

IN THE HIGH COURT OF MADHYA PRADESH
BENCH AT INDORE

(DB: Hon'ble Mr. Justice PK Jaiswal and
Hon'ble Mr. Justice Alok Verma)

WP No.394/2015

State Bank of India

Vs.

Shri Rajeev Arya and two ors.

Shri AK Sethi, learned Sr. Counsel with Shri RC Sinhal, learned
counsel for the petitioner.

Shri Manish Nair, learned counsel for the respondent no.1.

Shri Atul Sreedharan, learned counsel for the respondent no.2.

ORDER

(Passed on this 6th day of April, 2016)

Per Alok Verma, J.

This petition under Article 227 of the Constitution of India is filed challenging the order passed by learned DRAT, Allahabad in Review Application No.45/2014 dated 19.11.2014 whereby, learned Tribunal dismissed the review application and refused to review its own order passed in Appeal No.R-145/2011 dated 05.12.2012.

2. The relevant facts of the case are that under the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (herein after referred as 'the SARFAESI Act'), the petitioner / State Bank of India put on auction building situated at 2/3 RS Bhandari Marg, Indore, mortgaged by

guarantor of M/s. Swati Organics Ltd., which was the borrower of the bank. The first auction was held on 27.08.2009 in which respondent No.2 Sanjay Mathur was successful bidder but he could not deposit 25% of the purchase price on the date of sale itself and hence as per the terms and conditions of the said auction, 10% earnest money deposited by him was forfeited by the petitioner/bank. The second auction was held on 14.05.2010 in which respondent No.1 Rajeev Arya was successful bidder. He could also not deposit 25% of the purchase price on the date of sale itself and hence as per the terms and conditions of the said auction, 10% earnest money deposited by him was forfeited by the petitioner/bank.

3. Respondent No.2 Sanjay Mathur did not challenge the order of the forfeiture of earnest money, however, respondent No.1 Rajeev Arya filed Securitization Application No.112/2010 before the DRT which was disposed of vide order dated 07.10.2011. Against dismissal of the said Securitization Application No.112/2010, respondent No.2 filed an Appeal No.R-145/2011 before the DRAT, Allahabad. In the said appeal, DRAT, Allahabad, passed the impugned order dated 05.12.2012 and ordered refund of the forfeited amount of the earnest money of respondents No.1 and 2.

4. Aggrieved by the said order, the petitioner filed WP No.2770/2013 before this Court which was disposed of vide order dated 19.02.2014 by the Co-ordinate Bench of this Court in which the Co-ordinate Bench of this Court passed the following order:-

The grievance in this petition is that the Bank had consented for *inter se* bidding before the Appellate Tribunal, but did not give any consent either tacit or express to adjust or refund the forfeited amount in favour of the parties to the *inter se* bidding, being cause arising from an independent auction and not challenged in the application filed by Respondent No.1 before the D.R.T. The order passed by the Appellate Tribunal, however, proceeds on the basis that the Bank consented for such arrangement. If the Bank has any issue about the correctness of the said order, it ought to apply before the Tribunal for correction of the record of the Appellate Tribunal and, in particular, order dated 5.12.2012, if so advised. The Bank cannot be permitted to challenge the said order having given consent for the arrangement recorded therein.

Realizing this position, counsel for the petitioner/Bank seeks liberty to withdraw this petition to enable the Bank to pursue remedy of review petition/any other proceedings, as may be permissible in law, before the Appellate Tribunal. That will have to be decided on its own merits, in accordance with law.

We place on record the submission of counsel for the intervenor/Respondent No.2 in the writ petition that he ought to get the same relief as Respondent No.1 having intervened in the appeal proceedings. Since the writ petition is permitted to be withdrawn, we are not expressing any opinion on the correctness of

the said submission, either way. That will have to be tested in appropriate proceedings as and when occasion arises.

Although, the petitioner/Bank has been permitted to withdraw this petition, in the interest of justice, we are inclined to accede to the request of petitioner/Bank to order that the impugned decision of the Appellate Tribunal should not be given effect to by any party for a period of three weeks from today, to enable the petitioner/Bank to resort to remedy of review or any other appropriate proceedings before the Appellate Tribunal, as aforesaid.

We clarify that the stay is only in relation to the directions to refund/adjust the EMD amount in favour of Respondents No. 1 and 2.

5. After withdrawing this petition, the petitioner filed a review petition before the DRAT, Allahabad, which was disposed of by impugned order dated 19.11.2014 and the review petition filed by the petitioner was dismissed.

6. Before proceeding to consider reply of the respondent, the impugned order passed by the learned DRAT, Allahabad in Appeal No.R-145/2011 may be reproduced as under:-

As directed by this Tribunal by an order dated 07.11.2012, there have been auction of the property, description of which is as under:-

1. 2/3, R.S. Bhandari Marg, Indore.

The reserve price of the property as directed by this Tribunal by an order dated 07.11.2012 was fixed for a sum of Rs.2.21 crores, which was the price received by the Bank in the auction, wherein the respondent No.2 offered the said price.

The appellant offered his bid for a sum of

Rs.2,23,25,000/-.

So far as the intervener is concerned, the intervener offered his bid for a sum of Rs.2.23 crores.

So far as the respondent no.2 is concerned, he offered his bid for a sum of Rs.2,23,51,000/-. Thereafter, no bids were received from any of the respective parties.

Counsel for the respondent-Bank and its representative Chief Manager submitted that they have no objection to the same.

Under the circumstances, the bid of respondent no.2 for a sum of Rs.2,23,51,000/- is accepted being a highest bid and the auction is knocked down in favour of the respondent no.2.

In view of the aforesaid, since the respondent no.2 has already deposited the earnest money of Rs.55,25,000/-, therefore, this amount shall be adjusted towards the total auction price of Rs.2,23,51,000/-. The remaining amount shall be deposited by the respondent no.2 within a period of six weeks from today.

The earnest money deposited by the intervener and the appellant shall be refunded by the Bank. Since they have participated in the auction today, therefore, there is no reason to withhold the earnest money which was deposited by them in the earlier auction.

Sale certificate shall be issued by the Bank in favour of the respondent no.2 after receipt of the full amount from the respondent no.2.

In view of the aforesaid, the appeal stands disposed of.

7. The respondent No.1 in his reply stated that the petitioner had given his consent to the arrangement of the *Inter se* bidding directed by the DRAT and also finalization

of the bidding and now the petitioner cannot challenge the order passed by the DRAT. The petitioner could also have challenged the order passed by this Court in WP No.2770/2013 before the Supreme Court in the Special Leave Petition which was not done by the petitioner and accordingly, at this stage, correctness of the order dated 05.12.2012 cannot be challenged and no judicial scrutiny can be done against this order. According to him, it is well within the purview of the DRAT under the SURFAESI Act to hear the case in respect of the auction, recovery and refund of the EMD etc, therefore, DRAT has not committed any error in passing such order. Respondent No.2 Sanjay Mathur in his reply stated that the petitioner is trying to un-justly enrich itself without returning the respondent the earnest money lying with it. They have failed twice before the DRAT and lost all the legal battles and this writ is filed only to harass and delay payment of earnest money back to the respondent. Respondent No.3 is the successful bidder in the *inter se* bidding allowed by the DRAT. In his reply, the only objection raised is that as per the relevant clause of the petition, the petitioner seeks quashment of the whole order which should not be done as the petitioner is only aggrieved by that portion of the order in which DRAT ordered refund of the earnest money to respondents No.1 and 2 which was forfeited in earlier

auction by the petitioner.

8. In his rejoinder, the petitioner denied all the averments made by the respondents. The main contention of the petitioner is that the petitioner never consented for return of the forfeited amount. It only consented for inter se bidding amongst the respondents.

9. We have gone through the petition and the replies filed by the respondents meticulously.

10. Learned counsel for the respondent No.2 placed reliance on the judgment of the Supreme Court in the case of **General Manager, Sri Siddeshwara Vs. Ikbal and others** reported in **2013(10) SCC 83**. In para 19 of this judgment, the Supreme Court observed as under:-

19. There is no doubt that Rule 9(1) is mandatory but this provision is definitely for the benefit of the borrower. Similarly, Rule 9(3) and Rule 9(4) are for the benefit of the secured creditor (or in any case for the benefit of the borrower). It is settled position in law that even if a provision is mandatory, it can always be waived by a party (or parties) for whose benefit such provision has been made. The provision in Rule 9(1) being for the benefit of the borrower and the provisions contained in Rule 9(3) and Rule 9(4) being for the benefit of the secured creditor (or for that matter for the benefit of the borrower), the secured creditor and the borrower can lawfully waive their right. These provisions neither expressly nor contextually indicate otherwise. Obviously, the question whether there is waiver or not depends on the facts of each case and no hard-and-fast rule can be

laid down in this regard.

11. The Supreme Court thus observed that Rule (3) and Rule 9(4) of the Security Interest (Enforcement) Rules, 2002 (herein after referred to as the 'Rules 2002') are mandatory but they are for the benefit of the secured creditor. The Supreme Court observed that position of law is settled when the provision is mandatory it can always be waived by the party in whose benefit such provision has been made. Sub Rule 3 of Rule 9 provides that on every sale of immovable property, purchaser shall immediately deposit 25% of the amount of sale price to the authorised officer conducting sale and in default of such deposit, the property shall forthwith be sold again. Sub Rule 4 of Rule 9 provides that the balance amount of purchase price payable shall be paid by the purchaser to the authorised 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. It is apparent that for extending period provided by rule for payment of remaining portion of purchase price, there should have been written agreement between the parties.

12. Before the Appellate Tribunal on 07.11.2012, parties including the petitioner agreed for *inter se* bidding. In order dated 07.11.2012, the Appellate Tribunal observed as under:-

Since the parties have agreed for inter se bidding of the property concerned and the reserve price of the same would be of Rs.2.21 crores i.e. the price which has been received in the auction, as offered by the respondent No.2, therefore, the parties have further agreed that the reserve price would be of Rs.2.21 crores. As a consequence of the same, the inter se bidding would start not below to Rs.2.21 crores.

In view of the aforesaid, the case is adjourned for 05.12.2012 and on the said date, there would be inter se bidding between all the parties concerned those who appeared today. No further adjournment shall be given.

13. Going through this order, it is never mentioned in the order that during *inter se* bidding, earnest money deposited earlier during first and second auction by the respondents No.1 and 2 shall be revived and shall be their earnest money which was fixed by the authorised officer in compliance of the Rule 8(6)(e) of the Rules, 2002. Thereafter, the order dated 05.12.2012 was passed which has already been quoted before. In this order also, there is no mention that the bank was heard on the point of return of earnest money which was deposited earlier by respondents No.1 and 2, though, the matter was before the Appellate Tribunal only to consider this aspect of the case. It was in the knowledge of the Appellate Tribunal that the amount has already been forfeited and against such order of forfeiture, securitization application filed by the

respondent No.1 was already dismissed by the DRT, therefore, the petitioner never waived mandatory provision of Sub-Rule 3 and Sub Rule 4 of Rule 9 of the Rules 2002.

14. Learned counsel for the respondent No.2 also placed reliance on the judgment of the Supreme Court in the case of **Cochin University of Science and Technology and another Vs. Thomas P. John and others** reported in **Civil Appeal Nos.4159 and 6418 of 2003** decided on 06.05.2008. In which, it was held that education institution cannot be unduly enrich itself through profiteering or the imposition of capitation fee but they can fix the fee to meet out their own expenses and to maintain standard of the education. He also placed reliance on the judgment of the Supreme Court in the case of **Haryana Financial Corporation and another Vs. Rajesh Gupta** reported in **(2010) 1 SCC 655** in which it was held that forfeiture of earnest money is bad when default in the property came to light after he submits his bidding in the auction purchase.

15. In the light of the principle laid down in the above case, so far as the present case is concerned, there is nothing to infer that any point of time the petitioner expressly waived his right against the forfeited amount of EMD. Learned Appellate Tribunal also never consider this aspect on merit, never considered the arguments submitted by the petitioner, therefore, the order passed by the DRT so

far as it relates to return of earnest money to respondents No.1 and 2 was not in accordance with legal provision of law, therefore, liable to be set aside.

16. Accordingly, this writ petition is partly allowed. The impugned order of the Appellate Tribunal so far as it relates to return of the earnest money to respondents No.1 and 2 is set aside.

C.c. as per rules.

(PK Jaiswal)
Judge

(Alok Verma)
Judge

Kratika/-