

(2013) 08 P&H CK 0201
In the Punjab And Haryana At Chandigarh
Case No : CWP No. 9153 of 2012

Sanjeev Bansal

APPELLANT

Vs

Oriental Bank of Commerce and Another

RESPONDENT

Date of Decision : 19-08-2013

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Transfer of Property Act, 1882 — Section 55

Citation : (2014) 1 PLR 89

Hon'ble Judges : Sanjay Kishan Kaul, C.J.; Augustine George Masih, J

Bench : Division Bench

Advocate : Sanjeev Gupta, for the Appellant; R.P.S. Ahluwalia, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Kishan Kaul, C.J.—The Oriental Bank of Commerce/respondent No. 1 advanced a loan facility to M/s. Mohit Distributors. Flat No. 115, Sector 55, Palsora, Chandigarh allotted to Smt. Anita Garg by the Chandigarh Housing Board/respondent No. 2 is stated to have been given as security by way of equitable mortgage to respondent No. 1/bank. M/s. Mohit Distributors is alleged not to have paid the outstanding dues resulting in legal proceedings for recovery of a sum of Rs. 17,61,940/- alongwith pendelitte and future interest @ 15% per annum being instituted before the Debt Recovery Tribunal, Chandigarh. These proceedings resulted into a decree on 20.10.2003 in O.A. No. 623 of 2003 and the recovery certificate was issued on 20.10.2003. It appears that this decree was ex-parte and an endeavour is made by M/s. Mohit Distributors for seeking setting aside of the ex-parte decree, but there was non-compliance of the condition for doing so. In order to realize its dues, the flat was put up for auction by inviting sealed tenders on "as is where is basis". The reserve price fixed at Rs. 21,14,000/- with earnest money being 5% of the reserve price was required to be submitted by 25.07.2006 and the sealed tenders were to be opened on 26.07.2006 on which date auction would be conducted amongst the bidders.

Other than the terms and conditions as to how the auction would proceed there were two material terms which read as under:-

7. All the outstanding dues/taxes will be borne by the purchaser.

8. Other terms and conditions will be notified at the time of opening of the bids.

2. The petitioner was one of the participants and was the successful bidder at a price of Rs. 25.85 lacs. The entire amount was paid by the petitioner to the Debts Recovery Tribunal and the sale is stated to have been confirmed on 22.01.2007.

3. It is the case of the petitioner that he was facing some difficulties at the instance of respondent No. 2 and on 24.08.2006 had inquired in writing from the said respondent the details of the balance, if any, qua the property, but respondent No. 2 on 05.09.2006 refused to divulge information on the ground that the petitioner was not the owner of the property as per records of respondent No. 2/board. The petitioner claimed that subsequently he came to know that there was an outstanding amount of Rs. 3,95,331/- alongwith interest w.e.f. 2005 amounting to Rs. 6.76 lacs upto 31.01.2010 with further interest beyond that date @ 20% per annum.

4. The aforesaid situation led to the petitioner filing objections before the Recovery Officer. The petitioner sought relief against the bank for not appropriating the amount without giving possession of the property as the petitioner was of the view that fraud had been played on him. The factum of there being any liability of the purchaser qua the outstanding dues of any type either of respondent No. 2/board or otherwise was alleged not to have been highlighted either in the advertisement/publication or thereafter in any communication and even at the time of the bid. The schedule of the property attached to the proclamation of sale was also alleged to have been left blank. However, these objections were dismissed vide order dated 25.05.2007/28.05.2007 primarily on the ground that the sale was on "as is where is basis". The amounts were, thus, appropriated by the bank, but despite this, possession is stated to have been handed over much later only on 18.07.2007. The further challenge by the petitioner before the Debts Recovery Tribunal also failed when the appeal was dismissed on 26.03.2010 and same was the fate before the Debts Recovery Appellate Tribunal vide order dated 15.06.2010. The petitioner, thus, filed CWP No. 13006 of 2010 raising various grounds. However, the petitioner once again did not succeed as recorded in the order of the learned Single Judge dated 26.07.2010. The learned Single Judge found no ground to interfere with the impugned orders in exercise of writ jurisdiction, but while disposing of the writ petition also observed as under:-

Suffice it to say that the petitioner having stepped into the shoes of the allottee, is liable to pay the dues of the Housing Board. After paying the dues and getting "No Objection Certificate" from the Housing Board, the petitioner shall be at liberty to raise his claim against the respondent-bank in accordance with law.

5. The petitioner claims that thereafter he made a representation to respondent No. 2 for issuance of no objection certificate and for conveying the balance outstanding amount so that the property could be transferred in his name as per letter dated 18.08.2010 followed by a number of reminders. This elicited a response from respondent No. 2 after 19 months when the petitioner was informed vide letter dated 27.02.2012 that a sum of Rs. 7,52,495/- was the outstanding dues against the house upto 29.02.2012 which should be deposited failing which interest/penalty will be charged as per the terms and conditions of allotment. The substance of the letter reads as under:-

CHANDIGARH HOUSING BOARD CHANDIGARH No. CHB/AO-III/SO-VII/SA-III/2012/2526 Dated 27.02.2012.

To

Sh. Sanjeev Bansal, H. No. 115, Sector 55, Chandigarh.

Subject: Issuance of No Due Certificate of Dwelling Unit No. 115, Sector 55, Chandigarh.

With reference to your request dated 13.12.2010, you are requested to deposit Rs. 7,52,495/- as outstanding dues against the above said house upto 29.02.2012, failing which the interest/penalty will be charged as per terms and conditions of the allotment letter.

Sd/- Accounts Officer-III Chandigarh Housing Board, Chandigarh.

6. In pursuance to the letter on 29.02.2012 itself, the petitioner submitted a demand draft for the requisite amount and vide letter of the even date requested the no objection certificate to be issued followed by two reminders on 20.03.2012 and 17.04.2012, but to no avail.

7. It is in the aforesaid circumstances that the petitioner has filed the present writ petition under Article 226 /227 of the Constitution of India for issuing a dual direction:-

(i) Reimbursement of the amount paid by the petitioner to respondent No. 2/ board on behalf of respondent No. 1 or M/s. Mohit Distributors, sole proprietorship firm of Kamal Garg (husband of Smt. Anita Garg) to the tune of Rs. 7,52,495/- alongwith interest @ 12% per annum.

(ii) Directing respondent No. 2 to issue the no objection certificate and transfer the property in the name of the petitioner.

8. We may note that the large part of the averments in the writ petition are really challenges to the orders passed by the Recovery Officer, Debts Recovery Tribunal-II, Chandigarh, Debts Recovery Tribunal, Chandigarh and the Debts Recovery Appellate Tribunal, Delhi and as to why those orders were not in accordance with law. These, in our view, are really not open to the petitioner to be agitated again in view of the decision in CWP No. 13006 of 2010 since the

sale was never cancelled. All that was directed by the learned Single Judge vide order dated 26.07.2010 is giving liberty to the petitioner to raise his claim against respondent No. 1/bank in accordance with law after having paid the dues of the Housing Board and getting the no objection certificate from respondent No. 2/board. It is in the conspectus of the aforesaid that the controversy has to be examined by us. We are, thus, accordingly required to look into the defences set up by the two respondents really qua these issues.

Claim of re-compensation by the petitioner from respondent No. 1/bank of the amount paid to respondent No. 2/Chandigarh Housing Board to the tune of Rs. 7,52,495/- with 12% interest:-

9. The plea of the petitioner is that by merely observing that the sale is on "as is where is basis" the nationalized bank like Oriental Bank of Commerce/ respondent No. 1 cannot absolve itself of duly communicating the liabilities qua the property to the prospective purchaser in auction. It has been, thus, submitted that it was the bounden duty of respondent No. 1/bank to have disclosed the factum of the outstanding to respondent No. 2/board in the auction notice itself as that had a material bearing on the bid. The property had been mortgaged by the allottee in favour of respondent No. 1/bank after having obtained the no objection certificate from the Chandigarh Housing Board.

10. If we examine this plea, we find that the auction notice was not only on "as is where is basis", but also contained clause 7 which clearly provided that all the outstanding dues/taxes will be borne by the purchaser. The question which, thus, arises is as to what meaning could be assigned to the expression "outstanding dues" keeping in mind that no conveyance deed had been executed in favour of the owner by respondent No. 2/board as yet and only an allotment had been made.

11. In our view, it would certainly require the petitioner to make inquiries from respondent No. 2/board about any pending dues qua the property which the petitioner apparently tried to do, but post the auction vide his letter dated 24.08.2006. No doubt, there was some initial hesitation on the part of respondent No. 2/board to communicate the amount to the petitioner as they were refusing to recognize the petitioner since he was not the allottee. The petitioner, in fact, initiated legal proceedings before the Recovery Officer, Debt Recovery Tribunal-II, Chandigarh; further proceedings before the Debts Recovery Tribunal, Chandigarh & Debts Recovery Appellate Tribunal, Delhi and this Court by filing a writ petition assailing inadequacy of information in the auction notice, but failed. The liberty given to the petitioner to raise the claim against respondent No. 1/bank in accordance with law only gave a lease of life to the petitioner to agitate the limited issue as to whether the payment which the petitioner had made or which the petitioner makes to respondent No. 2/board could be said to be re-compensated by respondent No. 1/bank on the plea that non-disclosure of this material aspect entitled the petitioner to pass on the liability to respondent No. 1/bank.

12. Learned counsel for the petitioner relied upon the judgment of the Hon'ble Supreme Court in *AI Champdany Industries Limited Vs. The Official Liquidator and Another*, where the meaning of the expression "as-is-where-is basis and whatever-there-is basis" has been expounded. The Courts below held that the terms signify the condition, quality and the quantity in which the assets sold exist, but it does not take into account the liabilities attached to the assets sold. Since the terms and conditions of sale called upon the bidders to satisfy themselves regarding the title and encumbrance attached to the said assets, the property tax payable was held to be a liability which would be included in the expression "encumbrance". It was held that it was incumbent upon the purchaser to make inquiry regarding the liabilities to the Municipality. The Hon'ble Supreme Court, however, observed that the terms and conditions of sale must be read as a whole and must be given a purposive meaning. The word "encumbrance" in relation to the word "immovable property" was held to carry a distinct meaning and it ordinarily cannot be assigned a general/dictionary meaning. The encumbrance, thus, must be a charge on the property. If the property tax was merely a statutory due without creating any encumbrance on the property which had cast a duty upon all the auction-purchasers to make an investigation, it would mean that they must try to find out all the liabilities of the company in liquidation in their entirety. Since the respondent Municipality was an unsecured creditor, it was held not to stand on a higher footing than an ordinary unsecured creditor who is required to stand in queue with all others similarly situated. The Hon'ble Supreme Court also observed that Section 55 of the Transfer of Property Act, 1882 refers to a contract only and unless there is a contract to the contrary, the rights and obligations of the parties to a sale would be as indicated in Section 55. Thus, such a contract to the contrary must be express and not implied, as a result whereof the meaning of the term encumbrance would be expanded. The advertisement did not specify that all the public charges had to be paid.

13. Learned counsel also relied upon the judgment of the Hon'ble Supreme Court in *Haryana Financial Corporation and Another Vs. Rajesh Gupta*, where the non-disclosure of the non-existence of an appropriate passage to the unit was held to be fatal in auction of the defaulting unit by the State Financial Corporation, thus, disentitling it from appropriating/forfeiting the earnest money.

14. One cannot doubt the proposition that the disclosure in an auction notice should be complete. The expression "as is where is basis" has to be understood in the conspectus of the legal position explained hereinabove. However, the other terms and conditions of the auction notice have also to be perused and the petitioner seems to completely ignore clause 7 of the auction notice which puts a burden specifically on the petitioner qua all the outstanding dues/taxes. No conveyance deed had been executed in favour of the mortgagor and, thus, the petitioner on verification of title documents would be well aware of the fact that the title had yet to be perfected in favour of the mortgagor by respondent No. 2/board. Thus, this matter was required to be investigated further by the petitioner

with respondent No. 2/board once the auction notice itself prescribed the sale was on "as is where is basis" coupled with Clause 7 requiring all the outstanding dues to be borne by the purchaser.

15. We are thus of the view that the liability of Rs. 7,52,495/- which stands paid by the petitioner to respondent No. 2/board has to be borne by the petitioner and cannot be passed on to respondent No. 1/bank. If our view was to the contra, we may add that this would, inter alia, reduce the price below the reserve price fixed by the bank.

16. We may, however, note one disturbing aspect which emerged during the hearing of the case. This arises from the communication dated 20.12.2007 sent to the petitioner by respondent No. 2/board which states that the permission to mortgage was granted for raising the loan to Smt. Anita Garg to pay the outstanding amount of installments due towards the property. The relevant contents are as under:-

The aforesaid dwelling unit was allotted to Smt. Anita Garg. Smt. Anita Garg made an application for raising a loan from Oriental Bank of Commerce, Patiala to pay the outstanding amount of the installments. The permission was granted for raising the loan with the stipulation therein that the amount of loan will be paid to the Chandigarh Housing Board. Even the bank vide its application has stated that Mrs. Anita Garg applied for the mortgage of the said flat to make full and final payment. It was on that condition that Chandigarh Housing Board granted the NOC for payment of the Chandigarh Housing Board allotted dwelling units account. There is nothing in the official record to indicate as to whether Smt. Anita Garg raised loan from the bank or not. However, no amount was paid by Smt. Anita Garg to Chandigarh Housing Board. Chandigarh Housing Board has been issuing a notice and had even informed her about the payment of the outstanding amount through various letters.

17. The aforesaid, thus, indicates that Smt. Anita Garg was apparently in default of payment of installments for the mortgage and sought to mortgage the property to pay the installments and for that purpose approached respondent No. 2/board which had made the allotment for permission to mortgage the flat in favour of respondent No. 1/bank.

18. Respondent No. 2/bank has also placed on record as Annexure R2/5 the no objection granted for raising of the loan the contents of which read as under:-

CHANDIGARH HOUSING BOARD CHANDIGARH

No. HB-AO-SD-AA4/2000/7762

Date: 07.05.02

To

Smt. Anita Garg w/o Kamal Garg H. No. 115, Sector 55, Chandigarh.

Subject-Issue of No Objection/Non-Encumbrance Certificate to raise house building advance Regd. No. 361, Category III.

Reference your application dated 02.05.2002 on the subject cited above.

2. House No. 115 in Sector 55, Chandigarh has been allotted to you on hire-purchase basis on the terms and conditions contained in the allotment letter dated 29.06.95.

3. Chandigarh Housing Board will have no objection to your making the payment of the balance of the consideration money of the above dwelling unit in lump-sum and to your mortgaging your rights, title or interest in the dwelling unit in favour of Oriental Bank of Commerce, Urban Estate, Patiala in order to raise loan for the payment of price of the dwelling unit to the Board subject to the following conditions:-

(i) The Board shall have the first and paramount charge on the said property for the unpaid portion of purchase price and other dues outstanding against you, including penalty if any.

(ii) The right, title or interest in the dwelling unit may be mortgaged subject to the terms of the allotment letter and provisions of the Chandigarh Housing Board (Allotment, Management and Sale of Tenements) Regulation, 1979.

(iii) Though, the land under the dwelling unit is free from encumbrances, but it has been allotted by the Chandigarh Administration to the Chandigarh Housing Board on 99 years lease with effect from 29.10.92 under the provisions of Lease Hold of Sites and Building Rules, 1973 and Capital of Punjab (Development and Regulations) Act, 1952 as amended from time to time your right are subject to the terms and conditions as have been imposed by Chandigarh Administration on the Chandigarh Housing Board in the lease deed and also subject to the provisions of the said Act and the Rules.

(iv) No tripartite agreement shall be executed by the Chandigarh Housing Board for the purpose of your raising loan.

(v) The mode of the allotment shall not be converted from "hire-purchase" to "cash down" the Board shall have no objection in your making the payment of the balance price of the house in lump-sum, and

(vi) This certificate will be valid for six months from the date of its issue.

Sd/- Accounts Officer, For Chairman Chandigarh Housing Board, Chandigarh.

(Emphasis supplied)

19. When the aforesaid facts were pointed out to us during the course of hearing on 17.07.2013, it prima-facie appeared to us that the purpose for which the no objection certificate had been granted was for clearance of the installments and not for raising a loan from the bank for some other purpose i.e. to secure a business loan as had been urged by the bank. Not only that, instead of cheque

being made out in favour of the board as per the sanction letter, direct payment was made to the party. We, thus, found a prima-facie case of possible fraud and, thus, called upon the bank to file an affidavit addressing the aforesaid aspects and calling upon the personal presence of the Bank Manager who sanctioned the loan.

20. An affidavit was filed by the Deputy General Manager (Controlling Head) of the Regional Office of respondent No. 1/bank at Patiala affirmed on 13.07.2013. The affidavit states that M/s. Mohit Distributors were allowed bill purchase (clean) facility of Rs. 18.23 lacs on 29.11.2001 by the then Branch Manager Sh. S.M. Monga. The cheque was returned unpaid and consequently the amount of returned cheque was debited to the current account of M/s. Mohit Distributors for which security documents were duly executed by Sh. Kamal Garg. It is later on that Smt. Anita Garg, wife of Sh. Kamal Garg mortgaged the immovable property being the flat in question on 14.02.2002 in favour of respondent No. 1/bank by way of equitable mortgage to secure the outstanding with due interest in the credit facility allowed to M/s. Mohit Distributors as collateral security. The no objection certificate dated 07.05.2002 obtained by Smt. Anita Garg was subsequently deposited by her with the Branch, while the equitable mortgage was already created on 14.02.2002. It is stated that the bank had not represented or given any letter to respondent No. 2/board that the loan was being advanced for housing purposes as housing loan was not advanced to the party. The no objection certificate was issued by the board after creation of equitable mortgage and, thus, no fraud had been played. Sh. S.M. Monga, the then Manager of the bank, did not remain present as his services were stated to have been terminated by the bank in the year 2005.

21. The aforesaid, thus, shows that in so far as respondent No. 1/bank is concerned, there is much to be desired qua the manner in which the mortgage has been created. Firstly, in view of the allotment issued by respondent No. 2/board to Smt. Anita Garg in the absence of any conveyance deed, no mortgage could have been created without prior permission of respondent No. 2/board. In this behalf, we may refer to the allotment letter dated 29.06.1995. The allotment of the dwelling unit is under Partial Self-Finance Scheme. The allotment is made pursuant to draw of lots held on 17.06.1995 on the terms and conditions specified in the letter. The scheme is to be governed by the provisions of the Haryana Housing Board Act, 1971 and there has to be compliance with the provisions of the Capital of Punjab (Development and Regulations) Act, 1952. The total consideration is specified as Rs. 3,46,400/- and 50% of the amount is payable on allotment and the balance amount is to be paid in installment of Rs. 3,026/-. The allotment letter also requires execution of an agreement to sell/hire-purchase tenancy agreement as prescribed under the Chandigarh Housing Board (Allotment, Management and Sale of Tenements) Regulations, 1979 (hereinafter referred to as the said Regulations). During the hire-purchase period, the status would be that of the tenant of the board alone. In terms of clause 11, there is a restriction on sale, alienation or transfer of any right or interest in the property

or otherwise parting with possession of the whole or any part of the property till the allottee becomes owner or for a period of 10 years from the date of actual possession whichever is later. This is, however, subject to a proviso that the right, title and interest can be mortgaged in favour of the government, Life Insurance Corporation or any scheduled bank or any corporate body in order to raise loan for the payment of price of built up houses to the board; provided that the board would have the first and paramount charge on the said property for the unpaid portion of the purchase price and no such mortgage can be created without prior permission of the board and the board will be competent to impose any condition while granting such permission. Thus, it is abundantly clear that it is in pursuance to the aforesaid terms and conditions of the allotment letter that the permission was granted by respondent No. 2/board and, thus, prior permission of the respondent No. 2/board was required for mortgage.

22. Secondly, on Kamal Garg having obtained the no objection certificate dated 07.05.2002 from respondent No. 2/board and having deposited the same with respondent No. 1/bank, it would have been abundantly clear to the bank that the permission to mortgage had been granted only for the purpose of payment of the balance consideration due against the dwelling unit so that the amount could be paid in lump-sum. Thus, at least at that stage, the concerned officers of the bank would know that the property could not really have been taken as a security for due repayment of a loan facility. The loan installments, thus, remained unpaid.

23. The aforesaid, thus, shows that the concerned officers of the bank have been grossly negligent and there has been collusion with the borrower and the guarantor as Smt. Anita Garg obtained the no objection certificate for creation of the mortgage for re-payment of loan installments qua the flat in lump-sum, while the mortgage was said to be created for the amount already outstanding against M/s. Mohit Distributors, sole proprietorship firm of the husband of Smt. Anita Garg.

24. In view thereof, the stand taken in the affidavit affirmed on 13.07.2013 that the bank officials are not involved in any fraudulent act alongwith the borrower cannot be accepted and we call upon the Chairman of respondent No. 1/bank to start an appropriate inquiry qua this loan transaction and take it to the logical conclusion including filing of an FIR, if so required, and show due compliance to us within one month of this order.

25. Unfortunately, the aforesaid would not absolve the petitioner of the liability as if the petitioner would have inquired qua the dues against the flat from respondent No. 2/board, as was required in terms of the auction notice, the petitioner would have come to know the outstanding amount which the petitioner did find out and make efforts albeit after participating in the auction.

Direction against respondent No. 2/board to issue the No Objection Certificate:-

26. The petitioner finds himself in a dilemma and an enviable position of having paid the amount to respondent No. 2/board as outstanding in view of the

observations of the learned Single Judge of this Court on 26.07.2010, but still not having obtained the no objection certificate and the title documents. Respondent No. 2/board communicated the amount to the petitioner vide letter dated 27.02.2012 indicating the due amount as Rs. 7,52,495/- which was paid by the petitioner within two days, but despite reminders no objection certificate has still not been issued.

27. The reason for non-issuance of the no objection certificate appears from the counter-affidavit filed by respondent No. 2/board.

28. The board initially has sought to take a plea that there was no policy of the board to issue no objection certificate in favour of the purchaser. The second aspect pointed out is that the original allottee had apparently entered into an agreement to sell dated 07.05.2004 with one Sh. R.K. Pal, who filed a suit claiming decree of specific performance. Civil Suit No. 172 of 10.08.2005 was decreed ex-parte on 21.08.2007 by the Civil Judge (Junior Division), U.T. Chandigarh and execution proceedings are stated to be pending qua the same. The third aspect raised is that the no due certificate can be issued only in favour of the allottee on payment of entire consideration of the dwelling unit. The fourth aspect raised is that the dwelling unit is governed by the Chandigarh Lease Hold of Sites and Building Rules, 1973 and in terms of Rule 17(10) there is restriction on the transfer of the site or the building without prior permission and permission has to be granted subject to payment of 1/3rd of the unearned increase in the value being the difference between current market value of the property and the present value of the premium paid for the property.

29. In our view, the defence claimed on the basis of a suit decreed is rather surprising. The basis for the suit is stated to be the agreement to sell dated 07.05.2004. It is the own case of respondent No. 2/board that there cannot be any sale, transfer or mortgage without its prior permission when the status of the allottee is as a tenant. The board was never made a party to the suit and Smt. Anita Garg never contested the suit. The suit was filed on 10.08.2005, while the no objection certificate for creation of the mortgage was issued on 07.05.2002 much prior even to the alleged agreement to sell. Thus, there cannot have been any valid agreement to sell or a decree passed in view of these circumstances. The possession has already been handed over by respondent No. 1 to the petitioner and there are no directions of the executing Court.

30. Respondent No. 2/board communicated to the petitioner the outstanding dues qua the flat vide its letter dated 27.02.2012 and accepted the payment from the petitioner in full and final settlement of the same. At that time, there was no communication made qua the requirement to pay an unearned increase for transfer of the flat. In view of the long drawn out litigation, respondent No. 2 cannot claim ignorance about the circumstances in which the flat was auctioned and the petitioner became successful auction purchaser.

31. We may notice that the said regulations which govern the allotment in

question itself in clause 7 provide for the manner of payment of price and allottee's obligations. These terms, in fact, have been incorporated even in the allotment letter and the relevant clause reads as under:-

7. Manner of payment of price and Allottee's Obligations.-

(7) The allottee shall not sell, alienate, transfer or otherwise part with the possession of the whole or any part of the said property till he becomes the owner or for a period of 10 years from the date of actual possession whichever is later except that--

(i) a lease for a period not exceeding 5 years at a time may be created.

(ii) the right, title and interest of the allottee may be mortgaged in favour of the Government, Life Insurance Corporation of any Scheduled bank or any corporate body such as corporations and boards in order to raise loan for the payment of price of built up houses to the Board, subject to first charge on the property for the unpaid portion of purchase price and other dues outstanding towards the allottee remaining in favour of the Board:

Provided further that such mortgage lease, etc, can only be created with the prior permission of the Board and the Board will be competent to impose any condition while granting such permission.

32. The position, thus, is the full price stands paid to the board, as was due till date, qua flat which was mortgaged with respondent No. 1/bank and put to auction. The no objection certificate having been issued by respondent No. 2/board for creation of mortgage and the property having been purchased by the petitioner in public auction, respondent No. 2/board should grant the no due certificate to the petitioner as all dues, as demanded qua the flat, stand paid. In our view, no further hurdle can be created in the way of the petitioner perfecting his title. In fact, respondent No. 2/board in its counter-affidavit while claiming in para 14 that there is no policy of the board to accept the amount from the auction purchasers and to transfer the properties in their favour qualifies it by stating "particularly when the charge of the original allottees has not been perfected by way of entire payment of the dues of the Chandigarh Housing Board by the original allottee". In the present case, however, all dues now stand paid.

33. We may also note with regret that there has been no representation on behalf of respondent No. 2/board before us both on 17.07.2013 and 07.08.2013 when the judgment was reserved.

34. We may, however, reserve the liberty to respondent No. 2/board that while it must issue no due certificate to the petitioner and convey a title to the petitioner, if it is of the view that unearned increase is chargeable even in a public auction held pursuant to grant of permission for mortgage, it may initiate steps against respondent No. 1/bank because such unearned increase was never disclosed as a possible liability of the auction purchaser in the auction notice. Respondent No. 1/bank cannot fasten the liability on the petitioner ostensibly under the plea of sale

being on "as is where is basis". There was no disclosure of there being requirement of paying any additional amount over and above the consideration payable for the flat. If this amount was liable to be paid by the petitioner, then there should have been a clear disclosure in this behalf. Clause 7 of the auction notice refers only to the outstanding dues/taxes and such unearned increase payable on transfer in case of foreclosure of mortgage would not fall within the head "outstanding dues/taxes". These were not "outstanding" when the auction took place and if the plea of respondent No. 2/board was to be accepted and the amount became payable as a consequence of the foreclosure of the mortgage and the consequent transfer in favour of the auction purchaser, such payments should have been clearly spelled out in the auction notice.

Conclusion:-

35. We, thus, allow the writ petition with the following directions:-

- (i) Respondent No. 2/board would issue a no due certificate to the petitioner and perfect the title of the petitioner subject to the registration charges being borne by the petitioner.
- (ii) Leave and liberty is granted to respondent No. 2/board to seek recovery of the unearned increase in the given facts and circumstances of the case, if so payable, from respondent No. 1/bank.
- (iii) The Chairman of respondent No. 1/bank to file a compliance report under his signatures qua the mode and manner in which the mortgage was created referred to aforesaid.

Parties are left to bear their own costs.