(2007) 11 GAU CK 0049

Gauhati High Court

Case No: None

Rose Valley Real Estate and Construction Ltd.		APPELLANT
	Vs	
United Commercial Bank and Another		RESPONDENT

Date of Decision: Nov. 20, 2007

Acts Referred:

- Constitution of India, 1950 - Article 226
- Contract Act, 1872 - Section 56
- Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) - Section 13, 17, 31

Citation: AIR 2008 Guw 38 : (2009) 1 GLR 726 : (2008) GLT 805 Supp

Hon'ble Judges: I.A. Ansari, J

Bench: Single Bench

Judgement

@JUDGMENTTAG-ORDER

I.A. Ansari, J.

M/s. Pramila Hotel (hereinafter referred ''to as ''the borrower'') had enjoyed credit facilities with the UCO Bank (hereinafter referred to as ''the respondent bank'') against mortgage of their total building, situated at West Agartala. As the borrower had failed to repay its outstanding liability, the respondent bank took possession of the said hotel building as its secured assets. Having taken possession of the said hotel building in terms of the provisions of Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short, ''the Act''), the respondent bank published a notification, on 31-12-2006, informing intending bidders, in general, that the said hotel along with the plot of land, on which the said hotel building stood, would be sold by auction for the purpose of recovering the dues of the respondent bank, the date and time of the

sale, so published, being 7-10-2007 at 3.00 p.m. This notification, which incorporated the terms and conditions of the auction sale, made it clear that the successful bidder would have to make a deposit of 25% (including earnest money) of the bid money, on the day of sale, in the shape of demand draft or by cash, and the balance amount of the bid money shall be deposited by the successful bidder within fifteen days or within such time as may be extended from the date of approval of the sale by the secured creditor or its authorized officer. The notification also made it clear that in case of failure to make payment of the entire bid money within the stipulated time, the deposit made by the bidder till then would be forfeited.

2. The auction sale, in terms of the said notification, took place on 7-2-2007. The present writ petitioner, which is a company registered under the Companies Act, participated in the said auction sale and, being the highest bidder, the writ petitioner, in fulfillment of the terms of the notification aforementioned, deposited a sum of Rs. 60.70 lakhs being 25% of the bid money (including the earnest money), the offered price being Rs. 2,43,11,990/-. The respondent bank, vide its letter, dated 12-2-2007, requested the petitioner to contact the main branch of the UCO Bank, at Kolkata, for making deposit of the balance amount in terms of the said notification and, thereafter, obtain Sale Certificate from the said office of the respondent bank at Kolkata. In effect, the respondent bank, vide its letter, dated 12-2-2007, duly intimated the writ petitioner that the offer, made by the petitioner, had been accepted by the respondent bank and that the balance amount be deposited accordingly.

3. Being, however, aggrieved by the process of auction sale, the borrower filed a writ petition, which gave rise to WP (C) No. 41/2007 and an interim order was passed therein, on 15-2-2007, restraining the respondent bank from taking any further steps on the basis of the notification, dated 30-12-2006. This interim direction was further extended by order, dated 21-2-2007, passed in the said writ petition. The respondent bank, then filed a miscellaneous application, which gave rise to Civil Misc. Application No. 78/2007, seeking to get the said interim direction vacated. Upon hearing, this Misc. Application was disposed, on 5-3-2007, by vacating the interim order. After the interim order was so vacated, the respondent bank, vide Its letter, dated 7-3-2007, requested the writ petition to make deposit of the balance amount of Rs. 1,82,36,999/- immediately. The writ petitioner, however, declined to make the deposit and demanded refund of the 25% of the bid money, which the writ petitioner had already deposited on 30-12-2006. As the respondent bank refused to refund the money and claimed that the amount deposited by the writ petitioner already stood forfeited in terms of the conditions stipulated in the notification aforementioned, the writ petitioner, with the help of this writ application, made under Article 226 of the Constitution of India, has sought for, inter alia, issuance of a writ of mandamus commanding the respondent bank to refund the said amount of Rs. 60.75 lakhs.

4. The respondent bank has resisted the writ petition by filing its affidavit-in-opposition, wherein it has contended, inter alia, that the writ petition is not maintainable inasmuch as the writ petitioner has not availed the alternative remedy by way of preferring appeal, which the Act has provided u/s 17 thereof. It is also contended by the respondent bank that the amount of Rs. 60.75 lakhs, deposited by the writ petitioner, was rightly and lawfully forfeited.

5. It is in the backdrop of the above controversy that this writ petition has been taken up for hearing.

6. I have heard Mr. Somik Deb, learned Counsel for the writ petitioner, and Mr. S. Dutta, learned Counsel for the respondent bank.

7. Appearing on behalf of the writ petitioner, Mr. Somik Deb has submitted that Section 31 of the Act embodies various transactions to which the provisions of the Act do not apply. Mr. Deb contends that the deposited amount of Rs. 60.75 lakhs is nothing, but a lien on the security given to the respondent bank by the petitioner in terms of the provisions of Clause (a) of Section 31 of the Act. In the light of the provisions, contained in Section 31 (a), Mr. Deb submits, that the Act does not apply to a transaction, such as, the one at hand. It is also submitted by Mr. Deb that due to the interim directions, passed in WP(C) No. 41/2007, neither the writ petitioner was legally entitled to deposit, nor was the respondent bank legally in a position to receive, the balance amount of Rs. 1,82,36,999/- within the period of fifteen days from the date of completion of the sale. In such circumstances, according to Mr. Deb, the contract, which had been entered Into by the parties concerned, i.e. the present petitioner and the respondent bank, stood frustrated by impossibility of performance of the contract and, hence, neither the petitioner is bound to pay the balance amount nor is the respondent bank entitled to insist that the petitioner shall pay the balance amount. This apart, contends Mr. Deb, because of the interim directions, passed in WP(C) No. 41/2007, the respondent bank is not entitled, under Rule 9 of the Security Interest (Enforcement) Rules, 2002, to forfeit the said amount of Rs. 60.75 lakhs.

8. Mr. Dutta, on the other hand, contends that Section 31(a) has no application to the case at hand. Mr. Dutta also contends that the writ petitioner had an alternative remedy u/s 17 of the Act, but the petitioner has chosen not to avail the same and, hence, this writ petition is not maintainable in the face of an equally efficacious alternative remedy being available to the writ petitioner. It is further contended by Mr. Dutta that the respondent bank has lawfully forfeited the amount of Rs. 60.75 lakhs and the petitioner is not entitled to claim any relief against such forfeiture.

9. In order to determine if, in the context of the facts and circumstances of the present case, the present petitioner has a right of appeal u/s 17 of the Act, it is appropriate that the provisions of Section 17 are taken note of. Section 17 of the Act reads as under:

Section 17. Right to appeal - (1) Any person (including borrower), aggrieved by any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:

Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in Sub-section (4) of Section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the secured assets to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in Sub-section (4) of Section 13 taken by the secured assets as invalid and restore the possession of the secured assets to the borrower or restore the management of the secured assets to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under Sub-section (4) of Section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under Sub-section (4) of Section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under Sub-section (4) of Section 13 to recover his secured debt.

(5) Any application made under Sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under Sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in Sub-section (5), any party to the application

may take an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (5) of 1993 and the rules made thereunder.

10. A bare reading of Section 17 shows that Section 17 is attracted when a person, including a borrower, is aggrieved by any of the measurers, taken by the secured creditor or his authorized officer, as referred to by Sub-section (4) of Section 13 of the Act. A perusal of Section 13(4) is, therefore, imperative. Sub-section (4) of Section 13, in fact, reads as under:

Section 13(4). In case the borrower fails to discharge his liability in full within the period specified in Sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset;

(b) takeover the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole, of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower, which is relatable to the security or the debt;

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

11. A careful reading of Section 13(4) shows that Section 13(4) embodies various modes of recovery of the secured debts of the secured creditor. If anyone, including a borrower, feels aggrieved by the mode of recovery, which a secured creditor may adopt, he has a right to prefer an appeal in terms of Section 17. The writ petitioner, in the present case, is, admittedly, not a borrower nor is the writ petitioner a person

aggrieved by the mode of recovery adopted by the respondent bank as secured creditor. Thus, the controversy is not covered by the provisions contained u/s 13(4) of the Act. Since Section 13(4) has no application to the transaction at hand, the question of Section 17 being applicable to the present case does not arise at all. Hence, the present petitioner has no right of appeal u/s 17 of the Act in respect of the forfeiture of the amount, in question, or as regards the writ petitioner''s demand for refund of the said deposited sum of Rs. 60.75 lakhs.

12. In view of the fact that the respondent bank''s contention has no substance, as indicated hereinabove, an examination of Section 31 is not really necessary.

13. The above discussion brings me, now, to Rule 9 of the Security Interest (Investment) Rules, 2002 (in short, ''the Rules''), which lays down the procedure for sale. As Rule 9 is of great relevance to the present case, the same is reproduced hereinbefore:

9. Time of sale, issues of sale certificate and delivery of possession, etc.:

(4) The balance amount of purchase price payable shall be paid by the purchaser to the authorized officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the parties.

(5) In default of payment within the period mentioned in Sub-rule (4), the deposit shall be forfeited and the property shall be resold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold.

14. A careful reading of Rule 9(4) shows that the balance amount of purchase price shall be paid by the purchaser on or before 15th day of the confirmation of sale of the immovable property or within such extended period as may be agreed upon, in writing, by the parties concerned. Sub-rule (5) of Rule 9 of the Rules makes it clear that in the case of default in making the payment within the period mentioned in Sub-rule (4), the deposit shall stand forfeited and the property shall be resold. Sub-rule (5) of Rule 9 further makes it clear that the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold.

15. A close analysis of the provisions of Sub-rules (4) and (5) leaves no room for doubt that the forfeiture of the deposited amount is by way of default and not merely for the purpose of suitably compensating a secured creditor for the loss, which it may sustain as a result of auction sale having become fruitless, because of the failure of the successful bidder to deposit the balance amount within the stipulated period.

16. Referring to Section 78 of the Contract Act, Mr. Deb has contended that though Sub-rules (4) and (5) of Rule 9 make provisions for forfeiture of the deposited

amount, such deposit cannot be arbitrary and must be for the purpose of compensating the loss, which may be sustained as a result of failure of a secured creditor to bring an auction sale to its logical conclusion. Though the arguments, so advanced, appear attractive, the language, employed in Sub-rules (4) and (5), does not support such an argument, for, had it been the intention of the rule-makers that the forfeiture is only to compensate the loss, which the secured creditor may suffer due to auction sale having failed, Sub-rule (5) would not have embodied provisions to the effect that the defaulting purchaser shall forfeit all claim to the property or any part of the sum for which it may be subsequently sold. Thus, Sub-rule (5) of Rule 9 not only imposes penalty of forfeiture, but also makes it clear that the defaulting purchaser shall have no claim on any part of the sum for which the property may subsequently be sold. Sub-rule (5), is, thus, punitive in nature and is not merely compensatory. Sub-rule (5) obviously aims at desisting people from stalling the auction process by participating in an auction sale and thereby cause delay in the realization of the dues of the secured creditor by sale of the secured asset(s).

17. In view, however, of the fact that Sub-rule (5) of Rule 9 is punitive in nature, it is not possible for a secured creditor to take recourse to Sub-rule (5) and forfeit deposited amount unless a notice is given to the defaulting purchaser to show cause as to why the deposit made by him be not forfeited due to the defaulting purchaser''s failure to deposit the balance amount within the stipulated date. Such a provision has to be construed as inbuilt within the ambit of Sub-rule (5) of Rule 9, for, no penalty can be imposed without affording an opportunity to show cause to the person, who may suffer the penalty. In the present case, the respondent bank had, admittedly, not given any notice to the writ petitioner before the amount deposited by the writ petitioner was forfeited.

18. Be that as it may, what is also important to note is that under Sub-rule (4) of Rule 9, the deposit has to be made within fifteen days from the date of confirmation of sale of the immovable property or within such period of time as may be agreed upon, in writing, by the parties. In the present case, the sale, admittedly, took place on 7-2-2007. Hence, the balance amount was to be, ordinarily, deposited within 27-2-2007. In the present case, however, the sale was confirmed by the respondent bank by its letter, dated 12-2-2007. Thus, in terms of Sub-rule (4) of Rule 9, the balance amount of Rs. 1,82,36,999/- was required to be deposited by the writ petitioner within 27-2-2007. The writ petitioner, however, did not, admittedly, deposit the balance amount within 27-2-2007. After expiry of the time given, i.e. 2T-2-2007, either the amount deposited would stand forfeited in terms of Sub-rule (4) of Rule 9 or the time for deposit of the balance amount must be extended as may be agreed upon, in writing, by the parties. Extension of such period can, obviously, be with consent of both the parties.

19. In the present case, the writ petitioner was completely unwilling to enter into any extension of time. At the same time, the respondent bank has also not

expressed willingness to extend the period of deposit. Thus, the balance amount having not been deposited within 27-2-2007, the amount deposited by the writ petitioner would either stand forfeited in terms of Sub-rule (5) of Rule 9 or the same would have to be refunded. In the present case, the interim directions, issued in WP(C) 41/2007, were, admittedly, in operation restraining the respondent bank from proceeding with the notification, dated 30-12-2006, aforementioned. Since the present writ petitioner was also one of the respondents in WP(C) No. 41/2007, it logically follows that neither the respondent bank could have accepted the balance amount from the present writ petitioner not could have the present writ petitioner deposited the balance amount with the respondent bank so long as the interim directions, passed by the Court, on 15-2-2007 and further extended on 21-2-2007, were not interfered with or modified. Thus, by operation of law, the respondent bank was prevented from accepting the balance amount from the present petitioner on or before 27-2-2007. In the face of such embargo imposed by the Court, omission to deposit the balance amount, within 27-2-2007, by the writ petitioner cannot be treated as a default on the part of the writ petitioner in making the requisite deposit. When the writ petitioner has not defaulted, it cannot obviously be penalized and the amount of Rs. 60.75 lakhs, deposited by it, cannot be forfeited by taking recourse to Sub-rule (5) of Rule 9.

20. What surfaces from the above discussion is that the contract, in question, entered into by the parties concerned has failed not because of the voluntary acts of any of the parties, but because of circumstances beyond their control. In other words, it is clear that but for the interim directions, passed by the Court, the contract was binding on the parties. In the face of the interim order, the balance amount could not have been deposited within the stipulated period and, after the period for making deposit was over, the contract stood frustrated unless both the parties had mutually agreed to remain bound by the contract. Thus, none of the two parties can insist on the other to complete the transaction, for, any extension of time for deposit of the balance amount would require, in the light of the provisions of Sub-rule (4) of Rule 9, mutual consent of both the parties. In short, the contract has failed and the writ petitioner cannot be penalized, when it does not agree to remain bound by the contract.

21. The facts of the present case are squarely governed by the provisions of Section 56 of the contract Act, which reads as under:

Section 56.- Agreement to do impossible act - An agreement to do an act impossible in itself is void.

Contract to do act. afterwards becoming impossible or unlawful.... A contract to do an act which, alter the contract is made, becomes impossible, or, by reason of some event which the promissor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.- Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promissor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

22. From a bare reading of Section 56, it becomes clear that not only when an agreement to do an act, which is impossible in itself, that the contract would be void, but even when a contract to do an act, which is possible, but after the contract is made, such act becomes impossible, the contract would become void, when the act becomes impossible. This principle of contractual law is known as doctrine of frustration of contract. Impossibility to fulfil the contractual obligation may arise in different fact situations. When a contract becomes impossible to be performance for reasons, which have not been within the control of the person from whom the performance of contract is sought or damages are claimed, the contract becomes void. The obligation to perform, when the act becomes impossible, stands discharged. (See M.D., Army Welfare Housing Organisation Vs. Sumangal Services Pvt. Ltd.,

23. In Emden and Gill : Building Contracts and Practice (7th Edition; page 162-163), the authors make it clear that liability to pay damages for non-performance for an impossibility arises only when the contract is absolute and unrestricted by any condition expressed or implied. Thus, a difficulty may not, in all circumstances, amount to an impossibility.

24. In the present case, though the notice of auction sale shows that the extension of time was for the bank to grant, the fact remains that Rule 9(4) does not permit extension of time beyond 15 days without mutual consent of both the parties. In such circumstances, the auction, in the present case, cannot be held to be an absolute and unrestricted contract, particularly, when Rule 9, nowhere, says that even if it becomes impossible to deposit the balance amount within 15 days, as contemplated by Sub-rule (4) thereof, the deposit of 25%, already made in terms of Sub-rule (3) or Rule 9, shall stand forfeited on the failure of the defaulting purchaser to deposit the balance amount within 15 days.

25. In the backdrop of what has been discussed above, what needs to be noted and emphasized is that due to interim directions passed in WP(C) No. 42/2007, it was not possible for the writ petitioner to deposit the balance amount within the period of 15 days nor was it possible for the respondent-bank to receive such a deposit. In such circumstances, whether the writ petitioner can be penalized? The moot question, therefore, is as to whether a person can be penalized for no fault of his merely by resorting to equity clause in favour of the respondent State? Such a question was, in fact, raised in Mohammed Gazi v. State of M.P. reported (2000) 4 SCC 342 : AIR 2000 SC 1806. In Mohammed Gazi (supra), the security deposit was

sought to be forfeited by the Government. The bidder, on the other hand, claimed refund on the ground of frustration of contract. The contract for disposal of tendu leaves was granted by the State respondent to the appellant-bidder. Stay order was granted by the High Court, in a writ petition, filed by another tenderer, whose bid was not accepted. The stay order, however, prevented the appellant from collecting tendu leaves for which he had deposited the earnest money. Though the appellant was not made a party to the proceeding, the fact remains that tendu leaves, being perishable item, became useless by lapse of time. When the respondent-State passed an order compelling the appellant-bidder to perform the contract and to deposit the balance contract price, the appellant filed a writ petition for quashing the order passed by the respondent-State and for refund of the earnest money. Though the High Court found that there was no fault on the part of the appellant, it nevertheless held that the State cannot be held responsible for the default. The High Court, therefore, directed refund of the earnest money to the appellant after deducting Rs. 30,000/- therefrom. Striking down the directions so given by the High Court, the Apex Court observed and held thus:

7. In the facts and circumstances of the case, the maxim of equity namely, actus cariae neminem gravabit - an act of the Court shall prejudice no man, shall be applicable. This maxim is founded upon justice and good sense which serves a safe and certain guide for the administration of law. The other maxim is, les non cogit ad impossibilia - the law does not compel a man to do what he cannot possibly perform. The law itself and its administration is understood to disclaim as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of law must adopt that general exception in the consideration of particular cases. The applicability of the aforesaid maxims has been approved by this Court in Raj Kumar Dey and Others Vs. Tarapada Dey and Others, and Gursharan Singh and others etc. Vs. New Delhi Municipal Committee and others,

26. The principle flowing from the decision in Mohammed Gazi (supra) is this : An act of the Court shall prejudice none and, at the same time, the law does not compel a man to do what he cannot possibly perform. Thus, when an order of the Court makes it impossible for a person to perform a contract, such a contract must be held to have become frustrated for impossibility to perform. In the present case too, when the High Court''s interim order had restrained the writ petitioner from offering the balance amount within the stipulated period of 15 days and for the respondent-Bank to accept such an offer, the contract must be held to have become impossible to be performed unless the parties to the contract had agreed, in terms of Sub-rule (4) of Rule 9, to extend the period of deposit. The respondent-bank cannot, unilaterally and contrary to the provisions of Sub-rule (4) of Rule 9, extend the time of deposit. In the circumstances of the present case, the contract must be held to have become impossible to be performed. (See also Jai Durga Finvest Pvt. Ltd. Vs. State of Haryana and Others,

What crystallized from the above discussion is that it was statutory obligation of the respondent-bank to receive the balance amount within 15 days, but it could not have received the said amount and at the same time, the petitioner also could not have deposited the balance amount within the stipulated period of 15 days. Thus, the contract, which obliged the petitioner to make deposit of the balance amount within 15 days and the respondent-bank to receive the balance amount within the period aforementioned, had become impossible to be performed for reasons beyond the control of both the parties. In such circumstances, the contract must be held to have suffered from impossibility of performance and in such a case, the question of forfeiture of the amount deposited with the respondent-bank by the petitioner does not arise at all. Because of what have been discussed above, this writ petition partly succeeds. While the notification, dated 30-12-2006, is not interfered with, the directions, given by the respondent-bank as regard the forfeiture of the sum of Rs. 60.75 lakhs aforementioned, are hereby set aside and the respondent-bank is hereby directed to refund the said sum of Rs. 60.75 lakhs within two weeks from the date of pronouncement of the judgment. No interest shall, however, be payable on the said deposited sum of Rs. 60.75 lakhs.

27. This writ petition shall stand disposed of in terms of the above observations and directions. No order as to cost.