
(2012) 12 KL CK 0016
In the High Court Of Kerala
Case No : W.A. No. 1986 of 2012

Shaji P. Sebastian

APPELLANT

Vs

State Bank of India

RESPONDENT

Date of Decision : 07-12-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 21

Citation : (2013) 3 BC 399 : (2013) 1 KLT 481

Hon'ble Judges : Manjula Chellur, C.J.;A.M. Shaffique, J

Bench : Division Bench

Advocate : Bechu Kurian Thomas and Jawahar Jose, for the Appellant; P.V. Surendranath and P.V. Paulson, for the Respondent

Final Decision : Dismissed

Judgement

Manjula Chellur, C.J.—Heard Mr. Bechu Kurian Thomas, learned counsel appearing for the appellants. Appellants herein approached the learned Single Judge seeking a declaration that they are entitled for confirmation of sale conducted by the Authorised Officer under the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI Act"). It is not in dispute that the property in question belongs to one Jiji Paul who availed two different loans from the respondent-Bank securing the property measuring about 8.15 Ares (20 cents) at Manjapra Village of Ernakulam District. When he failed to effect the repayment as agreed after declaring the account as non-performing account, SARFAESI proceedings were initiated causing the property to be sold in public auction for realising the outstanding amounts due to the respondent-Bank. It is not in dispute by publication, the public auction came to be made in two dailies on different dates, i.e., the New Indian Express daily and also Mathrubhumi daily. Pursuant to the sale notice at Ext. P1, the appellants-writ petitioners through their Power of Attorney Holder submitted tender quoting Rs. 25,65,000/- as against the upset price of Rs. 25,64,000/-. 25% of the bid amount came to be

deposited then and there with the Authorised Officer and thereafter the disputed minutes came into existence at the instance of the Authorised Officer when the secured creditor respondent-Bank informed that there are court attachments in respect of the very same property which came to be sold in public auction. It is also not in dispute that the attachments were much later than the security created in favour of the Bank, especially when there was no indication of such attachments in the sale notice at Ext. P1. According to them, the minutes at Ext. R1(a) cannot be treated as an agreement and it is an unilateral document which will not create any right for the respondent-Bank or the Authorised Officer to deter from proceeding with the confirmation of sale. According to them, even if the minutes at Ext. R1(a) could be treated as an agreement, in the absence of any obligation on the auction purchaser to satisfy the attachments, it becomes a void condition and, therefore, it cannot be implemented. They also substantiate their contention by contending, the Bank cannot be allowed to perform the duty of an executor so far as the court attachments to give benefit to third party which has nothing to do with the loan in question. They rely Upon two decisions of this court, (1) Iyyunni and others Vs. Anto and Others, and (2) Francis Vs. Navodaya Kuries and Loans (P.) Ltd. and Others, .

2. As against this, the respondent-Bank contends, the entire procedure of public auction in question is under the SARFAESI Act and, therefore, there cannot be any reliance so far as the provisions contemplated under O. XXI of Civil Procedure Code. The rights and duties of the parties have to be governed under the SARFAESI Act, especially sub-r.(2) of R.9 of the Security Interest (Enforcement) Rules, 2002, apart from any agreement which indicates terms and conditions to be complied with by the parties, i.e., Ext. R1(a). In other words, the stand of the Bank is to the effect that even if entire deposit of amount is made as contemplated under sale notice, irrespective of any genuine reason, the Bank can resist confirmation of sale by virtue of power vested with the Bank under sub-r.(2) of SARFAESI Act.

3. The learned Single Judge, after referring to these conditions raised by the parties to the litigation refers to clause (7) in the sale notice and also sub-r.(2) of R.9 to opine that the secured creditor has to be satisfied or it is the option of the secured creditor either to confirm the sale or go back on the confirmation of sale. In the present case, apparently, except for the reason that there were two other court attachments over the property in question, the Bank has not putforth any other reason why they want to back out of confirmation of sale. It is not a situation where the secured creditor had not disclosed the court attachments and demanding satisfaction of those attachments much later than the confirmation of the sale. The public auction took place on 23.4.2012 and on the very same day auction proceedings were recorded by way of minutes in the presence of Authorised Officer, bidder, i.e., represented by Power of Attorney Holder and also witnesses, apart from representatives from enforcement agency. As per this document, the bidder was made to understand that there were two court attachments dated 7.8.2010 and 14.3.2011 for a sum of Rs. 22,96,000/- and Rs.

1,68,200/- in respect of the very same property which came to be purchased in public auction by the appellants and the bidder readily accepted to take all steps including deposit of money in the proper court to get the attachments released. In the concluding paragraph of the minutes, it says that in the above circumstances, the Authorised Officer accepted the tender subject to the fulfillment of the terms and conditions as stipulated in the tender notice dated 16.3.2012 and 20.3.2012.

4. The tender notice is Ext. P1. Clause (7) of this tender notice clearly indicates sale is subject to confirmation by the secured creditor. Therefore, including a clause, i.e., clause (7) in the tender notice is in pursuance of the authority vested with the secured creditor by virtue of R.9(2). In that view of the matter, the right of the Authorised Officer to accept or reject any tender is subject to again the confirmation of sale by the secured creditor. In other words, there is no vested right created in favour of auction purchaser to have an automatic sale once they become successful bidder by depositing 25% of the bid amount on the date of the sale followed by depositing the balance amount as contemplated under the procedure. The argument of learned counsel for appellants seems to be in the absence of last paragraph in the minutes Ext. R1(a) indicating the condition of satisfying that the attachments, it only refers to terms and conditions stipulated in the tender notice. Therefore, except the upset price indicated in the tender notice, there is no obligation for the bidder to satisfy other amounts, i.e., court attachments. Reading of last two paragraphs would mean, over and above the terms and conditions stipulated in the tender notice, the other conditions which were brought to the notice of the bidder, which accepted by the bidder, also has to be complied with as the last paragraph commenced with the words "in the above circumstances". There cannot be any other understanding of the last two paragraphs. Going through the judgments relied upon by learned counsel for appellants, the first judgment, i.e., Iyyunni and others Vs. Anto and Others, , pertains to a CPC where there was a dispute with regard to confirmation of sale or subsequent to confirmation of sale. The second judgment relied upon, i.e., Francis Vs. Navodaya Kuries and Loans (P.) Ltd. and Others, , pertains to SARFAESI proceedings where the controversy was not with regard to confirmation of sale but with regard to rights of a secured creditor. The learned Single Judge opined that once security is created over the property, the first priority would go to secured creditor if the property is brought for sale. Thereafter other encumbrances would come in the queue provided the auction price is more than the amount to satisfy the dues of the secured creditors. Therefore, none of these two decisions are any help to the appellants. Then coming to the facts of the present case, having agreed to satisfy the court attachments as additional condition apart from satisfying the terms and conditions at Ext. P1 and also as contemplated under the rules, the auction purchaser is under an obligation to discharge the attachment amounts as well in order to ask for confirmation of sale. In that view of the matter, the learned Single Judge was justified in saying that option must be given to the auction

purchaser to satisfy the court attachments as well, if he intends to proceed with the sale in question within two weeks from the date of judgment or the property has to be brought to sale again and any public can participate in the said sale including the auction purchaser. We do not find any good ground to interfere with the said opinion of the learned Single Judge. The Writ Appeal is, accordingly, dismissed. However, if the auction purchaser does not putforth his claim by depositing the attachment amounts as well within two weeks from today, the respondent-Bank shall return the amount deposited by the auction purchaser to the auction purchaser and proceed with fresh sale in accordance with procedure.