

A.F.R.**Court No. - 3****Case :-** WRIT - C No. - 169 of 2021**Petitioner :-** Anshu Agrawal**Respondent :-** State of U.P. and Another**Counsel for Petitioner :-** Manish Trivedi**Counsel for Respondent :-** C.S.C., Ashish Agrawal, Babu Lal Ram, Jyoti Bhushan**Hon'ble Naheed Ara Moonis, J.****Hon'ble Saumitra Dayal Singh, J.**

Heard Sri Manish Trivedi, learned counsel for the petitioner, Sri Ashish Agrawal learned counsel for the Respondent-Bank and Sri B.P. Singh Kachhawah, learned Standing Counsel for the State. Let Additional District Magistrate (Finance and Revenue), District Varanasi be impleaded as Respondent No.3, today itself.

The present writ petition has been filed mainly for the following relief:-

"(a) Issue a writ, order or direction in the nature of Mandamus directing the respondent no.2 (Manager, Union Bank of India, Varanasi) refund the entire amount paid by the petitioner in auction purchase of house no.8/335, Khajuri, Shivpur, District Varanasi, along with 12% interest."

Having heard learned counsel for parties and perused the record, it transpires, the petitioner is the auction purchaser of a secured asset bearing House No.8/335, Khajuri, Shivpur, District Varanasi (hereinafter referred to as the 'secured asset'). It was put up for auction by the respondent-Bank under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (hereinafter referred to the Act) for recovery of its dues against a home loan advanced to one Indu Bhushan Jaisawal and Smt. Kalawati Jaisawal, to the tune of Rs.7,79,279/-, on 30.11.2005. Upon default in repayment of that loan, the respondent-Bank resorted to proceedings under the Act. The auction of the secured asset itself took place on 09.01.2018. The petitioner made the highest bid at that auction at Rs.29.61 lacs. It was accepted. Admittedly, that amount was

paid by the petitioner in accordance with law. A Sale Certificate came to be issued to the petitioner on 28.01.2018. A copy of the same has also been annexed to the writ petition as Annexure-2.

It is the case of the petitioner, despite lapse of more than three years and nine months, neither the Bank has executed the sale-deed in its favour nor, it has handed over physical possession of the secured asset to the petitioner. Relying on a decision of a coordinate bench of the Court, in **Rakesh Kumar Kaushal Vs. State of U.P. and another 2019 (1) ADJ 689 (DB) (LB)**, it has been vehemently urged - the petitioner is entitled to refund of the auction money, Rs.29.61 lacs together with interest (claimed at the rate 12%). Further, it has submitted, the respondent-Bank had misled the petitioner in auctioning the property without first obtaining actual physical possession of that property.

On the other hand, learned counsel for the respondent-Bank relied upon another division bench decision of this Court, in **Dilip Kumar Singh and another Vs. State of U.P. and others (2013) 1 ADJ 91(DB)** to submit, there is no patent illegality in the respondent-Bank seeking actual physical possession over the property in question, after execution of the Sale Certificate. In fact, such proceeding would be valid and maintainable even after execution of the sale-deed in favour of the auction purchaser, if that eventuality arises. Next, reliance has been placed on a decision of the Supreme Court in **Standard Chartered Bank & others Vs. V. Noble Kumar & others (2013) 9 SCC 620** wherein the Supreme Court held - it was open to the secured creditor to either seek possession under Rule 8 of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as the Rules) or; to seek possession from the debtor under Section 14 of the Act and upon denial by the debtor, to seek possession by approaching the concerned Magistrate under Section 14 of the Act or; to directly approach the Magistrate under Section 14 of the Act. Third, reliance has been placed on another decision of the Supreme Court in **ITC Limited Vs. Blue**

Coast Hotels Ltd. & others (2018) 15 SCC 99, wherein it was opined, the right of the Bank to obtain possession under the Act survives the conclusion of the sale proceedings. Last, reliance has been placed on yet another decision of the Supreme Court in **Telangana State Southern Power Distribution Company Limited & another Vs. M/S. Srigdhaa Beverages (2020) 6 SCC 404**, wherein the right of the Bank to sell a secured asset on "As is where is whatever there is and without recourse basis" was firmly recognised. Further, a submission was made - in absence of any relief claimed against the Sale Certificate dated 28.01.2018, no refund (of the bid money) may ever be claimed by the petitioner.

On facts, learned counsel for the respondent-Bank submits, the Bank did not mislead the petitioner in any way. Relying on the e-auction notice dated 21.09.2017, it was submitted – that notice clearly indicated that the secured asset was being sold on "As is where is whatever there is and without recourse basis". The respondent-Bank did not make any other representation to the petitioner as may constitute misrepresentation either with respect to the fact of physical possession (of the secured asset), being not with the Bank on the date of e-auction sale or any other matter. It is also not the case of the petitioner that the respondent-Bank prevented the petitioner from ascertaining the correct facts with respect to physical possession of the secured asset.

In any case, upon conclusion of the e-auction proceedings, the respondent-Bank obtained physical possession over the secured asset on 13.03.2020. In proof thereof, learned counsel for the Bank has relied on the Possession Certificate dated 13.03.2020 annexed as Annexure CA-9 to the Counter Affidavit. However, he would further contend - after the physical possession was thus gained by the respondent-Bank but before it could be made over to the petitioner, the lockdown was enforced under the National Disaster Management Act, 2005. Taking advantage of that circumstance, the borrower

mischievously broke open the locks of the respondent-Bank (over the secured asset), and thus illegally regained possession. In that regard, a Criminal Complaint has been lodged by the respondent-Bank with the SHO, Police Station Lalpur, Varanasi on 22.11.2020. In any case, the respondent-Bank has filed another application (under section 14 of the Act), with the District Magistrate, Varanasi on 02.11.2020 seeking physical possession over the secured asset. That application is pending. These fact assertions made in the Counter Affidavit filed by the respondent-Bank are undisputed.

As to the delay in restoration of possession over the secured asset in favour of the respondent Bank, learned counsel would submit, the debtor has also filed an application to recall the order dated 31.01.2020 by which the possession was required to be made over to the Bank. On that application, the ADM (Finance and Revenue), Varanasi issued a notice dated 22.09.2020 - to the respondent-Bank. Those proceedings are pending.

In short, it has been submitted by learned counsel for the respondent-Bank that the said respondent had acted with fairness, due diligence and in accordance with law. Only on account of the procedural delays and illegal acts of the principal borrower, physical possession over the secured asset could not be made over to the petitioner. As to the decision of the coordinate bench of this Court in **Rakesh Kumar Kaushal (supra)** relied on by learned counsel for the petitioner, it has been submitted that the same is wholly distinguishable on facts.

Having heard learned counsel for parties and having perused the record, in the first place, it is undisputed between the parties that pursuant to the e-auction notice dated 21.09.2017, the secured asset was auctioned on 09.01.2018. The Sale Certificate came to be issued in favour of the petitioner on 28.1.2018. As to non-execution of the sale-deed, learned counsel for the Bank has also stated that the Bank has always been willing to execute such sale-deed. Also, no relief has been sought by the petitioner against the aforesaid Sale Certificate. It

is intact.

In the case of **Rakesh Kumar Kaushal (supra)**, in paragraph 6 of that report, it was clearly recorded - after accepting the deposit of the bid amount, the respondent-Bank (in that case), neither confirmed the sale nor handed over the Sale Certificate to the auction purchaser. In fact, the Bank (in that case), issued false assurances regarding handing over possession. Such is not the case here. For that reason alone, the ratio of that the decision is distinguishable on facts. Though, the issue of maintainability of the writ petition is not involved here, the relief being claimed in the present case cannot be granted on the strength of the aforesaid decision in view of the distinction on facts, noted above.

As to the third issue decided in the aforesaid decision, we agree with that pronouncement. The respondent-Bank is obligated to hand over physical possession of the secured asset to the petitioner, pursuant to the auction sale concluded in his favour.

What therefore survives for consideration is whether, under the Act, the respondent-Bank continues to be entitled to claim physical possession over the secured asset as may prevent the petitioner from seeking relief of refund of the bid money deposited by her. First, the petitioner may never claim such refund in face of the continued existence of the valid Sale Certificate dated 28.01.2018. That Sale Certificate has not been cancelled till date. Also, the petitioner has not sought any relief against it. The legal effect of the continued existence of that certificate is that the auction sale made in favour of the petitioner stands confirmed. In **B. Arvind Kumar v. Govt. of India, (2007) 5 SCC 745**, in the context of an auction sale of an immovable property conducted by a Civil Court, it was concluded as below

“Re: Point (ii)

12. The plaintiff has produced the original registered sale certificate dated 29-8-1941 executed by the Official Receiver, Civil Station, Bangalore. The said deed certifies that Bhowrilal (father of the plaintiff) was the highest bidder at an auction-sale held on 22-8-1941, in respect of the right, title, interest of the insolvent Anraj Sankla, namely, the leasehold right in the property described in the schedule to the certificate (suit property), that his bid of Rs 8350 was accepted and the sale was confirmed by the District

Judge, Civil and Military Station, Bangalore on 25-8-1941. The sale certificate declared Bhowrilal to be the owner of the leasehold right in respect of the suit property. When a property is sold by public auction in pursuance of an order of the court and the bid is accepted and the sale is confirmed by the court in favour of the purchaser, the sale becomes absolute and the title vests in the purchaser. A sale certificate is issued to the purchaser only when the sale becomes absolute. The sale certificate is merely the evidence of such title. It is well settled that when an auction-purchaser derives title on confirmation of sale in his favour, and a sale certificate is issued evidencing such sale and title, no further deed of transfer from the court is contemplated or required. In this case, the sale certificate itself was registered, though such a sale certificate issued by a court or an officer authorised by the court, does not require registration. Section 17(2)(xii) of the Registration Act, 1908 specifically provides that a certificate of sale granted to any purchaser of any property sold by a public auction by a Civil or Revenue Officer does not fall under the category of non-testamentary documents which require registration under sub-sections (b) and (c) of Section 17(1) of the said Act. We therefore hold that the High Court committed a serious error in holding that the sale certificate did not convey any right, title or interest to plaintiff's father for want of a registered deed of transfer.

(emphasis supplied)

Under Rule 9(6) of the Rules, upon payment of the entire bid amount and upon confirmation of the sale, a Certificate of Sale is issued in the Form prescribed in Appendix V to the Rules. There is no provision of law as may allow for cancellation of that Certificate, either under the Act or the Rules. Thus, in face of such Certificate of Sale, the petitioner may never claim any entitlement to refund of the bid money. Then, as to the right of the respondent-Bank to continue to claim physical possession after issuance of the Sale Certificate, though the stage of Rule 8 does not exist in face of the alleged conduct of the principal borrower however, in view of the law laid down in **Dileep Kumar Singh (supra)**, the application filed by the respondent-Bank is *prima facie* maintainable. In that case, the objection raised by the debtor that the Bank was not entitled to maintain an application to obtain physical possession after executing the registered sale-deed as it ceased to be a secured creditor, upon liquidation of its debt was specifically over ruled by this Court. In paragraph 14 of the report, it was held as under:-

"14. In view of the aforesaid discussions, the Issue No. 1 is decided holding that secured creditor is legally entitled to take

physical possession even after execution of sale-deed in favour of auction purchaser and the application under Section 14 of the 2002 Act by the bank before the District Magistrate was fully maintainable. The Issue No. 1 and 2 are answered accordingly."

Any doubt that may have existed in that regard stands resolved upon the decision of the Supreme Court in **ITC Limited (supra)**. In that case, wherein, in paragraph 48 of that report, it was held as below:-

"48. In this case, the creditor did not have actual possession of the secured asset but only a constructive or symbolic possession. The transfer of the secured asset by the creditor therefore cannot be construed to be a complete transfer as contemplated by Section 8 of the Transfer of Property Act. The creditor nevertheless had a right to take actual possession of the secured assets and must therefore be held to be a secured creditor even after the limited transfer to the auction purchaser under the agreement. Thus, the entire interest in the property not having been passed on to the creditor in the first place, the creditor in turn could not pass on the entire interest to the auction purchaser and thus remained a secured creditor in the Act".

(emphasis supplied)

At present, again on an undisputed basis, in view of the unrebutted assertion made in paragraph 20-21 of the counter affidavit, the Bank is pursuing its remedy under the Act to (regain) physical possession over the secured asset. There is no defect in that proceeding. Even otherwise, the respondent-Bank is both obligated in law to obtain such possession and it is also entitled to claim the same under Section 14 of the Act.

In so far as the plea of misrepresentation is concerned, it is unfounded. The undisputed e-auction notice proposed to sell the secured asset on "As is where is whatever there is and without recourse basis". As to the true meaning of that phrase, in the context of the proceedings under the Act, the Supreme Court in **Telangana State Southern Power Distribution Co. Ltd. v. Srigdhaa Beverages, (2020) 6 SCC 404** observed as under:

12. We may also notice that as an auction-purchaser bidding in an "as is where is, whatever there is and without recourse basis", the respondent would have inspected the premises and made inquiries about the dues in all respects. The facts of the present case, as in the judgment aforesaid, are more explicit in character as there is a specific mention of the

quantification of dues of various accounts including electricity dues. The respondent was, thus, clearly put to notice in this behalf”.

Thus, the burden was on the petitioner to establish, on the basis of firm pleadings and cogent evidence that the respondent-Bank had actively concealed or misrepresented any material fact from the petitioner with respect to the true value of and/or possession over the secured asset. No such fact pleading, or evidence exists that the respondent-Bank had at any stage represented to the petitioner that it had obtained physical possession of the secured asset before it was put up for auction. As discussed above, the respondent-Bank was at liberty to either first obtain physical possession over the secured asset and to later put it for auction or to first auction the same and later secure physical possession. That being the law, the petitioner may never claim misrepresentation by the respondent-Bank because the latter chose to auction the secured asset without first obtaining physical possession.

As to the respondent-Bank having first obtained symbolic possession over the secured asset, before auctioning it, there is no doubt. Though, the principal borrower may have filed an application to recall the order dated 31.01.2020, it also appears that the said order has yet not been recalled nor there is any stay order operating against it. Therefore, the delay in making over the possession over the secured asset (to the petitioner), is found to be procedural. It may be addressed by this Court while considering the residuary prayer made in the writ petition.

Accordingly, the present writ petition is ***disposed of*** with a direction that the respondent-bank shall forthwith file a proper application before the ADM (Finance & Revenue), respondent no. 3 along with a copy of this order seeking actual physical possession over the secured asset/property in question namely House No. 8/335, Khajuri, Shivpur, District Varanasi. Such application may be filed not later than two weeks' from today.

Upon such application being filed, the respondent no. 3 shall proceed to pass appropriate and necessary orders thereon within a further

period of thirty days after hearing all necessary parties. That order may be complied with within a further period of thirty days if there is no legal impediment.

If any other proceeding (instituted by the principal borrower or any third party), is also pending with respect to the order dated 31.02.2020 or any other order passed under any of the provisions of the Act and/or the Rules, the same would be necessarily concluded within a period of thirty days, if there is no legal impediment.

We are conscious that this direction is being issued *ex-parte qua* the principal-borrower. However, the directions do not seek to prejudice the rights of the principal-borrower but only effectuate the remedies provided in law including those that may have been sought by him.

It is further provided, in case, the respondent no. 3 or any other competent authority were to sustain the objections being raised by the principal borrower, it would then obligate the Bank to refund the amount of deposit made by the petitioner being Rs. 29.61 lacs together with interest as may be claimed. However, that stage has yet not arrived.

Accordingly, the writ petition stands **disposed of**.

Order Date :- 27.10.2021

Vivek Kr./Saurabh