

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Partha Sarathi Chatterjee

FMA 1017 of 2021
with
IA No. CAN 1 of 2022
Anita Tosniwal
-Versus-
The Reserve Bank of India & Ors.

For the Appellant : *Mr. Abhrotosh Majumdar, Ld. Sr. Adv.,*
Mr. Nilotpal Chatterjee,
Mr. Sourabh Sengupta,

For the SBI/Respondent No.2 : *Mr. Soumya Roy,*
Mr. Santosh Mahato,
Ms. Benazir Kazi.

For the Central Bank of
India/ Respondent
Nos.3 to 6 : *Mr. Gautam Chakraborty.*

Hearing is concluded on : *18th May, 2023.*

Judgment On : **9th June, 2023.**

Tapabrata Chakraborty, J.

1. The present appeal has been preferred challenging the order dated 17th June, 2019 passed in a writ petition being WP No.19604 (W) of 2016.

In connection with the appeal, the appellant/writ petitioner has also filed an application for appropriate order being CAN 1 of 2022.

2. The appellant's case is that the respondent no.5 published a notice in the newspapers on 29th September, 2012 for e-auction of different immovable properties. The appellant participated in the auction held on 1st November, 2012 conducted by the Central Bank of India (hereinafter referred to as CB) in respect of a flat being Flat no. D & E on the first floor of Sushila Niketan located at AF-337, Hanapara, Kolkata-70012 (hereinafter referred to as the said flat), as detailed in serial no. 11(b) of the auction notice. The appellant submitted a bid of Rs.35,00,000/- and emerged to be the highest bidder. Upon acceptance of the bid amount, the sale certificate was issued on 27th December, 2012. The sale deed pertaining to the said flat was thereafter executed on 28th August, 2014 and the original title deed being no. 8450 of 2007 was also handed over to the appellant. Suddenly, on 7th September, 2015 a possession notice was affixed in the said flat. Stating such fact the appellant lodged a complaint on 29th September, 2015 before the Banking Ombudsman but in vain. Again on 29th April, 2016, persons claiming to be the recovery agents of SBI visited the flat and threatened to dispossess the appellant. On 4th May, 2016, the appellant lodged a complaint before the DGM, Stressed Assets Management Branch, SBI and in reply, the appellant was communicated a memo dated 19th May, 2016 by the Authorised Officer (in short, AO) of SBI intimating *inter alia* that the flat in question was owned by one Gaurav Surana (Jain) *vide* original deed no.8450 of 2007 and the same had been mortgaged to SBI as security for sanctioning

credit facilities to M/s Bhagwati Lifestyle Private Limited. The said account became NPA on 27th February, 2012 and accordingly a notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short, SARFAESI Act) was issued on 22nd December, 2012 and possession was taken under Section 13(4) of the SARFAESI Act on 20th September, 2013. Thereafter, the appellant through her learned advocate issued a demand notice dated 7th June, 2016 protesting against the acts of the CB and claiming refund of the consideration amount along with interest. As there was no response, the appellant was constrained to prefer the writ petition. During pendency of the writ petition, the Investigating Officer, Central Bureau of Investigation (in short, CBI) by a notice dated 19th September, 2017 intimated the appellant that CBI has started a case being CBI Case No.RCBSK2016E0004 dated 18th March, 2016 relating to bank fraud on SBI. In connection with the said case, the mother deed pertaining to the flat in question being deed no.8450 of 2007 was also seized from the appellant. Such facts were brought on record by filling a supplementary affidavit.

3. The writ petition was dismissed for default on 5th March, 2019. The restoration application filed thereafter was allowed by the order impugned and the writ petition was disposed of observing *inter alia* that '*apparently, there are title disputes in respect of an immovable property. State Bank of India is also claiming security interest in respect of the same immovable property which was sold by Central Bank of India. A decision may be required as to which of the Banks has a better or a simpler right title and*

interest in respect of the immovable property concerned. It is for the parties to have the disputes resolved before the appropriate forum, in accordance with law. A writ Court need not enter into title disputes’. After filing of the appeal, the Assistant Director, Prevention of Money Laundering Act, 2002 (in short, PMLA) *vide* notice dated 26th November, 2021 had taken over possession of the said flat and the said notice stands annexed to the application for appropriate order. The notice also specifies that the order of provisional attachment was passed on 31st March, 2020.

4. In the present appeal, CB has affirmed an affidavit stating *inter alia* that one M/s Mahavir Textiles availed of credit facility upon mortgaging the flat in question. As the borrower defaulted, the loan account was declared NPA on 31st October, 2011 and subsequent thereto, notice under Section 13(4) was issued on 26th April, 2012. The said flat was put up for sale *vide* notice dated 29th September, 2012 and was auctioned on 1st November, 2012. Thereafter, CB issued sale certificate on 27th December, 2012 stating *inter alia* that the property had been sold on ‘As is where is basis’ and ‘As is what is basis’. The deed was thereafter executed on 28th August, 2014 and the appellant was handed over possession along with the original title deed to the appellant. Upon being served a copy of the writ petition on 8th September, 2016, CB came to learn that in respect of the said flat, SBI also issued notices under Section 13(2) and Section 13(4) of SARFAESI Act.

5. The respondent no.2 being the SBI also filed an affidavit-in-opposition stating *inter alia* that the said flat was mortgaged to SBI and as the borrower failed to repay, notices under Section 13(2) and Section 13(4) of

the SARFAESI Act were issued. The Section 13(4) notice was also published in the newspaper on 25th September, 2013. The mother deed on the basis of which loan was allegedly granted by CB was not genuine and the mortgage of the demised flat to the respondent no.3 was fraudulent.

6. Mr. Majumdar, learned advocate appearing for the appellant submits that the impugned order has been passed without appreciating the admitted facts and the writ petition has been disposed of on the basis of an erroneous observation that '*apparently, there are title disputes in respect of an immovable property*'. The writ Court without going into the merits of the appellant's claim and without appreciating that the appellant had been a victim of the fraud practised, refused her prayer towards refund of the consideration money along with interest moreso when the writ Court has the jurisdiction to set aside a statutory sale.

7. He contends that the appellant was caught in the cross fire between CB and SBI. Gaurav Surana was the original owner of the said flat, who purchased the same by a deed no. 8450 of 2007 and mortgaging the said deed, loan was obtained from CB and SBI. In the said conspectus and as it was explicit from the records that fraud had been practised, the observation of the learned Judge that '*a decision may be required as to which of the Banks has a better or a simpler right title and interest in respect of the immovable property concerned*' is otiose. The appellant who had invested her money and had been a *bona fide* purchaser cannot be asked to wait till a final decision is taken in the proceedings initiated by CBI, to get back possession of the flat or the money expended.

8. Drawing our attention to the sale certificate issued in favour of the appellant by CB on 27th December, 2012, Mr. Majumdar submits that a conscious statement was incorporated in the said certificate to the effect that *‘the sale of the scheduled Property was made free from all encumbrances known to the secured creditor listed below on deposit of the money demanded by the undersigned’*. It is, however, surprising as to how such a specific statement could have been incorporated in the sale certificate when admittedly a notice under Section 13(2) of the SARFAESI Act had already been issued by SBI on 22nd December, 2012 pertaining to the self-same flat.

9. He argues that on the date of issuance of the sale certificate as well as on the date execution of the sale deed, the CB authorities were very much aware of the fact that the flat in question was not free from encumbrances as the SBI authorities had also claimed right over the same. On one hand the CB authorities had issued the sale certificate and executed a deed in favour of the appellant upon receipt of the consideration money and on the other hand they had taken a plea that as the flat was purchased on *‘as is where is basis’* and *‘as is what is basis’*, the appellant cannot claim refund. It was incumbent upon the CB authorities to conduct proper enquiry and to ascertain as regards existence of encumbrances over the property before publishing the auction notice. For their laches the appellant cannot suffer.

10. He further argues that the CB authorities while conducting the sale were under an obligation to strictly follow Rule 8 of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as the 2002 Rules) which mandates that the secured creditor shall set out in the terms of the sale

notice any other thing which the AO considered it material for a purchaser to know in order to judge the nature and value of the property. In support of the arguments advanced reliance has been placed upon the judgments delivered in the cases of *Mr. Mandava Krishna Chaitanya –vs- UCO Bank, Asset Management Branch*, reported in 2018 SCC OnLine Hyd 196, *Jai Logistics, rep. by its Partner, G. Bhaskar, No.21/22, First Cross Street, Chennai-600010 –vs- The Authorized Officer, Syndicate Bank, No.105-106, Ponnurangam Road (West), R.S. Puram, Coimbatore*, reported in 2010 (4) CTC 627, *Janatha Textiles and Others –vs- Tax Recovery Officer and Another*, reported in (2008) 12 SCC 582 and *S.L. Ispat Private Limited and Another – vs- Punjab National Bank and Others*, reported in 2023 SCC OnLine Cal 33. Reliance has also been placed upon an unreported judgment delivered in the case of *State of West Bengal –vs- Union of India and Others* in support of the contention that the writ Court has the authority to set aside any Court sale or a statutory sale.

11. Mr. Chakraborty, learned advocate appearing for the CB submits that there had been no mistake on the part of the authorities of the said bank and they have acted in strict consonance with the SARFAESI Act and the Rules framed thereunder. A loan was advanced against mortgage of the flat. As the loanee failed to pay the dues the account was declared NPA on 31st October, 2011. Thereafter, Section 13(2) notice was issued. On 26th April, 2012, the AO of CB issued notice under Section 13(4). The said flat was put up for sale by an auction notice dated 29th September, 2012. The flat was sold to the highest bidder, sale certificate was issued and thereafter

the deed was executed. The allegation that the bank authorities had suppressed the encumbrances prior to issuance of the sale certificate is absolutely unfounded. The CB authorities had discharged their obligations by executing the sale deed and by handing over possession of the said flat to the appellant. Prior to participation in the tender process, the appellant was under an obligation to ascertain as to whether there was any encumbrance since the property was being sold on '*as is where is basis*' and '*as is what is basis*'. Being conscious about the said clause in the auction notice and having participated in the auction process and having paid the consideration money, the appellant cannot claim refund.

12. Mr. Roy, learned advocate appearing for SBI submits that on the basis of a forged deed, loan was granted by CB. The said deed did not create any security interest over the flat in question. At the time of sale of such property by CB, the said flat was mortgaged to SBI. The issue as regards genuineness of the deed retained by CB, is to be adjudicated in the pending criminal proceeding.

13. Heard the learned advocates appearing for the respective parties and considered the materials on record.

14. For adjudication of the *lis* the following dates are essential :-

30th October, 2011 – The loan account of the borrower in CB became NPA;

27th February, 2012 – The loan account of the borrower in SBI became NPA;

26th April, 2012 – Notice under Section 13(4) of the SARFAESI Act issued by the AO, CB;

29th September, 2012 – Auction sale notice issued by AO, CB;

1st November, 2012 – Auction conducted;

22nd December, 2012 – Notice under Section 13(2) of the SARFAESI Act issued by the AO, SBI;

27th December, 2012 – Sale certificate issued by the AO, CB;

20th September, 2013 – Notice under Section 13(4) of SARFAESI Act issued by the AO, SBI;

25th September, 2013 – Notice published in Business Standard and Akdin;

3rd October, 2013 – Complaint lodged on behalf of SBI to Inspector-in-Charge, Baguihati police station;

4th May, 2014 – Sale notice published by SBI in Times of India and Bartaman;

28th August, 2014 – Sale deed executed by CB in favour of the appellant;

31st March, 2020 - The order of provisional attachment was passed;

26th November, 2021 - The Assistant Director, PMLA took over possession of the said flat.

15. It is the stand of SBI that the account of M/s Bhagwati Lifestyle Private Limited became NPA on 27th February, 2012 and as such notice under Section 13(2) of SARFAESI Act was issued on 22nd December, 2012. Thereafter, notice under Section 13(4) was issued on 20th September, 2013 and physical possession of the flat was taken over. The possession notice

was also published in local newspaper on 25th September, 2013. At the time of routine visit on 30th September, 2013, it was noted that some unknown person had locked flat after breaking the bank's seal and padlock. To that effect a general diary was lodged in Baguihati police station on 3rd October, 2013 and thereafter the AO of SBI repossessed the flat and posted security guards. On 4th May, 2014 sale notice was published to dispose of the property through e-auction. Again on routine inspection it was found that the possession notice and display boards were destroyed and as such possession notice was again pasted and display boards were reaffixed on 3rd September, 2015.

16. It appears that sale certificate was issued on 27th December, 2012 by the AO of CB subsequent to issuance of Section 13(2) notice by AO of SBI on 22nd December, 2012. The deed was executed by CB in favour of the appellant on 28th August, 2014. It is the contention of SBI that possession of the flat was taken over on 21st September, 2013 and since the bank's seal and padlock was broken, a general diary was lodged in Baguihati police station on 3rd October, 2013 and thereafter the AO of SBI repossessed the flat and posted security guards. CB in its affidavit has averred that the bank handed over possession of the flat on 28th August, 2014. In the said conspectus, it thus cannot be totally ruled out that the CB authorities had no knowledge that SBI was also claiming security interest over the self-same property prior to execution of the sale deed on 28th August, 2014.

17. The provisions of the 2002 Rules cast an obligation upon the secured creditors to be diligent and to take all necessary steps to ascertain

as to whether there are any encumbrances over the property before putting up the property for sale *moreso* when the secured creditor is a nationalised bank. Being an instrumentality of the State it cannot act in a casual and negligent manner. In our opinion, though the property has been auctioned on '*as is where is basis*' and '*as is what is basis*', the bank could not have shirked its responsibility to disclose the encumbrances from taking clear possession and the learned Judge in appreciation of such proposition ought not to have refused to consider the appellant's claim. The possession of the flat has been taken over by the competent authority in the proceedings pertaining to bank fraud on SBI under the PMLA Act. In view of the fraud practiced by the original borrower the appellant cannot bear the brunt. There is no requirement under the said Rules towards execution of a deed of conveyance to perfect the sale conducted and as such the execution of the deed of conveyance does not detain us from issuing direction towards refund of the consideration amount to the appellant. It is made clear that the sale certificate and the subsequent deed of conveyance as executed in favour of the appellant shall not confer any title over the flat in question in favour of the appellant.

18. At the time of execution of the sale deed the appellant had paid an amount of Rs. 2,65,722/- as stamp duty and Rs. 41,843/- as registration fee. The said amount was not paid to the bank and it did utilise the same. The sale price of Rs. 35,00,000/- paid by the appellant had been received and retained by CB. The appellant also had not made a proper enquiry about the property before participating in the auction and she ought to have

been more diligent. For such laches we are not inclined to allow the appellant's prayer for interest and refund of the stamp duty and registration fee. However, it would be iniquitous to deny the appellant's prayer for refund of the consideration money of Rs. 35,00,000/-.

19. For the reasons discussed above, the order impugned in the present appeal is set aside and the respondent nos. 3 to 6 are directed to refund the consideration money of Rs. 35,00,000/- to the appellant within a period of two weeks from the date of communication of this order.

20. The appeal and the connected application are, accordingly, disposed of, however, without any order as to the costs.

21. Urgent Photostat copy of this judgment, if applied for, shall be granted to the parties as expeditiously as possible, upon compliance of all formalities.

(Partha Sarathi Chatterjee, J.)

(Tapabrata Chakraborty, J.)