

(2010) 10 MAD CK 0164

Madras High Court

Case No: Writ Petition No. 6354 of 2010 and MP No. 1 of 2010

Chemstar Chemicals and
Intermediates (P) Ltd.

APPELLANT

Vs

The Commercial Tax Officer,
State Bank of Mysore and Shyam
Flexi Pack Limited

RESPONDENT

Date of Decision: Oct. 7, 2010

Acts Referred:

- Constitution of India, 1950 - Article 226
- Financial Assets and Enforcement of Security Interest Act, 2002 - Section 13
- Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Rules, 2004 - Rule 8(6)
- State Financial Corporations Act, 1951 - Section 29

Citation: (2011) 2 BC 164

Hon'ble Judges: K.B.K. vasuki, J

Bench: Single Bench

Advocate: M.S. Krishnan, SC and Sarvabhauman Associates, for the Appellant; J. Ganesan, GA (T)-R1 and J. Radhakrishnan, R2, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

K.B.K. Vasuki, J.

On consent, the writ petition is taken up for final hearing.

2. The relief sought for in this writ petition is for issuing appropriate direction to the second respondent/State Bank of Mysore to refund the sale advance of Rs. 25,20,000/-paid to the schedule mentioned property on 11.3.2010.

3. The brief facts which are relevant for consideration herein are as follows:

The third respondent borrowed money from the second respondent bank and the property belonging to the third respondent was mortgaged in favour of the bank as security for repayment of the amount. The third respondent defaulted in discharge of its liability resulting in bringing the property for sale and tender cum auction sale notice was issued in the newspaper on 27.1.2010. The petitioner herein participated in the bid and was declared as the successful bidder for an offer of Rs. 1,00,95,000/-. Pursuant to the same, the petitioner has paid a sum of Rs. 17,18,352/-towards 25% of the sale consideration and the time was given to the petitioner for paying the balance sale consideration of Rs. 75,75,000/-on or before 26.3.2010. In the mean while, the petitioner applied for encumbrance certificate in respect of the property on 18.3.2010 and the encumbrance certificate was obtained on the same date, which reveals the subsistence of order of attachment upon the property by sales tax authorities for the tax arrears due from the third respondent which compelled the petitioner to apply to the authorised officer of the second respondent bank on 26.3.2010 seeking further time to clear the doubts arising due to the order of attachment regarding the validity of auction sale. The second respondent bank on receipt of the representation dated 26.3.2010 replied the petitioner on 27.3.2010 in and under which, the petitioner was advised to remit the balance amount immediately. The petitioner has instead of making further payment, come forward with this writ petition for the relief as stated supra.

4. The writ petition was filed on 29.3.2010 for the refund of sale advance along with M.P. No. 1 of 2010 seeking an order of ad-interim injunction. This Court on 30.3.2010 in M.P. No. 1 of 2010 ordered status quo as on date to be maintained.

5. According to the learned senior counsel for the petitioner, the petitioner came to know about the encumbrance by way of order of attachment upon the property and the same is only after he was declared as successful bidder and after he having paid advance amount of Rs. 25,20,000/-and the second respondent bank ought to have disclosed the encumbrance upon the property which was within the knowledge of the respondent bank on the date of issuance of tender cum auction sale notice and on the date of sale, the second respondent ought to have made the copy of encumbrance in respect of the property in question available so as to enable the participants to know about the same. It is but necessary for them to decide to participate in the auction. The failure of the second respondent to disclose the same in the auction or to make available relevant documents relating to the order of attachment on the date of inspection of the documents in the office of the second respondent bank, has made the petitioner to participate in the auction and to part with huge amount of advance. Had the petitioner been aware of the encumbrance upon the property on the date of inspection, he would not have participated in the bid and he is hence entitled to get refund of his advance money.

6. Per contra, the learned Counsel for the second respondent bank would seriously oppose the alleged claim of the petitioner both in law and on facts. The legal

objection raised by the learned Counsel for the second respondent is against the maintainability of this writ petition. It is contended by the learned Counsel for the second respondent that the statutory remedy available to the petitioner is to approach the Debt Recovery Tribunal under the relevant provision of SARFAESI Act and the writ jurisdiction does not lie. On merits it is considered that the petitioner was aware of the encumbrance on 5.3.20010 while inspecting the documents which are available in the office of the second respondent and he participated in the bid with the full knowledge about the property regarding its nature, extent, location condition etc., and if there is no basis for the petitioner to raise this issue except to postpone the payment of balance sale consideration within the prescribed time, in order to avoid cancellation of bid and the same lacks bonafide on merits.

7.I have considered the rival submissions made on both sides and perused the materials available on record.

8. Before going into the claim of the petitioner on facts, the first aspect to be considered is about the maintainability of this writ petition. The relief sought for herein is admittedly for directing the second respondent bank to refund the sale advance of Rs. 25,20,000/-to the petitioner. The property is brought for sale through public auction invoking the relevant provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter shortly referred to as "SARFAESI Act"). The second respondent bank has on the failure of the third respondent to make payment, invoked Section 13 of the Act which deals with "Enforcement of Security Interest" and has u/s 13(4)(a), taken possession of the secured assets and obtained orders. In so far as this writ petition is concerned, it is not against the action of the second respondent bank in bringing the property for auction which is one of measures taken by the bank u/s 13(4) of the Act, but only for certain relief arising out of and in the course of auction proceedings. Though it is seriously contended by the learned Counsel for the second respondent bank by relying upon Section 17 of the Act and by relying upon the latest unreported judgment of the Supreme Court dated 26.7.2010 in Union Bank of India v. Satyawati Tondon and Ors., that the remedy available to the petitioner is only to go before DRT which is constituted under the Act for entertaining any appeal u/s 17 of the Act, the same in the considered view of this Court, cannot be legally countenanced.

9. Section 17 makes it very clear that the appeal remedy available before the DRT is only against any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor or his authorised officer and not in respect of the dispute arising out of the same pursuant to the action taken u/s 13(4). The judgment cited on the side of the second respondent bank, is the case where the defaulting borrower was issued with notice u/s 13(4) of SARFAESI Act and immediately after receipt of the notice, the borrower filed the writ petition for restraining the bank from taking coercive action pursuant to the alleged illegal notice issued under

Sections 13(2) and 13(4) and one of the grounds raised by the respondent bank therein is the availability of alternative remedy u/s 17 of the Act. The Division Bench did not consider the objection regarding the availability of the alternative remedy and allowed the writ petition by granting prohibitory order as sought for by the petitioner therein. The same was challenged before the Supreme Court. The Supreme Court has considered the claim of the appellant bank both in law and on facts and has arrived at a conclusion that as the writ petition is filed against the notice issued under Sections 13(2) and 13(4), ignoring the availability of the statutory remedy before the DRT, the same is not maintainable. While doing so, the Apex Court has also expressed serious concern about the fact that the High Court has been continuously ignoring the availability of statutory remedies under the DRT Act and SARFAESI Act while exercising its jurisdiction u/s 226 of the Constitution of India which have serious adverse impact on the right of banks and other financial institutions to recover their dues. The Supreme Court has at the end of its judgment cautioned the High Courts to exercise their discretion in future in such matters with greater caution, care and circumspection. Though this Court is bound to follow the observation of the Supreme Court, the same is in my considered view, inapplicable to the facts of the present case. Unlike the case dealt with by the Supreme Court, the relief sought for herein is not against the measure taken u/s 13(4). In so far as the petitioner herein is concerned, he is only the third party, who participated in the auction held in pursuance of the action taken u/s 13(4) of SARFAESI Act and is not the person aggrieved against the action taken u/s 13(4) of the Act. Further, what is challenged before this Court is the procedural violation in the manner of auction so held, not the auction itself.

10. As a matter of fact, our High court in the judgment reported in *Sheeba Philominal Merlin and Anr. v. The Repatriates Co-op. Finance and Development Bank Ltd, Chennai-17 and Ors.* 2010 (5) CTC 449 has after discussing the issue of alternative remedy and after referring to the judgment of the constitutional bench of the supreme court reported in *State of West Bengal and Ors. v. The Committee for Protection of Democratic Rights, West Bengal and others* 2010 (2) CTC 84 and in [Secretary, Cannanore District Muslim Educational Association, Kanpur Vs. State of Kerala and Others](#), held that "High Court is conferred with wide power under Article 226 of the Constitution of India to reach injustice whenever it is found and as injustice is writ large and glaring, necessarily the judicial arm of this Court has to reach there and it cannot be prevented by plea of availability of alternative remedy". Our High court has also referring to other earlier judgment of the Supreme Court reported in *State of Uttar Pradesh v. Mohammad Nooh* AIR 1958 SC 86 held that availability of alternative remedy is not an absolute bar for exercising the writ jurisdiction and it is only a self-imposed restraint on its power and whenever there is contravention in violation of the principles of natural justice, the extraordinary power under Article 226 of Constitution of India can be invoked despite the fact of availability of alternative remedy.

11. The Supreme Court has also in the judgment reported in Haryana Financial Corporation and Anr. v. Rajesh Gupa 2010(5) MLJ 1125 (SC) entertained the writ petition for the relief to refund the amount illegally forfeited and has held the order of forfeiture of earnest money deposited by the highest bidder, on his default to pay the balance amount as arbitrary and illegal and has ordered the refund of forfeited amount. That being the legal and factual position, the plea of availability of alternate remedy raised on the side of the second respondent bank is devoid of any merits and deserves no acceptance.

12. On merits, the facts made available herein would reveal that the tender cum auction notice was issued on 27.1.2010, as per which, the inspection of the property under auction by the buyers was fixed on 4.3.2010 and verification of the documents relating to title, ownership and other legal procedure with the branch of the bank was fixed during office hours on 5.3.2010, collection of tender forms from the bank was on 9.3.2010 between 11.00 am and 1.00 pm and the last date for submission of the same was on 10.3.2010 before 4.00 pm.

13. It is not in dispute that the petitioner has submitted his tender in full after complying with all formalities and has been declared as the successful bidder and paid the advance amount. However, the petitioner thought fit not to proceed with the purchase of the property by raising the issue that the property was under attachment by the sales tax department. The petitioner has come forward with such contention for the first time in his letter dated 26.3.2010, wherein, it is specifically stated that he came to know about the order of attachment only after obtaining encumbrance certificate on 18.3.2010. In the reply dated 27.3.2010, the second respondent did not mention anything about the encumbrance but advised the petitioner to pay the balance amount of Rs. 75,75,000/- on or before 26.3.2010, as per the tender condition. There is absolutely no whisper in the reply notice as to whether the document containing encumbrance was made available on 5.3.2010 in the course of verification of the documents by the participants. It is throughout the stand taken by the petitioner that he came to know about the attachment of the property by the sales tax authority only after 11.3.2010 and only after obtaining encumbrance certificate on 18.3.2010 and had he been aware of the same before auction, he would not have participated in the auction. But, the second respondent has only in the counter filed herein, come forward with its plea that the document containing encumbrance is made available along with the documents of title and the same was also inspected by the petitioner and the petitioner is well aware of the existence of encumbrance as early as on 5.3.2010 and he participated in the bid and he cannot be permitted to withdraw from the auction and seeks refund of sale tax advance. However, the petitioner has in para 4 of the reply affidavit categorically denied that no encumbrance certificate was made available at the time of inspection and the encumbrance was disclosed to the petitioner only on 18.3.2010. Such stand is sought to be again denied by the second respondent bank by contending that the petitioner has raised the plea of non-availability of encumbrance particulars on

5.3.2010 only in his reply affidavit to the counter filed by the second respondent.

14. Be that as it may, the learned senior counsel for the petitioner has in the course of his argument, drawn the attention of this Court to the relevant provision of Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 which deals with the procedure for bringing the immovable secured assets for sale which is extracted hereunder:

8(6): The authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub rule (5):

Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which shall include

- (a) the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;
- (b) the secured debt for recovery of which the property is to be sold;
- (c) reserve price, below which the property may not be sold;
- (d) time and place of public auction or the time after which sale by any other mode shall be completed;
- (e) depositing earnest money as may be stipulated by the secured creditor;
- (f) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property.

15. The reading of Rule 8(6) makes it very clear as to what are the relevant particulars to be furnished in the sale notice, as per which the description of the property to be sold among other particulars including the details of the encumbrances and any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property shall be known to the secured creditor by setting out the same in the public notice. As rightly argued by the learned senior counsel for the petitioner, the very purpose of inspection of the documents is to enable the intending purchaser to know the nature, condition and value of the property and also other encumbrances or burden upon the property. Though the learned Counsel for the second respondent has attempted to argue that as the attachment is not an encumbrance as referred to under Rule 8(6)(a) and the same was not one of the material factors which the bank is bound to disclose under Rule 8(6)(f) of the Act, such contention certainly deserves no consideration. It cannot be disputed that the order of attachment is one of the material factors which is likely to influence the mind of intending purchaser to proceed or not to proceed with his participation in the

auction.

16. Even assuming it is to be true that the encumbrance certificate is made available for inspection on 5.3.2010, the same is as rightly pointed out by the learned senior counsel for the petitioner, would not amount to strict compliance with mandatory Rule 8(6) of the Act, as per which the particulars of the encumbrance if any or any other factor which the authorised officer considers it material for an intending purchaser to be aware as referred to in Rule 8(6)(a) and (f) are to be disclosed in the public notice regarding sale. In this case, except the description of the property, no other particulars about the attachment of the property by the sales tax department is set out in the public notice.

17. The Hon"ble Division Bench of our High Court has on earlier occasion dealt with the identical circumstance in the case of Jai Logistics rep. by its Partner, G. Bhaskar v. The Authorised Officer, Syndicate Bank, Coimbatore 2010 (4) CTC 627, wherein, the writ petitioner participated in the bid and declared as successful bidder and thereafter he applied for encumbrance certificate and came to know about the settlement deed executed by the original owner. As there was encumbrance over the property, the petitioner did not pay the balance consideration and sought for refund of money. The Bank rejected the request and forfeited the entire sum. Aggrieved by the order, the petitioner approached our High Court by invoking writ jurisdiction. The Division Bench has while setting aside the order as invalid, held at para 5 of the order as follows:

5. We have considered the submissions. Of course, in the aforesaid judgment, the Supreme Court, while considering a sale by the Official Liquidator, has held that it is the duty of the intending purchaser to satisfy himself as to the encumbrance before participating in the bid. Having participated in the bid, the intending purchaser cannot later on turn around and question the Official Liquidator on the ground that the encumbrance was not notified. In that case, the provisions of the Rules as applicable in the present case are not applicable to the Official Liquidator. But in the case on hand, once possession is taken over u/s 13(4) or u/s 14 of the SARFAESI Act, whenever the secured creditor contemplates a sale of immovable property, they will have to follow Rule 8 of the Security Interest (Enforcement) Rules, 2002. Rule 8(6)(f) mandates the secured creditors to set out in the terms of sale notice any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property. A reading of the said Rule, in our opinion, would also include the encumbrance relating to the property. We are inclined to read the rule in that way keeping in mind the interest of the intending purchaser to be put on notice as to the encumbrance, as otherwise he/she will be purchasing the property and simultaneously buying the litigation as well and an intending purchaser may not bid in the event he/she came to know of any encumbrance over the property. That is why the Rule specifically contemplates a provision for the Authorised Officer, while notifying the sale, to specifically state as

to the encumbrance. It will be a different issue in the event the auction notice indicated that it is the duty of the intending purchaser to verify not only the encumbrance by way of alienation of the property, but also the other statutory liabilities and in that case, the intending purchaser cannot later on turn around and seek for either the refund of the earnest money deposited or insist the Bank to clear the encumbrance. In the absence of such indication in the sale notice, in our considered view, the Respondent-Bank would not be justified in compelling a purchaser to go ahead with the sale by depositing the balance sale consideration together with the encumbrance

18. The Division Bench has hence directed the bank to refund the earnest money to the petitioner. While doing so, the Division Bench is also pleased to observe that "it is for the banks and financial institutions to indicate the encumbrance both by way of alienation in respect of the property or other statutory liabilities of the company or the individual, as the case may be, in the sale notice itself to avoid a situation like this. Equally the Banks and financial institutions could also make it clear in the auction notice in the case of no other liability by the company or individual". The observation so made by the Hon"ble Division Bench of our High court referred to above is as rightly argued by the learned senior counsel for the petitioner, squarely applicable in full force to the facts of the present case.

19. The Supreme Court also in the other judgment reported in Haryana Financial Corporation and Anr. v. Rajesh Gupta 2010 (5) MLJ 1125 (SC) has in the identical circumstances, held that on the failure of the Corporation to disclose the fair description of the property to the buyer, the order of forfeiture of earnest money is arbitrary and unfair and directed the Corporation to refund the forfeited amount.

20. The learned Counsel for the second respondent has also cited an authority reported in HI-Q Electronics Private Limited v. Branch Manager, Tamil Nadu Industrial Investment Corporation Limited and Ors. I 2001 (BC) 708 wherein, the case is arising out of Section 29 of State Financial Corporation Act, 1951 and the property was under attachment by the sales tax department and the successful bidder by reason of such attachment, sought for refund of the amount and the same was rejected by the bank and the bid amount was forfeited. When the same was challenged before our High court, the learned Single Judge rejected the contention of the writ petitioner therein that non-disclosure of the fact regarding the letter from the Sales Tax Department to the petitioner amounts to fraud and on that basis, the petitioner can ignore the same. Our High Court was not inclined to interfere with the auction sale which was already confirmed mainly in view of Clause 16 of the terms and conditions under which it is the duty of the intending purchaser to verify the dues payable on the property on the principle of "Caveat emptor". In my considered view, the judgment of the learned Single Judge referred to above, is not applicable to the facts of the present case for the simple reason that there is no such similar clause of terms and conditions herein. On the contrary Rule 8(6) of the

Act makes it mandatory that the sale notice shall contain all the particulars including encumbrances if any and any other material factor which the authorised officer considers it material for a purchase in respect of the property as referred to in Rule 8(6)(a) and (f) and the effect of the failure to comply with such mandatory requirement is already dealt with by our Hon"ble Division Bench in the judgment reported in 2010 (4) CTC 627 wherein, our High court has held that the same is against the interest of the participants and hence, set aside the order of forfeiture.

21. Thus, the petitioner is by applying the same ratio referred to above, entitled to ignore the auction sale of the property burdened with an order of attachment by the sales tax department and as and when he exercises his right not to proceed further, the respondent bank is bound to refund the amount deposited by him and this Court is hence, inclined to grant the relief as sought for by the petitioner herein.

22. In the result, the writ petition is allowed as prayed for. The second respondent bank is directed to refund the sale advance to the petitioner within two weeks from the date of receipt of the copy of this order. No costs. Consequently, connected Miscellaneous Petition is closed.