ganga Ram, Senior Manager, UCO Bank, Amipur Estate and Sri Surabhi Verma, Senior Manager, UCO Bank, Chinhath Branch, are present in person.

Heard Sri Ravindra Nath Pandey, learned Counsel for the petitioner, Sri Shashi Prakash Singh, learned Counsel for the opposite party No.3, Sri Prashant Arora, Counsel for the opposite party No.2 and Sri Umesh Chandra Srivastava, learned Counsel for the opposite party No.1.

Petitioner, who is auction purchaser of Plot No. 12, Khasra 347 situated at Mohibullapur, District Lucknow, has filed the instant writ petition under Article

226 of the Constitution of India, praying therein to issue a writ in the nature of Mandamus directing the opposite party No.1 to take appropriate steps for getting the house in question free from all encumbrances. It has also been prayed that a writ in the nature of Mandamus be issued directing the opposite parties Nos. 2 and 3 to take appropriate action against the previous owner of the house in question as well as against the opposite party No.1 to get the amount recovered from them forthwith.

Shorn off unnecessary the details of the facts are as under :

M/s Raj Nursing Home, Prop. Dr. Ram Kumar Singh [hereinafter referred to as the "borrower"], was advanced various financial facilities by the UCO Bank, I.T. College Branch, Lucknow after mortgaging Plot No. 12, Khasra No. 347, situated at Mohibullapur, District Lucknow but on default of the payment of bank dues, the Authorized Officer, under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [hereinafter referred to as the "Act"] and in exercise of powers conferred under Section 13 (12) read with rule of the Security Interest (Enforcement) Rules, 2002 [hereinafter referred to as the "Rules, 2002"] issued demand notice dated 16.3.2006 to the borrower. The notice was delivered to the borrower by hand against their acknowledgement but even then, borrower had failed to pay the Bank's dues and as such, the Authorized Officer of the Bank had issued possession notice of the property on 4.9.2006 in exercise of the powers conferred under Section 13 (4) of the Act. Accordingly, the physical possession of the mortgaged property in question was taken by the Authorized Officer on 9.7.2007 and possession notice was published in two newspaper i.e. "The Indian Express" dated 9.7.2007 and "Rastriya Sahara" on 26.7.2007. Subsequently, the possessioncumnotice for inviting tenders for the sale of the property for realization of the Bank's dues was issued on 18.2.2008 and the same was published in the news paper, namely, "The Financial Express" dated 19.2.2008 and "Dainik Jagran" dated 19.2.2008. As no bidder came forward to purchase the said property and as such, date of inviting tenders was extended and the same was published in the news papers, namely, "Financial Express" dated 23.6.2008 and "Rastriya Sahara" on 24.6.2008 but again no bidder came and as such, the date of inviting tender was extended till 19.7.2008 and the same was published in the newspaper, namely, "Financial Express" dated 9.7.2008 and "Rashtriya Sahara" dated 10.7.2008.

Pursuant to the publication made in "Rashtriya Sahara" dated 10.7.2008, petitioner filed her tender before the Authorized Officer by participating in its draw for purchase of the aforementioned property. Since out of tenders received, the tender submitted by the petitioner was found highest i.e. Rs.13,35,500/ and as such, a sale certificate dated 18.9.2008 was being issued in favour of the petitioner, mentioning therein that immovable property i.e. Plot No. 12, Khasara No. 347, Mohibullahpur, Tehsil & District Lucknow (2510 sq.ft.) secured in favour of the UCO Bank by the borrower towards the various financial liabilities, has been sold to the petitioner; further she has to bear the charges of registration,

stamp duty etc. Accordingly, the said sale certificate dated 18.9.2008 was got registered on 7.10.2008 in the office of SubRegistrar, Lucknow.

On obtaining the possession of the said house, the petitioner had sought for mutation of the property in her name on the basis of the said sale certificate in the office of the Lucknow Nagar Nigam, Lucknow, where she was informed that dues of house tax amounting to Rs.1,42,409.30 is pending and has to be paid before mutation of her name. Thereafter, the petitioner visited the office of Madhyanchal Vidyut Vitran Nigam (LESA), Power Station, Sitapur Road, Lucknow (opposite party No.2) to get the electricity connection for supply of electrical energy in her name, where also she was informed about the encumbrance of Rs.2,23,936.00 as arrears of electricity dues on the said property. On knowing the aforesaid encumbrances, the petitioner wrote a letter dated 14.1.2010 to the UCO Bank (opposite party No.1), requesting therein to make the payment of encumbrances due on the property but no heed was paid by the opposite party No.1. Hence the instant writ petition.

Learned Counsel for the petitioner has submitted that while publishing the sale notice, UCO Bank opposite party No.1 has concealed the facts that there is some due against the house in question i.e. house tax and other municipal taxes as well as electricity dues. He submits that by the sale certificate executed under the provisions of Act No. 54 of 2002, property sold will be free from all encumbrances of any kind and the sale certificate issued by the UCO Bank to the petitioner also contains that there is no encumbrance known on the property. He submits that the possession of the house in question was handed over to the petitioner on 18.9.2008 when the sale certificate was issued to her.

Elaborating his submission, Counsel for the petitioner submits that under the provisions of Rule 9 (7) of the Rules, 2002 framed under Act No. 54 of 2002, in case the property sold under the Act and is subject to any encumbrance, then, the Authorized Officer is under statutory obligation to get the property free from all encumbrances, whose property is sold and to make payment of encumbrances before sale but even then, the UCO bank did not adhere to the aforesaid provisions.

Lastly, Counsel for the petitioner submits that in case the petitioner would be deprived from her legal and constitutional rights of using the house in question on the ground that there is some due of electricity bills or house taxes against the said house, which was the liability of the previous owner of the house in question, who has motivated the bank concerned to arrange any how a nonencumbrance certificate so that the previous owner could get success in selling the same.

Per contra, Sri Umesh Chandra Srivastava, learned Counsel for the Bank has submitted that the alleged electricity dues or the alleged house tax dues payable by the borrower to the opposite parties Nos. 2 and 3 were not in the knowledge of the Bank nor there were disclosed by the borrower at any time during the

auction and the sale proceedings taken under the Act No. 54 of 2002. According to him, when any immovable property sought to be sold under the Act No. 54 of 2002, is subject to any encumbrance, the Authorized Officer is required to allow the purchaser to deposit with him the money required to discharge the encumbrances and any interest due thereon, which may be sufficient to meet the contingencies or further cost, expenses and interest as may be determined by him. Thus, the amount due as electricity charges and the house tax would remain the personal liability of the defaulter/borrower or the auction purchaser/petitioner.

In support of his submission, Sri Srivastava has relied upon the judgment of Hon'ble Apex Court in *AI Champdany Industries Limited Vs. Official Liquidator and another* [2009 (4) SCC 486] and *TRANSCORE Vs. Union of India and another* [I (2007) BC 33 (SC)].

We have heard learned Counsel for the parties and perused the records.

The SARFAESI Act, 2002 is enacted to provide a speedy and summary remedy for recovery of thousand of crores which are due to the Bank. In other words, the Act enables the bank and Financial Institution to realise longterm assets, manage problems of liquidity, asset liability mismatch and to improve recovery of debt by exercising powers to take possession of securities, sell them and thereby reduce nonperforming assets by adopting and reconstruction. The Bank/Financial Institution is entitled to take actual possession of the secured assets from the borrower or from any other person in terms of Section 13(4) of the SARFAESI Act. Any transfer of secured assets after taking possession of the same by the Bank/Financial Institution shall vest in the transferee all rights in relation to the secured assets as if the transfer has been made by the owner of such secured assets. Section 17(1) of the SARFAESI Act provides for appeal remedy to the aggrieved parties of any of the measures resorted to by the Bank under Section 13(4) of SARFAESI Act. If the party dispossessed is not in accordance with the provision of the Act, then the Debts Recovery Tribunal is empowered to put the clock back by restoring the status quo ante. These are the broad guidelines under which the secured assets are enforced/realised and the Bank/Financial Institution are able to recover its money against the secured assets in shortest time frame.

Where any borrower, who is under a liability to a secured creditor, makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as nonperforming asset, then the secured creditor may issue notice to the borrower to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under Subsection (4) which shall included "Sale" under Section 13(4)(a).

As per Rule 8(5) of the Security Interest (Enforcement) Rule, 2002, the methods of sale of the immovable secured assets include :

- "(a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or
- (b) by inviting tenders from the public;
- (c) by holding public auction; or
- (d) by private treaty."

The relevant provision of Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 which deals with the procedure for bringing the immovable secured assets for sale is reproduced hereunder :

"The authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable assets under subrule (5) :

Provided that if the sale of such secured asset is being effected by either 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 action or the time after which sale by any other mode shall be completed;
- (e) depositing earnest money as may 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."

A reading of Rule 8 (6) makes it very clear as to what are the relevant particulars to be furnished in the sale notice, as per which the description of the property to be sold among other particulars would also contain the details of the encumbrance and any other thing which Authorised Officer considers it material for a purchaser to know in order to judge the nature and value of the property.

Any asset sold under the SARFAESI Act is sold on "as is where is" and "as is what is" basis unless specified otherwise. Sale under SARFAESI is governed by terms and conditions of sale forming part of the sale process. The Bank/Financial Institution, while publishing its notice for auction sale of the property, interalia incorporates the following and brings to the notice of the public/bidders :

"Sealed tenders by way of submission of offer are invited from the general public for purchase of the immovable property possession of which have been taken by the bank under SARFAESI and the rule made there under on "as is where is" and

"as is what is" condition under the said Act, for realisation of outstanding dues from the borrowers."

"The Authorised Officer or the Bank shall not be responsible for any charge, lien, encumbrance, property or any other dues to the Government or any one else in respect of property auctioned"

After inviting the general public for purchase of the property under Public Auction, the following are the three stages under which payment is made by the successful bidder and upon completion of sale, the Authorized Officer shall issue sale certificate :

- (1) Earnest money deposit (at the time of bidding)
- (2) 25 per cent of the accepted sales price (including EMD) after successful bidding
- (3) 75 per cent of the balance amount within 15 days of the auction."

During the intervening period between the depositing of earnest money and till the balance sale consideration is paid, the auction bidder/purchaser after making part payment or full payment, may either demand to refund the amount from the Authorised Officer or request to cancel the sale if sale certificate is already issued on the ground that there exists encumbrance on the property or on the apprehension that title may not be proper and that the bank may not be competent to deliver possession of the auction property without encumbrance and free from any future litigation.

Section 55(1) of Transfer of Property Act, 1882 stipulates as under :

"Rights and liabilities of buyer and seller. In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold :

- (1) The seller is bound
 - (a) to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover;
 - (b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power;
 - (c).....".

A bare perusal of the above provision would show that duty is cast upon the Authorised Officer to disclose to the auction purchaser any material defect in the title, failing which it could be construed that purchaser was misled.

On the contrary, when the rule of caveat emptor (buyer beware) prevails, it is for

the purchaser to either verify the title before purchasing the property or invite complication through litigation. However, now the rule of caveat emptor is replaced by caveat venditor (seller beware) and when the Bank/Financial Institution put the property on sale, they must show clear title to the said property.

Notwithstanding above, yet another aspect which we have to consider is the effect of Section 35 of the SARFAESI Act which reads as under :

"The provision of the fact shall have effect, notwithstanding anything inconsistent therewith contain in any of the law for the time being in force or any instrument having effect by virtue of any such law."

The effect of Section 35 would be that the disposal of the secured assets would be in terms of the provisions of the SARFAESI Act. Therefore, we may independently examine the legal provisions of the SARFAESI Act, upon which title is transferred by issuance of sale certificate without reference to the Transfer of Property Act since the right under SARFAESI would prevail over the other right.

The right is conferred on all the Bank/Financial Institution, as secured creditor to realise money by disposal of the property, over which the security is created. In case of public auction, the purchasers are put on notice that sale of properties in question was "as is where is" and "as is what is condition". Before commencement of the auction, the original documents pertaining to the property as well as copies of other parent documents and the relevant file are made available for all the participants for inspection. The Bank/Financial Institution has to exercise due diligence on the security before the same is put on sale for the reason to rule out fraud, if any perpetrated by borrower and to rule out that the property is free from any encumbrance. Multiple mortgages are created by single borrower with different Bankers/Financial Institution and the secured creditor may or may not be aware of the any encumbrance on the property despite conducting due diligence. In view of the uncertainty in secured creditor being unaware of any encumbrance on the date of inspection of the property by the purchaser, whether the auction of the secured creditor is immune from challenge while recourse to action under Section 13(4).

Rule 9(10) of the Security Interest (Enforcement) Rule states that the certificate of sale to be issued by the Authorised Officer shall specifically mention that whether purchaser has purchased the immovable secured asset free from any encumbrance known to the secured creditor or not. A plain reading of the SARFAESI Act/Rules casts a duty upon the Bank/Financial Institution to furnish those encumbrances which are known to them on the property which are sold by them. However, Rule 8(6)(f) mandates additional duty on the Authorised Officer to make known to the bidders before auction 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. Therefore, it is evident that the immunity claimed by the Bank/Financial Institution on the pretext "as is where is" and "as

is what is basis" is dying a slow death and the Bank/Financial Institution being secured creditor, have to make due diligence/make thorough search of the property before proposing for sale. The borrowers are creating multiple registration of the same property subsequent to execution of mortgage with the Bank/Financial Institution and these frauds are rampant in the market. These frauds may not be known to the secured creditor in the normal course and if the property is sold "as is where is basis" without the knowledge of the subsequent encumbrances, there is apprehension that the auction proceedings could be stalled by the purchaser through the judicial intervention on the ground of non furnishing of the material information relating to encumbrance. Hence, the Bank/ Financial Institution have to tread very carefully before holding public auction and take all necessary steps to ascertain and furnish the information relating to encumbrance/attachment on the property to the intending purchaser.

In the instant case, it is not in dispute that petitioner is a bona fide purchaser of the assets or mortgaged assets of M/s Raj Nursing Home, Prop. Dr. Ram Kumar Singh, resident of 9/948, Sector9, Indira Nagar, Lucknow in an auction sale from the respondentBank. Such an auction was held under the Act by the respondentBank. The petitioner is neither the transferee nor the successor to the previous owner of the premises. The asset in question was sold on "as is where is" and "as is what is" basis and while effecting sale by inviting tender from public or holding public auction, the details of the encumbrance i.e. electricity dues and municipality tax dues have not been declared/furnished to the public at large by the Authorized Officer of the Bank. The ground taken on behalf of the Authorized Officer in not publishing the encumbrances in the property in question i.e. electricity dues and municipality tax dues was that he has no knowledge about the said encumbrances. This plea of ignorance of the knowledge of encumbrance on the assets sold on the pretext of "as is where is" is no longer an acceptable argument, for the reasons that Rule 8 (6) categorically enjoins as to what are the relevant particulars to be furnished in the sale notice, as per which the description of the property to be sold among other particulars shall contain the details of the encumbrance and any other thing which Authorised Officer considers it material for a purchaser to know in order to judge the nature and value of the property shall be known to the secured creditor by setting out the same in the public notice.

In AI Champdany Industries Ltd. (supra), on which reliance has been placed by the Bank, is not applicable in the instant case. In that case, when the Company went in liquidation, the Official Liquidator took charge of both the immovable and movable assets of the Company and it was given due publicity. The respondentMunicipality did not file its claim before the Official Liquidator, whereas in the instant case, statutory duty has been cast upon the "Authorized Officer" to declare the dues/encumbrances in the public notice for auction. The Authorized Officer committed procedural irregularity and did not follow the provisions of the Act and Rules causing serious prejudice to the petitioner. Similarly, the facts of Trancore (supra) are quite distinct and this case is also of

no help to the respondentBank.

For the above discussions, one thing is clear that the Authorized Officer of the Bank and officers of the Bank, who participated in the auction proceedings, have clearly not taken care of the encumbrances such as Electricity dues and municipality dues already thereon upon the premises and further on knowing the facts that in the property in question, electrical energy meter and sewage etc. were installed but even then the said authorities had neither informed the electricity department or the municipality authority to the effect that the said property is going to be auctioned and "No Objection Certificate" was obtained from either the Electricity Department and Municipal Commissioner as after possession of the property in question, the bank was the secured creditor. Without ascertaining the above taxes, the tender of selling the property in question was published and the petitioner being the bonafide purchaser did not know the aforesaid taxes purchased the property in question through auction. Even in the sale certificate dated 18.9.2008, it has been indicated against the heading "Encumbrance, if any No encumbrance is in knowledge", which was rightly understood by the petitioner an innocent citizen that there is no encumbrance or dues upon the property.

Rule 2(a) defines ""Authorised Officer" as under:

"authorised officer" means an officer not less than a chief manager of a public sector bank or equivalent, as specified by the Board of Directors or Board of Trustees of the secured creditor or any other person or authority exercising powers of superintendence, direction and control of the business or affairs of the secured creditor, as the case may be, to exercise the rights of a secured creditor under the 1[Act];

a) Authorised Officer must be of rank not less than Chief Manager in a public sector bank or equivalent.

b) (i) Board of Directors

(ii) or Board of trustees of the secured creditor

(iii) or any other person

(iv) or authority exercising powers of superintendence, direction and control of business or affairs of the secured creditor under the Act is competent to initiate action."

There are two categories of persons i.e. a) and b) as stated above. One is Chief Manager or equivalent. Another is Board of directors or Controller of the business of the secured creditor. All the acts of Authorized Officers are supposed to be bona fide, fair and reasonable as the action taken under the Act is administrative in nature and not a judicial action as held by Hon"ble Supreme Court in *Mardia Chemicals Ltd. v. Union of India* [(2004) 4 S.C.C. 311].

Authorised Officer, who is clothed with statutory power has to perform his action

as per prescription of law. Performing action or omitting to perform the action contrary to prescription of law contemplated is not permissible (*expressio unius est exclusio alterius*). He enjoys immunity from civil and criminal prosecution if his acts are *bona fide*. For *mala fide* acts, he is not only answerable personally but also binds his secured creditor for vicarious liability in Civil & Criminal prosecution. He possesses unlimited pecuniary jurisdiction (provided the financial asset is not below one lakh rupees) and unlimited territorial Jurisdiction for enforcement of security interest. Demand notice served by him operates as injunction against borrowers from dealing with secured assets. He represents secured creditor. His services are not mandatory but may be engaged to exercise the rights of the secured creditor. The purpose of choosing Chief Manager level officer as Authorized Officer is that on account of rich experience and maturity of mind he will be able to take action with due care and caution in view of stringent nature of the provisions of the Act.

The Supreme Court in *ICICI bank Vs. Shanti Devi Sharma & Ors.*: 2008 (2) Bank CLR 745 (S.C.) held that in addition to Guidelines on Fair Practices Code for Lenders, Master circular on outsourcing financial services and Master Circular on credit card operations and another Circular on ""Code of Bank's Commitment to Customers (COBCC) were promulgated by RBI with advise to banks to strictly adhere to them in loan recovery process. It seems they are not strictly adhered to and are treated as mere ritual exercise and RBI also had taken serious note of it and remarked that complaints are received regarding violation of the guidelines. In this case the borrower committed suicide on account of humiliation caused by repossessioners engaged by the bank. Supreme Court declined to expunge the remarks of the High Court as well as to quash the order of the High Court in directing the police to investigate into the matter. The Supreme Court also imposed costs of Rs.25,000/ to the bank..

In another case i.e. *Sheeba Philominal Merlin & Anr. Vs. The Repatriates Coop Finance & Development Bank Ltd. & Ors.*:20104L.W. 497, Hon"ble Madras High Court ordered CBCID to proceed according to law after investigation of fraudulent sale of secured asset (by bank officials) belonging to the guarantor for a very low price tampering of bid amounts, in an action taken under SARFAESI Act in the loan account without serving the statutory notice. The High Court also imposed costs of Rs.50,000/ payable by the bank to the petitioners.

For the reasons aforesaid, it is clear that the secured creditor does not enjoy the immunity in respect of his action if it is not *bona fide*. Chief Manager level officer is chosen because with rich experience and maturity of mind he will be able to take action with due care and caution in view of stringent nature of the provisions of the Act. But in the instant case, the Authorized Officer, who was the Chief Manager level Officer of the reputed bank of our country, prior to publishing the auction notice, did not take care of the encumbrances occurred in the property in question and not mentioned the said encumbrances in the property in the public notice. Furthermore, when the petitioner being *bona fide* auction

purchaser raised the voice rather informed the Authorized Officer about the said facts did not adhere its request and flatly refused to his responsibility. In these backgrounds, the petitioner filed the instant writ petition in the year 2010 and since then, he fought for his legitimate right. Even otherwise, petitioner after paying the entire bid amount did not enjoy the property in question on the ground that electricity dues and municipality tax dues have not been paid by the previous owner. Therefore, we think it appropriate to impose cost upon the officers, who have participated in the auction proceedings.

In view of the above, the writ petition is allowed with cost. Respondent No.1/UCO Bank is directed to pay the cost of Rs.1,00,000/ before the Registrar of this Court. On receipt of the said cost, the same shall be paid to the petitioner. The respondent No.1 Bank shall pay the municipalities Tax and electrical charges, which were outstanding against the property till the date of issuance of sale certificate together with interest/penalty.

Looking to the fact that petitioner purchased the property in the year 2008 and since then, she is fighting for the cause, the respondent Bank shall pay the above outstanding dues within four weeks and furnish copies thereof to the petitioner. Respondent No.1/UCO Bank shall also pay Rs.1,00,000/ as cost to the petitioner for mental agony and expenses of litigation. However, it will be open for the respondent No.1 to realize the cost from the officers, who participated in the auction proceedings and were not vigilant towards their duties.