(2006) 06 MAD CK 0198

In the Madras High Court

Case No : W.P.Nos. 1261 and 3957 of 2006 and W.P.M.P. No''s. 1426 and 4211 of 2006

S. Sathyakumar and K. Dhanalakshmi — APPELLANT

Vs

The Indian Overseas Bank
Mr. A. Muthuraman Vs The Authorised Officer, Indian Overseas Bank, Asset Recovery Management Branch, Mr. Sathia Kumar and K. Dhanalakshmi — RESPONDENT

Date of Decision : 14-06-2006

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(4)

Citation : (2007) 3 LW 770

Hon'ble Judges : K. Suguna, J

Bench : Single Bench

Advocate : K.M. Vijayan, for M. Sureshkumar and K.M. Valsala, in W.P. No. 3957/2006, for the Appellant; Benjamin George, Benjamin George, for R1 and K.M. Vijayan, for M. Sureshkumar, for the Respondent

Judgement

K. Suguna, J.—W.P. No. 1261/2006 has been filed for issue of a Writ of Mandamus directing the respondent therein to refund the amount

deposited by the petitioners by way of Earnest Money Deposit pursuant to the auction sale notice in respect of the property bearing plot No. 30-

A(SP) Thiru.vi.ka Industrial Estate, Guindy, Chennai 600 032 with interest as may be fixed by this Hon''ble Court whereas W.P. No. 3957/2006

has been filed for issue of a Writ of Mandamus directing the 1st respondent therein to forfeit the sum of Rs. 24 lakhs deposited by the 2nd and 3rd

respondents jointly with the 1st respondent towards the reserve price of the property belonging to the petitioner auctioned by the 1st respondent

on 9.12.2005 and credit the same to the loan account of the petitioner therein. In this order, the parties will be referred as per their rank in W.P.

No. 3957/2006.

2. The facts leading to the case are:

M/s. Muthuraman Exports is a proprietary concern belonging to the petitioner in W.P. No. 3957/2006. The petitioner availed various credit limits

and loans from the 1st respondent Bank. The said credit limits and loans were secured by furnishing various movable and immovable properties.

The property covered under the above writ petitions namely, land and building bearing Plot No. 30-A (SP) Thiru. vi. ka Industrial Estate, Guindy,

Chennai 600 032 is one among the various securities furnished to the 1st respondent Bank. The petitioner/borrower defaulted in repayment.

Hence, the 1st respondent invoked the right conferred on the secured creditors and issued a demand notice on the mortgagor on 3.12.2002 calling

upon them to settle the dues . Since, they did not pay the dues, the 1st respondent decided to take possession of thesecured assets and obtained

an order from the Chief Metropolitan Magitrate , Egmore in Crl.M.P. No. 3483/2004 on 14.12.2004 and subsequently, by notification dated

21.1.2005, notified for the auction sale of the premises bearing Plot No. 30-A, Thiru.vi.ka Industrial Estate, Guindy, Chennai belonging to M/s.

Muthuraman Exports under the provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002

(SARFAESI Act in short) read with the rules therein. As per Clause 7 of the notification, the intending bidders can inspect the property.

Accordingly, respondents 2 and 3 inspected the premises and during such inspection, respondents 2 and 3 found that a third party by name M/s.

Perfect Stitch Garments Private Limited was in possession of the premises. Even though the sale notification disclosed that the property belonging

to M/s. Muthuraman Exports was brought for auction, in pursuance of Section 13(4) of the SARFAESI Act, it appears that possession of the

property was not taken over from the original owner namely, M/s. Muthuraman Exports and respondents 2 and 3 have participated in the auction

by depositing a sum of Rs. 24 lakhs towards Earnest Money Deposot and submitted their bid on 9.12.2005 offering to purchase the property at

Rs. 2.50 crores. Along with the said offer, respondents 2 and 3 had enclosed a letter to the effect that their offer is only a conditional offer, ie.,

their offer is valid only if the Bank takes over possession of the premises from the thirdparty/trespasser and in the said letter, they have specifically

mentioned that they would comply with the terms and conditions of the auction notice by paying 25% of the bid amount provided the possession of

the property vests with the bank, apart from saying that the validity of the offeris only for a period of 2 weeks. On 9.12.2005, along with others,

respondents 2 and 3 had also participated in theauction. Since, no one had quoted a higher amount than respondents 2 and 3, they were declared

as successful bidders. But,with regard to the conditional offer made by them, nothing was informed to them by the respondent Bank. Subsequent

to this, a letter dated 9.12.2005 was served to them stating that the property was auctioned, as per the condition of the sale i.e, ""AS IS WHERE

IS AND AS IS WHAT IS"" and accordingly, respondents 2 and 3 were directed to pay the balance amount representing 25% of the bid amount

failing which they were informed that their deposit shall be forfeited. For the same, respondents 2 and 3 sent a reply dated 14.12.2005 bringing to

the notice of the 1st respondent that in their initial offer, they have specificaly mentioned that it was only a conditional offer, as such, the Bank

cannot proceed with the offer unless the said condition is complied with. But, no reply was given for the same. Hence, respondents 2 and 3 filed

W.P. No. 1261/2006 for the relief, as already stated. As far as W.P. No. 3957/2006 is concerned, this has been filed by one of the partners of

M/s. Muthuraman Exports, who availed loan from the 1st respondent and on default in payment, the property was brought to sale and as per the

prayer in the said writ petition, the 1st respondent namely, Indian Overseas Bank should forfeit a sum of Rs. 24lakhs deposited by respondents 2

and 3 jointly towards the reserve price of the property belonging to the petitioner auctioned by the 1st respondent and credit the same to the loan

account of the petitioner.

3. According to the learned senior counsel appearing for respondents 2 and 3 in W.P. No. 3957/2006, their offer was a conditional offer and in

their letter dated 9.12.2005, it was clearly stated that they are submitting their tender/offer subject to the condition that the Bank takes over

possession from the third party/trepasser and only after the property is taken over by the Bank, they would pay 25% of the bid amout as per the

tender conditions. As such, according to the learned Counsel, since the condition, which had been mentioned in their letter dated 9.12.2005 was

not complied with, respondents 2 and 3 need not pay 25% of the bid amount. Apart from this, since the 1st respondent did not comply with the

condition, they must refund the Earnest Money Deposit. Further, according to the learned Counsel, only after receiving the letter dated 9.12.2005,

wherein conditional offer had been made, respondents 2 and 3 were allowed to participate in the auction. As such, since the 1st respondent did

not comply with the condition, they cannot forfeit the Earnest Money Deposit and they have to refund the same.

4. But, according to the learned Counsel for the 1st respondent, namely, the Bank, though the letter making a conditional offer was received by the

Bank, at the spot, where the auction took place, on 9.12.2005, the participants of the auction were circulated with a write up invoking certain

conditions. As per those conditions, the property shall be auctioned in ""AS IS WHERE IS AND AS IS WHAT IS CONDITION"", besides

stating that the buyer will get a valid title to the property and that the Bank will not undertake for vacant possession of the property and the

responsibilityof getting vacant possession rests with the buyer. According to the learned Counsel for the 1st respondent, accepting this,

respondents 2 and 3 have submitted a letter also dated 9.12.2005 and participated in the auction. As such, the stand of respondents 2 and 3 that

their offer was a conditional offer and since the condition was not complied with, they are entitled for refund of Earnest Money Deposit cannot

stand. Further, according to the learned Counsel, the auction notice contained certain conditions and though respondents 2 and 3 made a

conditional offer initially, subsequently, they gave a etter, on the same day, stating that they have understood the terms and conditions of the auction

and now, they cannot rely on the letter given along with the offer and demand for refund of Earnest Money Deposit. As such, the learned Counsel

for the 1st respondent contended that the writ petitions have to be dismissed.

5. Learned counsel for the petitioner has contended that though the property in question, actually, is worth of nearly 4 crores, because of the

default committed, the same has been auctioned for 2.5 crores. Apart from that, according to the learned Counsel, the 1st respondent has credited

the expenses incurred by them for conducting the auction to the loan account of thepetitioner and in the event, 1st respondent refunds the amount

of Rs. 24 lakhs to respondents 2 and 3, it will be in violation of the terms and conditions of the auction and the bid amount has to be credited to the

loan account of the petitioner.

6. I have considered the above submissions of the respective counsel.

7. Admittedly, respondents 2 and 3 have participated in the auction by depositing a sum of Rs. 24 lakhs towards Earnest Money Deposit and

submitted their bid on 9.12.2005 to purchase the property at Rs. 2.50 crores, enclosing a letter to the effect that their offer is valid only if the 1st

respondent takes over possession of the premises from third party, besides stating that they will comply with the terms and conditions of the

auction relating to payent of 25% of the bid amount provided, the possession of the property vests with the Bank and there is no dispute with

regard to the same. Subsequent to receiving this conditional offer, respondents 2 and 3 were permitted to participate in the auction held. Since,

they were successful bidders, the bid was knocked down in their favour and there is also no dispute that the conditions imposed in the letter of

respondents 2 and 3 dated 9.12.2005 have not been complied with by the respondent Bank. But, the stand of the 1st respondent Bank is that

though the conditional offer was given, at the spot, where the auction took place, a ""write up"" was circulated to the participants wherein it was

specifically stated as follows:

...The property is now brought to auction under ""AS IS WHERE IS AND AS IS WHAT IS CONDITION"". The buyer will get valid title of the

property. However, Bank will not undertake for vacant possession of the property. The responsibility of getting vacant possession rests with the

buyer.

Accepting this, respondents 2 and 3 had submitted their letter dated 9.12.2005. In the said letter, it is stated that respondents 2 and 3 are

depositing a sum of Rs. 24 lakhs towards 10% deposit of reserve price of the property for participating in the auction and that they have

understood the terms and conditions of the auction and that they shall abide by them. But, as stated earlier, while submitting their offer along with

the letter, respondents 2 and 3 had specifically stated that complying with the condition relating to deposit of 25% of the bid amount will come into operation only in the event of the 1st respondent Bank taking possession of the property in question. Even at the time of auction, as per the

averment in the affidavit, the 1st respondent Bank had not informed anything about the above said condition imposed by respondents 2 and 3 and

this has not been denied by the Bank, except saying that a ""write up"" was circulated to the participants in the auction. As far as the question of

refund of Earnest Money Deposit is concerned, asper the terms of the auction notice also,the successful bidder has to deposit 25% of the bid

amount immediately and in the event of failure to deposit the same, he has to forfeit the Earnest Money Deposit. Here, since the 1st respondent

Bank has not complied with the condition, which was put forth by respondents 2 and 3 in their letter dated 9.12.2005, as such, the question of

depositing 25% of the bid amount will not arise. That apart, though according to the counsel for the 1st respondent Bank, respondents 2 and 3 had

given a letter at the spot, to participate in the bid accepting the terms and conditions, when a specific letter has been issued with regard to deposit

of 25% of the bid amount, in my opinion, basing on the letter given by respondents 2 and 3 at the spot, the Bank cannot take a stand that

respondents 2 and 3 have to forfeit the amount. As per the terms and condtiions of the auction notice also, only in the event of failure to deposit

25% of the bid amount, the successful bidder will lose the Earnest Money Deposit. The deposit of 25% of the bid amount will come only if the

Bank had complied with the condition imposed. When that has not been complied with, neither the question of payment of 25% of the bid amount

nor the forfeiture of Earnest Money Deposit will arise. As such, referring to the letter dated 9.12.2005, given by respondents 2 and 3, the Bank

cannot take a stand that respondents 2 and 3 are not entitled for refund of Earnest Money Deposit.

8. As far as W.P. No. 3957/2006 is concerned, the grievance of the petitioner is that the expenses incurred by the 1st respondent Bank for the

above said auction will be included in the loan account of the petitioner. Apart from that, the Earnest Money Deposit made by respondents 2 and 3

has to be credited to the loan account of the petitioner. Since already an auction has been conducted on 9.12.2005, the total expenses come to

Rs. 50,000/-, according to the learned Counsel for the 1st respondent, that amount can be deducted from the Earnest Money Deposit made by respondents 2 and 3 and in the event of second auction, if the expenses are credited to the loan account of the petitioner, the petitioner is at liberty

to take appropriate steps. As far as refund of Earnest Money Deposit made by respondents 2 and 3 is concerned, for the reasons stated above,

the 1st respondent Bank is directed to refund the same, after deducting Rs. 50,000/- being the expenses incurred by the Bank for the auction

conducted on 9.12.2005. The writ petitions are disposed of accordingly. No costs. Connected W.P.M.Ps are closed.

