

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
ORIGINAL SIDE

Present :-

THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA.

IA No. GA 2 of 2022

in

W.P.O. 2166 of 2022

Avlokan Commosales Private Limited & Anr.

Vs

State Bank of India & Anr.

For Phoenix / Applicant : Mr. Shaunak Mitra, Adv.
Mr. Shaunak Ghosh, Adv.
Mr. Arindam Paul, Adv.
Mr. Saptarshi Saha, Adv.

For the Writ Petitioners : Mr. Siddhartha Mitra, Sr. Adv.
Mr. Roibat Banerji, Adv.
Ms. Natasha Roy, Adv.

For the Respondent Bank : Mr. Joy Saha, Sr. Adv.
Mr. Sarvesh Chandra Shrivastava, Adv.
Mr. Samir Kr. Das, Adv.
Mr. Somnath Mukherjee, Adv.

Last Heard on : 30.11.2022.

Delivered on : 06.12.2022.

Moushumi Bhattacharya, J.

1. The applicant Phoenix ARC Private Limited seeks to intervene and be added as a party respondent in the writ petition. The writ petitioners are the successful auction purchasers of a property which was put on sale by the State Bank of India (SBI) as the financial creditor. The property was of Sancheti Electronics Ltd. (debtor) and was put on sale under the SARFAESI Act, 2002. However, before the Sale Certificate could be issued by SBI in favour of the writ petitioners, the Debts Recovery Tribunal passed an injunction on 7th August, 2018 in an application filed by the borrower challenging the auction sale. The Sale Certificate hence could not be issued to the writ petitioners until the injunction was vacated in March, 2022. The writ petitioners had paid the entire consideration amount to SBI pursuant to being declared as the successful auction purchaser on 2nd August, 2018. The amounts paid by the writ petitioners as the successful auction purchasers to SBI became due and payable and the present writ petition was filed for a direction on SBI for refund of an amount of Rs. 55,19,250/- along with interest.

2. The applicant Phoenix ARC claims that SBI assigned the borrower's dues to Phoenix by a Deed of Assignment dated 27th January, 2020 and thus Phoenix stepped into the shoes of SBI and is hence a necessary and proper party to the writ petition. Learned counsel appearing for Phoenix submits that the disputes with the borrower were amicably settled by Phoenix and the DRT proceeding was disposed of on 1st March, 2022. It is submitted that the

settlement did not have any bearing on the auction sale of the property in favour of the writ petitioners. It is further submitted that the applicant issued the Sale Certificate for the property in favour of the writ petitioners on 28th March, 2022 and a corrected Sale Certificate on 29th March, 2022. Counsel complains that the applicant was however not made a party to the writ petition and that issuance of the Sale Certificate is a crucial fact since that would disentitle the writ petitioners from claiming return of the sale consideration.

3. According to learned counsel appearing for the writ petitioners, the amount became due and payable from SBI prior to the Deed of Assignment dated 27th January, 2020 between SBI/Assignor and Phoenix/Assignee. Counsel submits that although the writ petitioners paid the consideration amount to SBI, the writ petitioners lost interest in purchasing the property by reason of the passage of time and are now entitled to refund of the same. Counsel submits that SBI as the assignor can always claim adjustment of the money from the assignee/Phoenix who seeks to intervene in the writ petition. It is urged that the writ petitioners did not receive or accept the Sale Certificate dated 28th March, 2022 which Phoenix allegedly issued to the writ petitioners.

4. SBI sought to submit its Note after the matter was made reserved for judgment. It is evident from the Note that SBI is taking up the cause of the applicant and wants Phoenix to be impleaded as a party respondent in the writ petition. The Note reflects that SBI has also addressed on the merits of the case.

5. The issue before the Court is whether the applicant, Phoenix ARC, is a necessary or proper party whose presence is required for adjudicating the dispute in the writ petition. The following dates are relevant for this adjudication.

6. The writ petitioners paid Rs. 55,19,250/- to SBI pursuant to the writ petitioners being declared the successful auction purchasers for the property of the borrower which was put on sale by SBI. The writ petitioners put in the money for purchase of the property soon after being declared the successful bidder in the auction sale in August, 2018. SBI however failed to hand over the Sale Certificate to the writ petitioners in view of an injunction passed by the DRT on 7th August, 2018. The injunction remained in force till March, 2022, thus depriving the writ petitioners of the right of possession and enjoyment of the property despite having put in the entire consideration money. The petitioners were hence kept waiting for the Sale Certificate of the property in question for almost four years. Significantly, SBI received the money from the petitioners in four tranches between 25th July, 2018 and 14th August, 2018. The order of injunction of DRT was passed on 7th August, 2018 which makes it clear that SBI received the money from the petitioner even after the order of injunction on the sale was passed and being fully aware of the said fact.

7. It is also undisputed that the petitioners demanded refund of the money advanced to SBI by letters dated 10th October, 2018 and 13th December, 2019 which form part of the writ petition. By a letter dated 12th October, 2018, SBI

informed the petitioners that the bid amount cannot be refunded by reason of the matter being sub-judice before the DRT.

8. There is clearly no privity of contract between the writ petitioners and the applicant Phoenix. On the other hand, the privity of contract is between the writ petitioners and SBI. The writ petitioners paid the consideration money to SBI in July and August, 2018 and the claim for refund was made in October, 2018 and December, 2019 which is borne out from the letters exchanged between the petitioners and SBI.

9. The Deed of Assignment between the SBI and Phoenix/applicant dated 27th January, 2020 is an event which is admittedly subsequent to the petitioners' payment of consideration for purchase of the property and even subsequent to the claim for refund of the amount. The records do not reflect that the writ petitioners either by conduct or by writing agreed to the devolution of SBI's liability to Phoenix or that Phoenix became a party to the contract between the petitioners and SBI at any point of time. The material on record, including the correspondence between the petitioners and SBI, accordingly point only to one direction; that the liability to refund the consideration money is solely that of SBI with who the petitioners have privity of contract.

10. Whether the petitioners have made out a case for refund of the consideration money will be decided in the writ petition which is ready for hearing and in which the SBI has not filed its affidavit despite directions for

such. The facts indicate that there is little doubt that the issue in the writ petition can be decided without the presence of the applicant as the liability to refund the money is only of SBI; such liability having arisen pursuant to SBI receiving the money from the petitioners in July-August, 2018. The Deed of Assignment dated 27th January, 2020 between SBI and Phoenix was executed much after the petitioners claim for refund of the money from SBI. Hence, the presence of Phoenix as the alleged assignee is not necessary for adjudicating on the issue of refund of the bid amount from SBI to the petitioners.

11. In this context, two orders passed by a Coordinate Bench are of relevance. By an order dated 17th May, 2022, the Court observed that it was not satisfied with the stand of SBI which had admittedly received monies from the petitioners and has reaped the benefit of the same. The Court also observed that the transaction between Phoenix and SBI is of no concern to the petitioners. SBI was accordingly directed to deposit Rs. 55,19,250/- along with interest at 14% per annum with the Registrar, Original Side of this Court within a specific period of time. The prayer of SBI to add Phoenix as a party was left to be decided upon a formal application being filed for the same. Moreover, an application filed by SBI for recalling the aforesaid order was dismissed by an order dated 15th June, 2022 with costs of Rs. 11,000/-. SBI unsuccessfully challenged the rejection of the recalling application before the Division Bench.

12. The undisputed facts stated above together with the orders passed by the Coordinate Bench persuade this Court to hold that the Phoenix/applicant, who

claims to be an assignee of SBI's liabilities, is canvassing the cause of SBI with reference to the petitioners' claim for refund of the consideration money. The oral submissions made to the Court also indicate that SBI likewise is advocating the cause of Phoenix. This Court is however not convinced with either the stand taken by SBI or Phoenix since the latter can have no direct interest in the subject-matter of the writ petition having entered the picture almost two years after the petitioners made payment of the consideration money to SBI and long after the petitioners claimed for refund from SBI. The presence of Phoenix is not necessary for adjudication of the dispute in the writ petition as the dispute is entirely between the petitioners and SBI.

13. In *M/s. Gammon India Ltd. vs. Union of India; (1974) 1 SCC 596*, a 5-Judge Bench of the Supreme Court held that an intervener cannot raise points which are not canvassed by the petitioners in the pleadings. This decision fits in squarely with the present facts.

14. The application for intervention and addition of Phoenix as a party respondent to the writ petition hence fails for the above reasons. The reliance on Order I Rule 10(2) of The Code of Civil Procedure, 1908 is of no assistance to the applicant or to the SBI since under the said provision, the onus is on the Court to pass an order if the Court finds that a party has been wrongly impleaded. Order I Rule 10(2) also comes in where the Court deems it necessary to pass orders for effective and complete adjudication of the questions involved in the suit. The view of the Court that the applicant is

neither a proper nor a necessary party has already been stated in the preceding paragraphs of this judgment.

15. GA 2 of 2022 is accordingly dismissed without any order as to costs. The parties shall be at liberty of mentioning the writ petition for early hearing.

Urgent Photostat certified copy of this Judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)