

(2017) 01 MAD CK 0160
In the Madras High Court
Case No : Writ Petition No. 15311 of 2013

Sarala Bardia

APPELLANT

Vs

The Authorised Officer

RESPONDENT

Date of Decision : 20-01-2017

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2017) 2 CTC 186 : (2017) 1 DRTC 831 : (2017) 2 LW 152 : (2017) 2 MLJ 236

Hon'ble Judges : Mr. M.S. Ramesh, J.

Bench : Single Bench

Advocate : Mr. P. Sreenivasulu, Advocate, for the Respondent; Mr. N. Anand Venkatesh, Advocate, for the Petitioner

Final Decision : Allowed

Judgement

Mr. M.S. Ramesh, J. - The brief facts of the case is as follows:- The respondent bank had conducted an auction sale of property situated at Door No.2/393 and 394, Kengari Revenue Village Panchayat, comprised in Survey No.193, Kilkotagiri, Nilgiris District on 02.02.2012 under the SARFAESI Act, 2002, by inviting tenders for open auction. The petitioner was declared as successful bidder. The respondent had issued a sale certificate after receiving a sum of Rs.11,50,000/- towards sale consideration. On the same day, the possession of the property was also handed over to the petitioner. After taking possession, the petitioner realised that the property auctioned in Old Survey No.193 has been changed into New Survey No.404/8 which in turn was sub divided as S.No.404/8-A, 8B and 8C and that an extent of 3.70 cents alone was physically available. As per the tender notification, the said property was described to be comprised in S.No.193, admeasuring an area of 6.50 cents. The petitioner trusting on the terms of the tender notification, had participated in the auction thinking that he was purchasing 6.50 cents. When it was factually realised that the property was only 3.70 cents and not 6.50 cents, the petitioner had issued a legal notice to the

respondent bank on 08.04.2013, seeking for refund of the sale amount of Rs.11,50,000/- together with interest from 02.12.2012. Though the respondent bank had received the said legal notice, they had failed to reply to the same and hence, the present writ petition has been filed.

2. Mr. N. Anand Venkatesh, learned counsel appearing for the petitioner submitted that the petitioner had participated in the auction held by the respondent based on the details given by the respondent bank in the tender notification that was published in the newspapers on 02.01.2012. Since the property to be comprised in Survey No.193 was described to measuring an area of 6.50 cents, he had opted to bid an exorbitant amount of Rs.11,15,000/-. The petitioner had also applied for the encumbrance certificate and ensured that the property had no encumbrances that were detrimental to the title of the auctioned property and therefore, believing the auction notification, he had purchased the same. When the petitioner had realised that only an extent of 3.70 cents was available on physical verification, he had directly requested the bank to refund the sale amount with interest which was also ignored. It is the case of the petitioner that had the bank revealed the physical extent to be 3.70 cents only, he would have either opted out of the tender or quoted 50% of the amount alone. Hence, the learned counsel for the petitioner submitted that the respondent bank is bound to refund the sale amount.

3. Mr. P. Srinivas, learned Standing Counsel for the respondent bank would submit that the auction notification had clearly stated that the lands were sold in "as is where is condition". According to him, the petitioner had personally inspected and measured the extent of the property in question before participating in the auction and after satisfying about the correctness of the extent, he had purchased the same. Hence, the respondent bank will not be liable for refunding the sale amount.

4. I have carefully considered the rival submissions made by the learned counsel on either and perused the entire materials available on record.

5. Before analysing the authenticity of the extent of land auctioned by the respondent bank, it would be relevant to point out that when the writ petition was heard, I had specifically posed a question to the learned counsel for the respondent bank that the counter affidavit did not specifically state that the lands auctioned was to an extent of 6.50 cents and hence, directed the respondent bank to file an additional counter affidavit. Subsequently, an additional counter affidavit was also filed in which the Authorised Officer of the respondent bank had stated that the actual extent sold by the respondent bank in the public auction dated 02.02.2012 is only an extent of 6.50 cents and not 3.70 cents.

6. In view of the specific stand taken by the respondent bank, the learned counsel for the petitioner had filed an application for appointment of Advocate Commissioner and in order to verify the physical measurement of the subject property, an Advocate Commissioner was appointed by this Court.

7. Pursuant to the appointment, the Advocate Commissioner had visited the subject property and with the help of a licensed surveyor and in the presence of both the petitioner as well as the Manager of the respondent bank, the subject property was measured and a report was filed.

8. As per the Advocate Commissioner's report, the subject property situated at Door Nos.2/393 and 394 at Kengari Revenue Village Panchayat, Niligris District was only 3.70 cents and not 6.50 cents. The Advocate Commissioner had also filed a sketch demarking the subject property from the adjacent properties.

9. The first submission of learned counsel for the respondent bank is a little surprising that the bank had sold the property in "as is where is" condition only and that the petitioner who had failed to satisfy himself about the physical measurement cannot now seek for refund of the sale amount. The auction notification very clearly states that the lands sought to be auctioned is about 6.50 cents in S.No.193. From a perusal of the sketch filed by the Advocate Commissioner, it is seen that there are vacant lands around old survey No.193 and therefore, I am unable to visualise as to how the petitioner who was carried away by the description of the property given by a reputed financial institution can disbelieve the extent. No doubt that the auction purchaser should be aware of what he proposes to buy and ought to have carried out to due diligence on the property. But in the present case, the bank intended to auction 6.50 cents only as pointed out in the submissions made by the respondent's counsel. Hence, when the Bank intended to auction 6.50 cents, the phrase "as is where is" would necessarily mean to refer to an extent of 6.50 cents and not 3.70 cents.

10. Learned counsel for the respondent bank would further submit that the respondent bank cannot be held liable for any subsequent event that took place after the petitioner had possession of the property on 02.02.2012. It is not the case of the respondent bank that there were encumbrances after the petitioner had purchased the subject property from the auction. Incidentally, the learned counsel for the petitioner had also produced the encumbrance certificate of the property for the period from 01.01.2000 to 14.09.2015 and it is seen that the lands in survey No.193, did not carry any encumbrance showing any detrimental alienation reducing the extent from 6.50 to 3.70 cents.

11. The other grounds raised by the respondent bank are that the petitioner should have been vigilant before purchasing the property and ought to have taken diligent efforts to measure the property before purchasing; that the bank had sold subject land in as is where condition and therefore, any shortage of lands contrary to their tender notification cannot be put against them; that the petitioner having inspected the property and satisfied about the correctness of the same before participating the public auction and therefore, cannot claim refund of the sale amount. Putting forth the above said grounds, learned Standing Counsel for the respondent bank relied upon a judgment of the Supreme Court reported in (2008) 12 SCC 541, (Indian Bank v. Godhara Nagrik Cooperative Credit Society Limited an another) and submitted that to ensure

whether any sub division took place in the said property can be determined only through a proper trial by a Civil Court and that the petitioner is not entitled to invoke the writ jurisdiction. Paragraph 16 of the said judgement reads as under:-

"16. It is one thing to say that the public section banks having regard to the provisions of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 should discharge their functions keeping in mind the larger public interest but ordinarily in the matter of enforcement of contract, they are to be governed by the terms thereof, which would not be amenable to writ jurisdiction of the High Court unless the actions of the banks are found to be wholly arbitrary and unreasonable."

12. In my considered view, the aforesaid observation of the Hon"ble Supreme Court is against the respondent bank. In a case of this kind when the respondent bank had voluntarily published the extent of the land to be at 6.50 cents without verifying the actual physical measurements such an action could only be deemed not only to be an act of dereliction and unreasonableness but also arbitrary. The Hon"ble Supreme Court while holding that the banks are to be governed by the terms of the contract which would not be amenable to writ jurisdiction had also observed that if the actions of the bank are found to be wholly arbitrary and unreasonable then they would be amenable to writ jurisdiction.

13. Learned Standing Counsel also relied upon the judgment of the Division Bench of this Court reported in 2012 (5) CTC 413 (R. Shanmugachandran (Deceased) v. The Chief Manager, Indian Bank and submitted that the petitioner ought to have made sufficient enquiries to verify the extent of the property which he proposed to purchase.

14. Paragraph 25 of the said order reads as follows:

"25.As a matter of fact, the statutory provisions make it clear that a sale could take place only after the expiry of 30 days from the date of the Public Notice. This 30 days time is intended to serve two purposes. One for the borrower to gather resources and repay the loan and another for all intending purchasers to make sufficient enquiries as a person of normal diligence and ordinary prudence would do while buying any immovable property. The purport of Rule 8(6) cannot be extended to such an extent that it obliterates the liability of the purchaser to undertake due diligence and to scrutinise the title to the property. Therefore, the obligation of the Authorised Officer is only to disclose the encumbrance that had come to the notice of Secured Creditor. It is for the Auction Purchaser to apply for Encumbrance Certificates, in the time of 30 days made available to the intending buyers to see if there are any encumbrances."

15. This judgment again is not in favour of the respondent bank, since the Hon"ble Division Bench of this Court had observed that it is for the auction purchaser to apply for an encumbrance certificate to ensure that there are no encumbrances which could affect the extent of the property. In the present case, the petitioner had applied for an encumbrance certificate which did not disclose

any detrimental entries and reflected the subject property to have a measurement of 6.50 cents. In my view, the petitioner has taken due efforts to verify the encumbrance certificate before purchasing the property. Hence, the said judgment would be of no help to the respondent bank.

16. Mr. N.Anand Venkatesh, learned counsel appearing for the petitioner, relied on a judgment of the Hon"ble Supreme Court in Civil Appeal No.829 of 2003 dated 15.12.2009 (Haryana Financial Corporation and another v. Rajesh Gupta), in which case, financial Corporation had sold the properties on as is where is basis. Discarding the stand of the Corporation, the Hon"ble Supreme Court had held that the appellant Corporation cannot be permitted to take advantage of their own wrong. The relevant paragraphs are extracted hereunder:-

"16.A perusal of the aforesaid letter makes it apparent that the appellants/ Corporation were merely relying on the documents submitted by M/s. Unique Oxygen Private Limited, Old Hansi Road, Jind i.e., the defaulting unit. The appellants/Corporation had been informed by the management of the defaulting unit at the time of availing of the loan facility that the Unit had the necessary independent approach road. The letter however does not indicate, that any independent inquiries were made by the appellants/ Corporation to verify the authenticity of the statements made by the management of the defaulting unit which had availed of the loan, by mortgaging the assets of the unit. The entire issue seems to be concluded against the appellants/ Corporation by letter dated 30.4.1998, the relevant parts of which have already been reproduced in the earlier part of this judgment. A perusal of the extracts, reproduced earlier, would clearly show that the Branch Manager has informed the head office in unequivocal language that the independent passage shown in the sale deed is not connected directly with the defaulting unit. It also indicates that the defaulting unit had merely purchased some land to connect the rasta with the revenue record on which movement of the vehicle is not possible at all. This land was not even mortgaged with the appellants/Corporation. The letter also clearly states that by exclusion of the aforesaid land the size of the plot would be reduced from 1210 sq. yards to 1130 sq. yards. That would mean that the main gate of the factory would be out side the land offered for sale. Taking into consideration the aforesaid facts the Division Bench concluded as follows:

"Taking the totality of circumstances into consideration, we are satisfied that the petitioner was not at fault. He was entitled to withhold the money as the respondents had failed to provide a proper passage. Still further, the factual position having been admitted in the letter dated April 30, 1998, a copy of which is at Annexure P6, and nothing to the contrary having been produced on the file, we find that the action of the respondent/Corporation in forfeiting the amount deposited by the petitioner was wholly arbitrary and unfair."

17. We see no reason to take any different view. We are also of the opinion that the Division Bench was justified in further concluding that in law the appellants/ Corporation undoubtedly has the power to forfeit the earnest money provided

there was a failure on the part of the respondent to make the deposit. The Division Bench, however, observed that the respondent was dealing with an instrumentality of state. He was entitled to legitimately proceed on the assumption that the appellants, a Statutory Corporation, an instrumentality of the State, shall act fairly. The respondent could not have suspected that he would be called upon to pay the amount of Rs.50 lakhs without being given even a proper passage to the Unit that he was buying. We are of considered opinion that the respondent had deposited the sum of Rs.2.5 lakhs on the clear understanding that there would be an independent approach road to the Unit. This is understandable. Without any independent passage the plot of land would be not more than an agricultural plot, not suitable for development as a manufacturing unit. We therefore don't find any substance in the submission made by the learned counsel for the appellants/Corporation.

17. The Hon''ble Division Bench of this Court in *Jai Logistics v. The Authorised Officer*, reported in 2010 (4) CTC 627 has held that it is for the Authorised Officer to disclose all the materials that a purchaser should know in order to judge the nature of value and the property. Paragraph 5 of the said judgment reads 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 as 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.

18. Following the aforesaid order, a learned single Judge of this Court in *Chemstar Chemicals and Intermediates (P) Ltd. v. The Commercial Tax Officer* reported in 2010 6 CTC 635 had also held at paragraphs 18 and 19 as follows:-

"18.The Division Bench has hence directed the bank to refund the earnest money to the petitioner. While doing so, the Division Bench is also pleased to observe 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". The observation so made by the Hon"ble Division Bench of our High court referred to above is as rightly argued by the learned senior counsel for the petitioner, squarely applicable in full force to the facts of the present case.

19.The Supreme Court also in the other judgment reported in 2010 (5) MLJ 1125 (SC) in *Haryana Financial Corporation and another v. Rajesh Gupta* has in the identical circumstances, held that on the failure of the Corporation to disclose the fair description of the property to the buyer, the order of forfeiture of earnest money is arbitrary and unfair and directed the Corporation to refund the forfeited amount.

19. Thus, it is seen from the aforesaid judgments relied upon by the learned counsel appearing for the petitioner, the respondent bank which is a reputed bank, cannot be lethargic while dealing with an auction. I am only able to come to a conclusion that without any physical verification of the extent of the property, the respondent bank had auctioned the said property. The property sold under the auction is not a movable property like an automobile, jewellery etc., which could be sold in "as is where is condition". The immovable property which is comprised in a specified survey number has boundaries and the minimum responsibility that is cast upon the respondent bank before the auction is to ensure that the property is free from all encumbrances and that it correlates to the exact measurement of the land which was notified in the auction notification. The petitioner who had verified the extent of the land, its survey number through the encumbrance certificate applied by him could not be found fault with. Though the learned counsel for the respondent made a faint attempt to establish that the property in question measures 6.50 cents only and not 3.70 cents, it would be appropriate to refer the report of the Advocate Commissioner. After surveying the subject land with the help of a licensed surveyor, the Advocate Commissioner by a report dated 22.11.2016 had given the following findings:-

"FINDINGS

Pursuant to the order and warrant dated 25.10.2016, I visited the residential land and building bearing No. 2/393 and 394 at Kengari Revenue Village Panchayat, at Old Survey No. 193 and New Survey No. 404/8B, Kilkotagiri, Nilgiris District and measured the entire land along with its boundary with the help of a licensed surveyor, in the presence of both the petitioner and the respondent in the above referred writ petition. In view of the visit made by me and the boundary measurement sketch prepared by the land surveyor. I am of the following findings:-

i) the boundary of the building bearing Door. No. 2/393 and 394 at Kengari Revenue Village Panchayat, at Old Survey No. 193, New Survey No. 404/8B, Kilkotagiri, Nilgiris District admeasures to 0.00.81 hectare or 2 cents (marked in red colour lines in the boundary sketch)

ii)the boundary of the vacant area within the premise of the subject property admeasures to 0.00.69 hectare or 1.70 cents (marked in red colour filled box in the boundary sketch) and

iii)the total extent of the subject property situated at Door.No. 2/393 and 394 at Kengari Revenue Village Panchayat, at Old Survey No. 193 and New Survey No. 404/8B, kilkotagiri, Nilgiris District admeasures to 0.01.5 hectares or 3. 70 cents (which is shown as enlargement sketch of Survey No. 404/8B in the boundary sketch).

iv)the land situated at Old Survey No 193 , New survey No. 404/8C which is adjacent to the subject property admeasures to 0.01.34 hectares or 3.311 cents, which is marked in yellow coloured space and described as "No Enjoyment Area" in The boundary sketch.

On the light of the visitation and perusal of the boundary sketch prepared by the land surveyor, I have observed that the subject property situated at Door.No. 2/393 and 394 at Kengari Revenue Village Panchayat, at Old Survey No. 193 and New Survey No. 404/8B, kilkotagiri, Nilgiris District is only 3.70 cents not 6.50 cents, which is also evident from the boundary sketch, shown as enlargement sketch of Survey No.404/8B is totally 3.70 cents."

20. In view of the physical verification of the Advocate Commissioner, I have no reason to disbelieve the present physical extent of land available in old survey No.193 and new Survey No.404/8B and consequently hold that the land which was auctioned by the respondent bank was only 3.70 cents and not 6.50 cents.

21. In view of the above discussions, the writ petition deserves to be allowed and is accordingly allowed. The respondent bank is directed to refund the sale amount of Rs.11,15,000/- with interest at the rate of 11% per annum from 02.02.2012 to the petitioner. It would also be open to the respondent bank to seek for cancellation of the sale certificate for which purpose the petitioner is directed to assist the bank.

22. In normal circumstances, this Court would not impose costs. However, in view of the lethargic attitude of the respondent bank, in making the petitioner believe otherwise on the extent of the land and also the fact that the petitioner was constrained to take out an application to appoint an Advocate Commissioner and incur expenses towards the Advocate Commissioner fees, it would be proper that the respondent bank be directed to reimburse the Advocate Commissioner fee to the petitioner by way of costs. Hence, the respondent bank is directed to pay a sum of Rs.50,000/- to the petitioner towards costs.