

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP No.22743 of 2019 (O&M)

Reserved on 13.07.2022.

Date of Decision: 19.07.2022

JOGINDER SINGH

.....Petitioner

V/s.

PUNJAB NATIONAL BANK AND ANOTHER

.....Respondents

CORAM: **HON'BLE MR. JUSTICE M.S. RAMACHANDRA RAO**
HON'BLE MR. JUSTICE HARMINDER SINGH MADAAAN

Present: Mr. Ashish Gupta, Advocate,
 for the petitioner.

 Mr. Saurabh Kapoor, Advocate,
 for the applicant (Proposed respondent No.3).

 Mr. Gaurav Goel, Advocate
 for the respondent-Bank.

M.S. RAMACHANDRA RAO, J.

Background facts

The petitioner herein had submitted a tender in response to a public notice dt. 24.04.2019 inviting tenders under the provisions of the SARFAESI Act, 2002 (hereinafter referred to as “the Act”) for auction of factory, land and building comprised of (a) Khata No.936, Khatauni No.1390 Khasra No.1980/306 (6-5) **Lot:1** Factory Land and Building comprising of (a) Khata No.936, Khatauni No.1980/306 (6-5) to the extent of 120/2500 share measuring 6 biswa (b) Khatauni No. 1408 Khasra No.1638/308 (2-0-0) 1639/308 (2-6-10) 1638/308 (0-9-10), 1637/308 (0-9-0), measuring 5 Bigha 5 Biswa (c) Khatauni No.1410 Khasra No. 1982/307 (1-16) measuring 1 bigha 16 biswa, Sale Deeds Nos. 920 dt 15.10.1974, Sale Deed No.208 dt. 17.05.1977, Sale deed No.759 dt. 11.06.1985, Sale Deed No.2494 dt.

05.02.1986, Sale Deed No. 2496 dt. 05.02.1986 total measuring 7 bigha 7 biswa as per jamabandi for the year 2006-07, situated in the revenue limit of **village Kukar Majra**, Hadbast No.64 **Tehsil Amloh, District Fatehgarh Sahib** in the name of M/s Krishna Agricultural Steel Works, Mandi Gobindgarh. **Lot 2**: Immovable property comprising of Khata No.936/1411, Khasra No. 1981/307 (2-0) measuring 2 bigha as per jamabandi for the year 2006-07, Deed No.207 dt. 17.05.1977 situated in the revenue limits of **village Kukar Majra**, Hadbast No.64, **Tehsil Amloh, District Fatehgarh Sahib** in the name of M/s Pawan Engineering Works.

The 1st Lot property was owned by M/s Krishna Agricultural Steelworks, Mandi Gobindgarh and the 2nd Lot property mentioned herein above is owned by M/s Pawan Engineering Works.

As per the tender notice, the reserve price of the properties was fixed at ₹3.95 Crores for the 1st Lot of property, and ₹1.10 Crores for the 2nd Lot properties.

The petitioner submitted a bid on 24.05.2019, and made a deposit of 10% of the reserve price amounting to ₹50,50,000/-.

The petitioner had quoted ₹7.22 Crores for both Lots, and deposited on 27.05.2019 a further sum of ₹35 Lakhs.

Thereafter, the petitioner claims to have verified the records of the property from the Tehsil office by securing copy of the *jamabandi* (Annexure P- 2) of the above properties.

In the said *jamabandi*, there were certain entries *qua* the properties mentioned above regarding orders passed by the High Court of

Punjab and Haryana and the District Courts and certain interim orders granted by the Courts.

In the tender, none of these facts have been disclosed by respondent No.1-Bank (for short “the Bank”).

The petitioner contends that when he approached the officials of the Bank and pointed out this, he was informed that the Bank sells properties on “*as is where is basis*” and they are not concerned with other charges/claims on the property and the responsibility *qua* the same is upon the purchaser only.

The petitioner deposited a further sum of ₹95 Lakh on 29.06.2019 i.e. 25% of the bid amount of ₹1.80 Crores (₹85 Lakhs + ₹95 Lakhs).

The petitioner contends that he was awaiting receipt of information from the Bank about the Court litigation, but the Bank sent a letter (Annexure P-4) dt. 23.07.2019 informing the petitioner that the initial amount of ₹50,50,000/- paid by the petitioner as EMD for the tender stood forfeited, and the balance amount would be credited in the account through RTGS process.

The petitioner claims to have approached the Bank officials and requested them not to do so stating that he would pay rest of the amount also, with a little delay.

The petitioner contends that it was the duty of the Bank to disclose any charge or encumbrance or litigation in respect of the properties for which tenders were invited, that there was a material misrepresentation in the tender notice that *no encumbrances were known to the Bank*, that the

Bank should have done due diligence and discovered these facts before giving the tender notice, that they have obviously not done any due diligence as is now clear from the contents of the *jamabandi* (Annexure P-2), and the Bank in these circumstances, cannot forfeit any amount deposited by the petitioner.

The petitioner, therefore, prayed for quashing of letter dt. 23.07.2019 (Annexure P-4) issued by the Bank, for issuance of a sale confirmation letter in his favour, and also for a direction to the respondent-Bank to issue a 'No Objection Certificate' of the properties in question in favour of the petitioner and get the entries cleared in the revenue record. Alternatively, petitioner also sought refund of ₹1.8 Crores deposited by the him towards 25% of the bid amount.

Events After filing of the Writ Petition

While issuing notice of motion, this Court on 27.08.2019, restrained the respondent-Bank from putting the above properties to sale, either by way of tender and e-auction, and this order was extended from time to time.

Reply Filed by the Respondent-Bank

The respondent-Bank has filed reply along with application for vacating the stay.

According to the Bank, the e-Auction/Tender Notice issued by it, contained the following conditions:-

“The Sale through e-Auction/by calling Tenders is being held on “AS IS WHERE IS” and “AS IS WHAT IS BASIS”.

Any other encumbrances know to the Bank- is not known. The Authorized Officer of the Bank shall not be responsible for any charge, lien, encumbrances, or any other

dues to the Government or anyone else in respect of properties auctioned. The Intending Bidder is advised to make their own independent inquiries regarding the encumbrances on the property including statutory liabilities, arrears of property tax, electricity dues etc.”

It is the contention of the respondent-Bank that in view of the above condition, it was the duty of the intending bidder to make his own independent enquiries regarding encumbrances on the property such as statutory liabilities, arrears of property tax, electricity dues etc., and the petitioner himself should have done proper due diligence before submitting his tender.

It also justified the forfeiture of the Earnest Money Deposit of ₹50,50,000/- which had been deposited by the petitioner on 24.05.2019, on the ground that 25% of the bid amount of ₹7.22 Crores i.e. ₹1,80,50,000/- was not deposited before 28.05.2019, and petitioner had deposited it with a delay only on 29.06.2019 and so it was justified in forfeiting the said amount and putting the property for fresh auction subsequently on 28.08.2019.

It, however, stated that in view of the order dt. 28.07.2019 the said auction of 28.8.2019 was deferred. It was also contended that the petitioner should have availed the alternative remedy under Section 17 of the Act before the Debts Recovery Tribunal, Chandigarh.

Learned counsel for the parties reiterated their respective contentions.

The consideration by the Court

The questions for consideration in the light of the above said pleadings are as under:-

a) Whether the Writ Petition is maintainable and the petitioner should be asked to avail alternative remedy under Section 17 of the SARFAESI Act, 2002 and the Writ Petition should be rejected on the ground of non-availment of the alternative remedy by the petitioner?

b) If not, whether the petitioner is entitled to any relief?

Question (a):

We shall first consider the question i.e.,

“ a) Whether the Writ Petition is maintainable and the petitioner should be asked to avail alternative remedy under Section 17 of the SARFAESI Act, 2002 and the Writ Petition should be rejected on the ground of non-availment of the alternative remedy by the petitioner?”

We may point out that this Writ Petition had been filed on 29.07.2019, almost three years back, and this Court had entertained this Writ Petition by issuing notice of motion, and granted interim relief which is subsisting till date.

At this point of time, 3 years later, in our opinion, it would be a travesty of justice to dismiss the Writ Petition on the ground of non-availment of the alternative remedy by the petitioner.

Also, as we shall point out later in this judgment, if there is a violation of the provisions of the Act by the respondent-Bank, the Writ Petition can be entertained by this Court, and it is not necessary to relegate the parties to avail alternative remedy.

Though counsel for respondents have placed reliance on the decision of the Supreme Court in the case of **Aggarwal Tracom Pvt.Ltd. vs. Punjab National Bank**¹ to contend that the Writ Petitions under Article 226 of the Constitution of India cannot be entertained when effective statutory remedy is available to the aggrieved person, in a later judgment rendered in the case of **Authorized Officer, State Bank of Travancore and Another Vs. Mathew K.C**², the Supreme Court held that there are well defined exceptions to the rule of exhaustion of alternative remedy as laid down in decision of **Commissioner of Income Tax and Others vs. Chhabil Dass Agarwal**³ and one of such exceptions mentioned in Para 15 of the said judgment is “*where the statutory authority has not acted in accordance with the provisions of the enactment in question.*”

Similar view has been taken by this Court also in the case of **M/s Skytone Electricals (India) Limited vs. Canara Bank and Others**⁴.

Therefore we reject the plea of the respondent that the Writ Petition ought to be dismissed in view of existence of alternative remedy under Sec.17 of the Act. Point (a) is answered accordingly.

Question (b)

Now we shall consider question (b) i.e.,

“Whether the petitioner is entitled to any relief?”

Admittedly, under the provisions of the Act, the secured creditor is enabled, in the event of default in payment of the loan, to sell the secured asset under Section 13(4) of the Act read with Rules 8 and 9 of the

¹ Order in SLP No.33514 of 2016

² 2018 (3) SCC 85

³ 2014 (1) SCC 603

⁴ Passed in CWP No.12301 of 2020 on 14.07.2020, Division Bench of Punjab and Haryana High Court.

Security Interest (Enforcement) Rules, 2002 (for short “the Rules”) after issuing notice under Sec.13(2) and taking symbolic possession by invoking Sec.13(4)/physical possession under Sec.14 of the Act .

We may also point out that under Rule 8(5) of the Rules, publication of the notice of sale is required to be made including mention therein about the *details of encumbrances known to the secured creditor [Rule 8 (6) (a)]*, and *any other thing which the Authorized Officer considers material for a purchaser to know in order to judge the nature and value of the property [Rule 8 (6) (f)]*

Having regard to the above provisions contained in the Act, a duty is cast upon the Authorized Officer to publish all details with regard to the property including details of encumbrances, if any, such as (i) whether the property is a vacant property or is in the occupation of a tenant, (ii) whether there is any other charge on the said property, (iii) any other details which are material for a purchaser to know in order to judge the nature and value of the property etc.

Merely by inviting the tender notice on “*as is where is basis*”, “*as it is where it is basis*” and “*whatever there is basis*” the Bank is not absolved of its statutory obligation of disclosing the encumbrances attached to the property brought for sale by way of tender or e-auction or sale by public auction.

In the case of **Rakesh Kumar Kaushal Vs. State of U.P. and Others**⁵, a Division Bench of the High Court of Allahabad High Court (Lucknow Bench) held :-

⁵ Manu/UP/4944/2018

“33....xxxxxxxxxx

34. In this regard, we would like to mention that relevant provisions of the SARFAESI Act and the Security Interest (Enforcement) Rules have already been quoted wherein sub rule (5) of Rule 8 of the Rules, 2002, provides for publication of the notice into leading newspapers which shall include details as set forth in sub-clause (a) to (f). Sub-clause 6 (f) of Rule 8 provides for publishing of "any other thing which the authorized officer considers it material for a purchaser to know in order to judge the nature and value of the property". In these circumstances, a duty is cast upon the Authorized Officer to publish all details with regard to the property, whether the property has any encumbrances or not, whether the property is a vacant property or is tenanted, whether there is any other charge on the said property, and all other details which is material for the purchaser to know in order to judge the nature and value of the property.

35. In the present case, the advertisement does not disclose any such detail about the property from which it can be easily inferred that the same is in possession of some third-party, or that there is a litigation pending or for some material reason, it would be difficult to obtain the vacant possession of the property. A joint reading of section 13 (4) of the SARFAESI Act and Rule 9 (clauses 9 and 10) would clearly show that the Authorized Officer, shall deliver the property to the purchaser, free from all encumbrances, on deposit of money as specified in sub rule 2. However, the aforesaid rule does not prevent the bank from bringing the property for auction, when there are encumbrances attached to the property. Merely, by including a clause "as is where is basis or as is what is" condition stated in the sale notice does not obviate the bank from disclosing the encumbrances attached to the property, brought for auction.

36. The bank cannot shrug off its responsibility in disclosing the encumbrances in the advertisement when it is known that transparency is the essence of good governance and fair play. Concept of transparency is becoming a core value in democratic

and participative governance. The public demand for transparency is getting stronger in good governance. Transparency is built on the basis of free flow of information and the whole process of government, institutions and information needs to be accessible to the interested parties, as well as the information provided should be sufficient to be understood.

37. The undisputed fact in the case at hand is that when notice under section 13(4) of the SARFAESI Act was issued by the Bank, the physical possession of the mortgaged property was not taken. There is a duty cast upon the Bank under clause (9) of rule 9 of the Rules, 2002 to deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in sub rule (7). In the writ petition it has rightly been asserted by the petitioner that he was shocked when he came to know that there were some defects in title of the aforesaid property and the same is defective, which was not disclosed by the Bank at any stage, rather it suppressed the material information.

38. It may be noted that when a person participates in auction to purchase a property, he relies on the auction notice and the documents shown to him by the secured creditor, as he is under a bona fide belief that any material aspect of the property must have been disclosed by the secured creditor inasmuch as the secured creditor is under a mandate to disclose any aspect which the Authorized Officer considers it material for the purchaser to know in order to judge the nature and value of the property as mandated under rule 8(6). The respondent bank has failed to disclose any such circumstance or material fact from which it could be gathered that the physical possession of the property would be difficult or near impossible. In the aforesaid circumstances the respondent Bank cannot take umbrage of the clause "as is where is" "as it is where it is" in order to deny physical possession of the auction property to the petitioner and to non-suit him. In other words, the respondent cannot shirk away the statutory responsibility to deliver possession of the

property free from all encumbrances, to the person who was paid full consideration for the said property.

39. Accepting the contention of the Bank would be absolutely inequitable, wholly arbitrary and may on the contrary permit withholding of necessary information by the secured creditor in relation to its valuation in order to seek a higher price of the property. If such an advantage is permitted, it would directly affect the credibility of the entire process and the object of the SARFAESI Act, which is sought to be achieved.

40. The third-party, who comes forward to purchase the secured asset must have the confidence that he would get the property at the earliest and in case, considerable long time is consumed in transferring the property not only it would defeat the purpose of the Act but would also cause colossal loss and injury to a auction-purchaser, like the petitioner.

41. In light of the above, we are of the considered opinion that by merely inserting a clause "as is where is" and "as is what is" the responsibility of the Bank does not get diluted nor it can in any manner assist the bank in denying physical possession to the auction purchaser."(emphasis supplied)

This decision was also confirmed by the Supreme Court in SLP No. 3493 of 2019 on 11.02.2019.

Similar view was also taken by the Division Bench of Telangana and Andhra Pradesh High Court in the case of **Mandava Krishna Chaitanya Vs. UCO Bank, Asset Management Branch**⁶.

Even in the said case, the Division Bench of the High Court for the States of Telangana and Andhra Pradesh held that a secured creditor, who is empowered under the Act to enforce any secured interest created in its favour, without intervention of a Court or a Tribunal has to act strictly in accordance with the procedure prescribed therefor, and cannot take the

⁶ 2018(2) ALT 640; passed in Writ Petition No.39084 of 2017 decided on 21.0.2018.

responsibility resting upon it lightly; that such a secured creditor not only owes a duty to protect the interest of the borrower by raising the best possible price while selling his mortgaged properties, but also owes a duty to the auction purchaser to verify the encumbrances that attach to the mortgaged property proposed to be sold, so as to inform all intending bidders of the same; Clauses (a) and (f) in the proviso to Rule 8(6) of the Rules of 2002 bear out this responsibility explicitly, as the secured creditor is mandated thereunder to include the details of the encumbrances known to it and also any other thing which may be considered material for a purchaser to know in order to judge the nature and value of the property.

It held that these clauses impose a duty upon the secured creditor to undertake due diligence at least at the stage of putting the secured asset to sale, if not at the time of taking the said property as security while granting loans, so that the bidders in the auction can rest assured that the secured creditor has taken necessary measures in this regard and proceed to participate in the auction sale.

It also held that ignorance of the secured creditor as to the encumbrances on the property sold by it is no longer an acceptable argument in the light of the decisions of various Courts rejecting the plea that a sale on ‘*as is where is*’ basis constitutes a shield of protection.

It went on the held that the concept of ‘as is where is’ and ‘as is what is’ basis has lost its significance in the current commercial milieu and the principle of *caveat venditor* is more on the rise as compared to the outdated principle of *caveat emptor*; that the Transfer of Property Act, 1882, requires the seller to own up to certain duties and it is not open to a

responsible bank to take an innocent auction purchaser for a ride by selling to him a tainted property and thereafter claim protection under the principles of 'buyer beware'.

It held that the innocent Auction Purchasers cannot be victimized by the Banks by the carelessness of exercising minimum care to ascertain the encumbrances attached to the secured asset, and if it proceed to sell the property without informing the bidders of the same, such a sale would be vitiated.

This decision was also upheld by the Supreme Court in SLP No. 8022 of 2018 on 09.04.2018.

In another case **Shaik Janimiya Vs. State Bank of India, SAM Branch II, Rep by its Authorized Officer, Kachiguda, Hyderabad**⁷ passed by the Division Bench of Telangana High Court, of which one of us (M.S. Ramachandra Rao, J. is a member) the decision in **Mandava Krishna Chaitanya (Supra 6)** has been followed and the principle that the Bank cannot hide behind the conditions 'as is where is basis' mentioned in the sale notice, and harass the innocent Auction Purchasers was reiterated.

There is a civil litigation in respect of these assets for which the tender notice was given by the Bank and it is corroborated by the material filed by it along with its reply.

According to the *jamabandi* in relation to both lots, there is an order passed by the Additional Civil Judge, Amloh on 26.03.2013 and another order dt. 21.01.2016 passed by this Court.

The latter order is in fact one wherein in the Civil Suit C.S.No.201 of 15.10.2011 filed by a third party Gurdeep Singh against the

⁷ 2020(4) Andh LD 397

M/s Krishna Agricultural Steel Works and others, the trial Court i.e. Civil Judge, Junior Division, Amloh had dismissed on 19.12.2012 an application under Order 38 Rule 5 of the CPC for attachment of the property, but the High Court in Civil Revision No.2147 of 2013 had reversed the same by passing an order in the Civil Revision, and set aside the order of the Civil Judge, Junior Division, dt. 19.10.2012 (Annexure R-8). The suit itself was later decreed on 31.1.2017 (Annexure R-9).

As per Or.XXXVIII Rule 11 CPC, where property is under attachment by virtue of the provisions of the said Order XXXVIII CPC and a decree is subsequently passed in favor of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for re-attachment of the property. So the attachment before judgment granted shall be effective and operative *even after* passing of the decree and while executing the decree it is not necessary to re-attach the property.

So if the petitioner had to get clear title from the Bank pursuant to the tender /public notice dt.24.4.2019 (P4), he would have to satisfy the said decree in the above suit as well. Had the petitioner been aware of this, he might not have participated in the tender issued by the Bank at all.

No intending purchaser wants to buy fresh litigation or take on other unknown liabilities against third parties, and it was the statutory duty of the Bank to disclose them in the public notice/tender notice. So the action of the respondent Bank is arbitrary and contrary to the provisions of the Act.

It is strange that these documents are disclosed along with reply affidavit had not been taken into account for disclosing in the tender/public notice dt.24.4.2019 (P4) (under Rule 8(6) (f)) the existence of civil court

decree which undoubtedly would have a bearing on the willingness of the bidder to participate in a Public Auction/Tender notification and would also have impact on the price being offered.

For all these reasons, we are of the opinion that the Bank has failed to act in a transparent manner, and had acted inequitably and arbitrarily.

Accordingly, the Writ Petition is partly allowed and the respondent-Bank is directed to refund to the petitioner a sum of ₹1.80 Crores deposited by the petitioner with interest @ 7% per annum from the respective dates of deposit of such amount within 4 weeks from today. It shall also pay costs of ₹25,000/- to the petitioner.

In view of this relief being granted to the petitioner, the other reliefs sought by the petitioner are rejected.

(M.S. RAMACHANDRA RAO)
JUDGE

(HARMINDER SINGH MADAN)
JUDGE

19.07. 2022

Ess Kay

<i>Whether speaking / reasoned</i>	:	<i>Yes /No.</i>
<i>Whether Reportable</i>	:	<i>Yes/No</i>