

2023 LiveLaw (SC) 308

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
AJAY RASTOGI; J., BELA M. TRIVEDI; J.
APRIL 11, 2023.

CIVIL APPEAL NO(S). 2724 OF 2023 (Arising out of SLP(Civil) No(s). 17470 of 2019)
MOHD. SHARIQ versus PUNJAB NATIONAL BANK AND OTHERS

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 - Security Interest (Enforcement) Rules, 2002 - Rule 9(5) of SARFAESI Rules cannot be pressed into service since the auction purchaser was not informed regarding the proceedings pending before DRT at the time of auction or even thereafter - Directs refund of the deposit forfeited by the bank.

(Arising out of impugned final judgment and order dated 10-03-2016 in SPA No. 387/2015 passed by the High Court of Uttarakhand at Nainital)

For Petitioner(s) Mr. Dhaval Mehrotra, AOR Mr. Gaurav Agrawal, Adv. Mr. Dhaval Mehrotra, Adv. Mr. Prajwal Hallur, Adv.

For Respondent(s) Mr. Rajesh Kumar Gautam, AOR Mr. Anant Gautam, Adv. Mr. Sumit Sharma, Adv. Ms. Anani Achumi, Adv. Ms. Madhumita Bagchi, Adv. Mr. Awanish Sinha, AOR

J U D G M E N T

Rastogi, J.

1. Leave granted.
2. The present appeal is directed against the judgment and order dated 10th March, 2016 passed by the Division Bench of the High Court of Uttarakhand, Nainital whereby the High Court while reversing the finding returned by the learned Single Judge under its order dated 21st July, 2015 upheld the re-auction proceedings initiated by the first respondent(Punjab National Bank-secured creditor) held on 1st May, 2014 and granted liberty to the appellant to initiate independent proceedings before the competent forum for recovery of the amount which stood forfeited by the first respondent.
3. The seminal facts culled out from the record and relevant for the purpose are that the third respondent borrowed money from the first respondent. However, the third respondent later became defaulter and its bank accounts became NPA and ultimately notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002(hereinafter being referred to as the “Act 2002”) was issued and thereafter assets of the borrower were taken into possession under Section 13(4) of the Act, 2002. In furtherance thereof, auction notice was published by the Bank on 18th June, 2013 with reserve price of Rs.1.19 crores inviting the bids in reference to the mortgage property of the borrower.
4. The appellant who was the successful bidder furnished his bid of Rs.2,01,00,000/- on 22nd July, 2013 and deposited earnest money of Rs.11,19,000/- as per the condition of the bid/auction which successful bidder has to deposit (25% of the bid amount) on acceptance of the bid and that was deposited on 27th July, 2013.
5. On 25th July, 2013, the borrower (third respondent) preferred an appeal before the Debt Recovery Tribunal, Lucknow(hereinafter being referred to as “DRT”)

assailing the auction notice dated 18th June, 2013. DRT vide order dated 26th July, 2013, after hearing the counsel for the borrower, passed an interim order directing that since auction is to be held on that day itself (i.e. 26th July, 2013), the Bank is at liberty to proceed with the auction but confirmation of the sale shall be kept in abeyance and await further orders of DRT.

6. The auction was held on 26th July, 2013. It is an admitted fact that the appellant was completely unaware of the interim order passed by DRT on 26th July, 2013. As the highest bidder, the appellant had to deposit 25% of the bid amount which he deposited on 27th July, 2013 amounting to Rs.38,35,000/- (balance of 25% of the bid) which the first respondent accepted.

7. In total, the appellant deposited an amount of Rs.50,25,000/which included earnest money and 25% of the bid amount. The DRT later vacated the interim order due to non-prosecution on 14th October, 2013 but the substantive proceedings before the DRT remained pending and were posted for 18th October, 2013. Since the appellant was completely unaware of the pending proceedings before the DRT initiated at the instance of the third respondent(borrower) and it was nowhere indicated in the auction notice which ordinarily in the instant fact situation would not have been possible but the date when auction was held on 26th July, 2013 and the appellant was called upon to deposit the earnest money and 25% of the bid amount, no such information was extended to the appellant about the pending proceedings in reference to the auction notice published on 18th June, 2013 before the DRT.

8. The appellant was, for the first time, informed by a communication dated 18th October, 2013 wherein he was asked to pay the balance amount as interim relief has been rejected by DRT. The appellant responded to the communication made and submitted that he volunteers to pay the balance amount provided the matter pending with DRT is decided. Certain communications were made between the appellant and the first respondent. However, the first respondent later informed the appellant by communication dated 28th October, 2013 that if he fails to deposit the balance amount of the auction bid, the first respondent may forfeit the earnest money.

9. There is no material on record to substantiate that the first respondent ever passed the order to forfeit the money deposited by the appellant pursuant to the communication dated 28th October, 2013 of which a reference has been made.

10. Without awaiting any further action, the first respondent initiated the re-auction proceedings pursuant to notice dated 5th March, 2014. Immediately, when this fact came to the notice of the appellant, he approached the High Court by filing writ petition under Article 226 of the Constitution seeking Mandamus to withhold re-auction proceedings which has been initiated by the first respondent pursuant to notice dated 5th March, 2014 and further prayed directing the first respondent to execute the sale deed in favour of the appellant on deposit of the balance money of the auction bid or in alternative, refund the amount which the appellant had deposited pursuant to the auction proceedings initiated in reference to notice dated 18th October, 2013.

11. On the request made by the appellant, the High Court, by interim order permitted the re-auction proceedings to proceed further, but made the auction subject to the outcome of writ proceedings. It reveals from the record that in the pending proceedings before the High Court, to test bona fides of the appellant, the High Court directed the appellant to deposit Rs.1.77 crores, after adjustment of the sum already

deposited with 10% interest, which indisputedly the appellant deposited on 10th March, 2015 . It is informed that the highest bid of Rs.1,70,50,000/- in re-auction held on 5th March, 2014 against Rs.1.70 Crore as a reserve price was confirmed and the sale deed was executed by the first respondent in favour of the subsequent purchaser on 1st May, 2014.

12. Taking note of the bona fides of the appellant, as a final bid amount was deposited in compliance of order of the High Court, the learned Single Judge keeping in view the paramount principle that the mortgaged property must fetch the maximum realizable value on which the security interest was created, set aside the re-auction proceedings and directed the first respondent to execute the sale deed in favour of the appellant and directed that the amount deposited by the appellant, i.e., of Rs.1.77 crore be adjusted by the first respondent and money deposited by the subsequent auction purchaser be returned with 10% interest under its order dated 21st July 2015.

13. The extract of the order dated 21st July, 2015 passed by the learned Single Judge is referred as under:-

“Consequently, writ petition succeeds and is hereby allowed. Re-auction held pursuant to the re-auction notice dated 05.03.2014 in favour of respondents nos.07 and 8 sale dated executed in favour of respondent no.7 and 8 on 27.05.2014 is hereby held invalid. Consequently, sale certificate dated 01.05.2014 issued in favour of respondent nos. 7 and 8 and sale deed executed in favour of respondent no. 7 and 8 on 27.05.2014 is hereby declared void and non est. Mandamus is issued against the Bank to execute sale deed in favour of the petitioner at the earliest, in any case, within two weeks from today. Bank shall be at liberty to withdraw Rs.1,77,00,000/- deposited by the petitioner with the Registrar General of this Court. Bank is further directed to refund the amount taken from respondents no.7 and 8 along with 10% interest thereon within two weeks from today. It is, however, made clear that sale in favour of the petitioner shall be subject to the final decision in the case pending before the D.R.T. No cost.”

14. The order of the learned Single Judge came to be challenged by the subsequent auction purchaser before the Division Bench of the High Court. The High Court, after hearing the parties, was of the view that no error was committed in the re-auction proceedings initiated pursuant to notice dated 5th March, 2014 and at least the subsequent auction purchaser was not at fault and if there is no error been committed in the decision making process adopted by the first respondent, there appears no reason to set aside the re-auction proceedings initiated in reference to notice dated 5th March, 2014 and accordingly while upholding the re-auction proceedings directed the first respondent to return the sum of Rs.1.77 crores which was deposited by the appellant pending proceedings with accrued interest before the learned Single Judge of the High Court and so far as the amount which stands forfeited, liberty was granted to the appellant to avail appropriate remedy for recovery as admissible under the law. The operative part of the order of the Division Bench of the High Court dated 10th March, 2016 is quoted hereunder:-

“The upshot of the above discussion is that the appeal filed must be allowed; the directions issued by the learned Single Judge must be set aside; and the writ petition must be dismissed. However, we would think that, in regard to the question about the forfeiture of Rs.50,00,000/- which has been effected by the respondent Bank, we should leave it open to the writ petitioner to seek appropriate remedy before the competent forum, if advised. The amount, however, deposited by the writ petitioner in a sum of Rs.1,77,00,000/-, which has been directed to be put in Fixed Deposit under orders of this Court, shall be returned to the writ petitioner along with the accrued interest.”

15. The order of the Division Bench of the High Court became a subject matter of challenge in appeal before us.

16. Learned counsel for the appellant has made a limited submission that so far as the money which has been forfeited by the first respondent is concerned, no finding to the contrary has been recorded by the Division Bench of the High Court under the impugned judgment that the appellant is not qualified to claim the amount forfeited by the first respondent still left the appellant to avail the remedy which the law permits.

17. Learned counsel further submits that there is no requirement of adopting any other remedial mechanism when there is no dispute either on facts or on law that the sum which was forfeited by the first respondent pursuant to the auction proceedings initiated in reference to notice dated 18th June, 2013, the appellant is qualified to seek refund of the amount forfeited and it is an apparent manifest error committed by the High Court under the impugned judgment and at least the appellant is entitled to refund of the amount deposited and if the appellant is being thrust upon to adopt any other remedial mechanism, it will cause great injustice to him and needs interference of this Court.

18. Per contra, learned counsel for the first respondent Bank submits that as per terms and conditions of the auction notice dated 18th June, 2013, since the appellant has failed to deposit the balance amount of the auction bid within the time stipulated, despite reasonable opportunity being afforded, the first respondent is justified in taking a decision of forfeiture of the earnest money.

19. Learned counsel further submits that the decision taken by the first respondent regarding forfeiture is in accordance with Rule 9(5) of the Security Interest(Enforcement) Rules, 2002(hereinafter being referred to as the "Rules 2002") and in the facts and circumstances, no error was committed by the respondent Bank in taking decision of forfeiture of the amount deposited in reference to auction notice dated 18th June, 2013.

20. Learned counsel further submits that earlier when the auction notice dated 18th June, 2013 was published, the highest bid of the appellant was of Rs.2.01 crores but because of the litigation, the highest bid in the subsequent auction proceedings pursuant to notice dated 5th March, 2014 was of Rs.1,70,50,000/-. Thus, it was because of the appellant the distress value of the property was deflated and thus it is only the appellant who is responsible to bear the loss and if the first respondent is directed to refund the money forfeited, it may be in contravention to Rule 9(5) of Rules, 2002, thus the finding returned by the Division Bench of the High Court needs no interference.

21. We have heard learned counsel for the parties and with their assistance perused the material available on record.

22. We have already noticed the narration of facts but it will be apposite to summarise for better appreciation. The auction notice, in the first instance, was published on 18th June, 2013 with the reserve price of Rs.1.19 crores and the appellant's bid of Rs.2.01 crores was the highest. The earnest money of Rs.11.19 lakhs was deposited on 22nd July, 2013 and the bid was finalized on 26th July, 2013 and 25% of the bid in terms of the auction notice of Rs. 38.35 lakhs was deposited by the appellant on 27th July, 2013. This fact has not been disputed that DRT passed an interim order on 26th July, 2013 and the fact that the proceedings had been initiated

and pending on the date when the auction was held and the date on which 25% of the bid amount was deposited by the appellant, i.e., 27th July, 2013, was never brought to the notice of the appellant which would give him an option to revisit as to whether he may proceed with the auction or withdraw at that stage.

23. This fact can be further corroborated which has come on record that even when the correspondence was made by the first respondent, the only request made by the appellant throughout was that he had no difficulty to pay the balance amount provided the matter is finally decided by DRT. Obviously, as a man of ordinary prudence, one is always supposed to assess the value of the property on which the auction was held by the secured creditor (first respondent). To test the bona fide of the appellant, when the subsequent auction proceedings at the later stage were initiated pursuant to notice dated 5th March, 2014 with the reserve price of Rs.1.70 crores and the highest bid was of Rs.1,70,50,000/-, just Rs.50,000/- above the reserve price and pending proceedings before the learned Single Judge, appellant was called upon to deposit the balance of Rs.1.77 crores (in terms of his bid of Rs.2.01 crores) without fail, it was deposited by him on 10th March, 2015 and that was the reason which persuaded the learned Single Judge not only to set aside the subsequent auction held dated 5th March, 2014 but further directed to the first respondent to execute the sale deed on the final bid of Rs.2.01 crores being deposited, in favour of the appellant.

24. The Division Bench of the High Court although has reversed the finding so far as the subsequent auction proceedings held pursuant to notice dated 5th March, 2014 is concerned, the appellant has no quarrel with the same. The only grievance of the appellant is relegating him to avail remedy which the law permits for recovery of the amount forfeited, there appears, in our view, no justification in the facts and circumstances particularly when the factual matrix is not in dispute and the money deposited by the appellant towards earnest money and the first instalment of 25% in terms of the auction notice dated 18th June, 2013 is the accepted fact by either party.

25. We are of the considered view that once there is no dispute on the facts came on record, there appears no reason for the appellant to be relegated to avail other remedial mechanisms for recovery of the undisputed amount and the Division Bench has committed a manifest error in the facts and circumstances in not exercising its power under Article 226 of the Constitution and instead of resolving the dispute, the Division Bench under the impugned judgment has kept the issue alive, permitting the parties to have a second innings in reference to the dispute which stands crystalized/settled.

26. So far as the submission made by the first respondent in reference to Rule 9(5) of the Rules, 2002 is concerned, that may not be of any assistance for the reason that ordinarily if the highest bidder fails to deposit the balance amount of the purchase price, in terms of 9(4) within the stipulated period and commits default, its consequence is stipulated under Rule 9(5) of the Rules, 2002. But the instant case was not a case of simple default. The appellant has come with the bona fide defence that he was never informed on the date when the auction was held or day thereafter that the substantive proceedings are pending before the DRT instituted at the instance of the borrower. As a man of ordinary prudence, if someone has been called upon to participate in the bidding process, the facts must be made clear to the parties for the reason that there is always a high variance between market realizable value and the

distress value of the mortgaged property when put to public auction under the provisions of the Act, 2002.

27. We further make it clear that since the appellant filed the present appeal after a long delay which we have condoned as such, he is not entitled to any interest on the amount forfeited by the first respondent.

28. Consequently, the appeal succeeds and accordingly allowed. The first respondent is directed to return the money of Rs.50.25 lakhs to the appellant deposited in reference to the auction notice dated 18th June, 2013 within a period of two months failing which it shall carry interest @ 12% per annum until the date it is made over to the appellant. No costs.

29. Pending application(s), if any, shall stand disposed of.

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