(2023) 09 KL CK 0111

In the High Court Of Kerala

Case No : Original Petition (DRT) No.62 Of 2023 & Writ Petition (C) No.5742 of 2023

Sunitha Menon APPELLANT

Vs

Bank Manager, Union Bank Of India RESPONDENT

Date of Decision : 14-09-2023

Acts Referred:

Constitution of India, 1950 — Article 226

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 — Section 17

Citation : (2023) 09 KL CK 0111

Hon'ble Judges : T.R.Ravi, J

Bench : Single Bench

Advocate : B.Dipu Sach Deev, Arun Babu, Aneeshraj R., Asp.Kurup, Sadchith.P.Kurup, C.P.Anil Raj, Siva Suresh

Final Decision : Disposed Of

Judgement

T.R.Ravi, J

1. The above original petition and writ petition have been filed by the auction purchaser in a sale conducted under the provisions of the SARFAESI Act by the 1st respondent. Since the prayers made are intrinsically connected, the original petition and the writ petition are being disposed of together.

2. The 1st respondent had granted a loan to M/s.Khadeeja Agencies on the security of a mortgage of a property of 10.10 Ares comprised in old Sy.No.1319 corresponding to Re.Sy.No.298/13 of Block No.3 of Veiloor Village. When the borrower failed to repay the loan availed of, the property was brought for sale. The petitioner is the successful bidder. The sale notice was published on 19.11.2021. The auction was conducted on 16.12.2021. The petitioner bid the property successfully for a sum of Rs.67,63,300/- and a sum of Rs.6,73,830/- was initially remitted towards 10% of the bid amount on 20.12.2021. Subsequently, a sum of Rs.10,17,000/- was paid, being the balance amount

towards the 25% of the bid amount. A total sum of Rs.16,90,830/- was thus paid. According to the petitioner, when he visited the property on 03.01.2022, she came to know that the total extent available was only 9.22 Ares and not 10.10 Ares which had been advertised. When the matter was brought to the attention of the respondent, the respondent is stated to have taken the stand that the petitioner should have measured the property prior to participating in the auction. The petitioner submitted complaints before the superior officers of the Bank. The petitioner also approached this Court by filing WPC No.8711 of 2022, which was disposed of by judgment dated 05.04.2022. This Court observed that the questions raised in the writ petition are matters which require an appreciation of disputed facts, and since the Tribunal had started its functioning, it has to be decided by the Tribunal. Reserving liberty to the petitioner to pursue her statutory remedies before the DRT, the writ petition was disposed of. This Court directed that proceedings for cancellation of the auction shall be kept in abeyance for a period of 60 days to enable the petitioner to move the Tribunal. The above judgment became final. The Bank had no complaints about the judgment. However, the stand of the Bank is that the petitioner was to have made the entire payment by 17.03.2022, and since the same was not done, the only option was to forfeit the entire amount deposited by the petitioner in terms of Rule 9(5) of the Securitisation Act. The petitioner filed a securitisation application within two months from the date of the judgment in WP(C) No.8711 of 2022. When defects were noted in the securitisation application, that it was filed beyond the period of limitation, the petitioner filed OP(DRT).No.286 of 2022 before this Court. On 23.06.2022, this Court directed a joint inspection of the property on 01.07.2022 and further directed the respondent Bank to hand over to the petitioner the records that show that the actual extent of the property is 10.10 Ares as advertised. A joint inspection was conducted thereafter, and it would appear that on actual measurement, the property had only an extent of 9.10 acre and not 10.10 Ares. This fact has also been recorded in the subsequent order dated 31.08.2022 in OP(DRT).No.286 of 2022. This Court directed the petitioner to remit the amount proportionate to the amount payable to the extent of 9.10 Ares provisionally and directed the Bank to retain the said amount in a non-lien account. OP(DRT).No.286 of 2022 was finally disposed of by judgment dated 15.12.2022, directing the Registrar, Debts Recovery Tribunal-II, Ernakulam, to consider the matter in the light of the observations made in the judgment. The Court had expressed its view that the period from 11.03.2022 to 05.04.2022, during which time the matter was pending before this Court, has to be excluded for the purpose of determining whether the application is filed within time. It was also observed that the petitioner, who was the auction purchaser, came to know about the fact that there is a difference in extent only on 03.01.2022, and the Bank itself had agreed to measure the property by letter dated 05.03.2022. In fact, the letter dated 05.03.2022 specifically refers to the directions by the higher-level officers of the Bank to measure out the property. It is thus evident that there was a mistake in the extent of the land advertised and that the Bank itself was willing to measure out the property. OP(DRT)No.62 of

2023 is filed seeking a direction to the Debt Recovery Tribunal to number the securitisation application dated 03.06.2022 in the light of the judgment in OP(DRT).No.286 of 2022 without further raising the issue of limitation. There is also a prayer for the issuance of a sale certificate for 9.10 Ares of the auction property instead of the advertised 10.10 Ares and issue a sale certificate in respect thereof. WP(C) No.5742 of 2023 was filed subsequently when the petitioner was threatened of forfeiture of the amount deposited. The prayer in the said writ petition is for a direction not to forfeit the advance bid amount till the final decision in SA No.7225/2022 (filing number) filed before the Debt Recovery Tribunal-II, Ernakulam.

3. The respondents have filed a counter affidavit contending that they are entitled to forfeit the amount and that the period of limitation cannot be extended.

4. I have heard the counsel for the petitioner and the respondents.

5. The counsel for the Bank referred to the judgment in Indian Bank v. George in OP(DRT)No.73 of 2018, wherein this Court held that there is no provision for extending the period of limitation. Reliance is placed on a Division Bench judgment of this Court in Pushpa Diams and Ors v. V.H.Muhamed Basher and Ors in WA 1045/2022,, wherein this Court held that if the sale price is not paid as provided for in Rule 9(4), then the consequence is that the deposit shall be forfeited and the property will re-sold. Reliance is also placed on the judgment in Agarwal Tracom Private Limited v. Panjab National Bank and Others [2018 (1) SCC 626], to submit that the petitioner had a statutory remedy under section 17 of the SARFAESI Act and this Court cannot interfere in such matters under Article 226 of the Constitution of India. The counsel for the petitioner referred to the judgment of a Division Bench of Madras High Court in V.Sridhar v. The Authorized Officer, Indian Bank, Guindy Branch in WP(C) No.16579 of 2016 wherein the Division Bench had directed the respondent Bank to refund the amount paid by the auction purchaser, which was sought to be forfeited. That was a case where the sale was on as is where is/ as is what is condition, and the authorised officer was not in a position to deliver possession of the auction property without any encumbrances and free of litigations. Another Division Bench judgment of Madras High Court in P.R.Thangamshiri v. The Chief Manager, Punjab National Bank in WP(C) No.20689 of 2022 was also referred to, wherein the Court had held that the purpose of forfeiture is to protect the secured creditor from adverse loss and where there is no such loss to the respondent Bank, the forfeited money has to be refunded. The Court had referred to the judgment of Hon'ble Supreme Court in Alisha Khan v. Indian Bank (Allahabad Bank) and Ors (C.A Nos.7680-7681 of 2021) wherein the Hon'ble Supreme Court had allowed an appeal against the forfeiture of 25% of the auction sale consideration and directed the Bank to refund the same on the ground that no loss had been caused to the respondent on account of the subsequent re-auction.

6. I have considered the contentions raised by the counsel on either side. The

petitioner had approached this Court by filing WP(C)No.8711 of 2022, wherein this Court had specifically reserved the right of the petitioner to move the Debt Recovery Tribunal within 60 days, keeping the cancellation of the auction in abeyance. This Court was of the firm opinion that since the question whether the extent was as advertised is a question of fact which has to be gone into by the Tribunal, the same cannot be decided by this Court. The respondent, who has a case that the period for deposit was over in March, 2022, did not challenge the judgment of this Court permitting the petitioner to approach the Debt Recovery Tribunal. When defects were noted in the securitisation application, the petitioner again approached this Court by filing OP(DRT).No.286 of 2022. This Court has specifically directed a joint inspection, which was also not challenged by the Bank. On joint inspection, it has come out that the extent was neither 10.10 Ares nor 9.22 Ares as contended earlier by the petitioner but was only 9.10 Ares, a reduction of 1 Are from the total extent which was advertised for sale. It is thereafter that the original petition was finally disposed of in December 2022, making observations regarding the question of limitation. This Court had, in as many words, expressed its opinion that the issue has to be considered on merits when it clearly said that the Tribunal has to take into account the fact that even as on 05.03.2022, the respondent was willing to measure out the property and that the petitioner herself came to know about the reduction of extent only much after the auction sale. Going by the judgment in Alisha Khan (supra), the question of forfeiture of the deposit of 25% of the auction sale consideration has to be considered along with the loss if any, suffered by the Bank. The judgments relied on by the Bank relating to the limitation cannot be applied in this case, where the Bank has suffered several orders from this Court which do not justify the Bank raising the question of limitation at this stage. If the stand of the Bank was that the auction stand concluded as early as in March, 2022 and no further challenge could be made, such a contention ought to have been raised in the earlier writ petitions. In fact, this Court had even permitted the petitioner to pay the proportionate amount for 9.10 Ares, which order was also not challenged by the Bank.

7. In such circumstances, I am of the opinion that the issue should be dealt with on merits by the Debt Recovery Tribunal and the rights of the petitioner cannot be taken away on the grounds of limitation.

8. In the above circumstances, the original petition and writ the petition are disposed of. There will be a direction to the Debt Recovery Tribunal-II, Ernakulam to accept the securitisation application filed by the petitioner treating the same as having been filed within time and consider and dispose of the same on merits. The question whether any amount is to be forfeited shall also be considered by the Debt Recovery Tribunal on the basis of the decisions on the issue with reference to the loss if any, that the Bank has suffered.