Pushpa Builders Ltd v. The Vaish Cooperative Adarsh Bank Ltd., 2021 PLRonline 9096 ;

LogIn to read full text

2021 PLRonline 9096 ;

Delhi High Court

Asha Menon J.

Pushpa Builders Ltd v. The Vaish Cooperative Adarsh Bank Ltd.

02.09.2021

CM(M) 281/2020 & CM APPL. 8357/2020 (stay)

Banking – Auction – Mortgaged assets – When collaterals and securities provided by borrowers are available to the creditors for sale and transfer to recover outstanding dues, creditors have the responsibility to get a fair and market value for the same – It is quite a common practice to claim that the value of the property has been depressed because the Bank's attachment/lien exists over the property – However, this kind of argument does not appeal, as the consideration is to be paid by the purchaser as per market rates, to whosoever is entitled to receive it i.e., either the original owner or the creditor. [Para 17]

Banking – Auction – Mortgaged assets – Receiver – Incumbent on all Receivers of immovable property/security to maintain them in good condition and not to allow the property to waste – Creditor cannot later on claim that the property under its custody had become dilapidated and therefore, cannot command the market value – Creditor would be responsible for the loss of such value and such practices that lead to distress sales below par have to be completed rooted out not just discouraged. [Para 17]

Banking – Auction – Mortgaged assets – While the attempt of the banks and financial institutions to minimize their losses makes good business sense, there cannot be a free run for them at the cost of the borrowers who have mortgaged to them or furnished valuable property as security to assure repayment, which are worth multiple times the value of the loan – Reasonable, to expect the Banks such as the respondent, to also respect the right of the borrowers to maximize their profits from the sale of collaterals/securities by the banks – Where, Banks seek to sell the immovable properties that are provided as security including through mortgage, it is incumbent on them to be earnest in their efforts so that the valuable security is not disposed of to the prejudice of the borrower. [Para 15, 16, 17]

Banking – Auction – Mortgaged assets – Executing Court ought not to have readily agreed to the repeated downward revision of the reserved price – Executing Court must always exercise caution and be circumspect while dealing with such applications, bearing in mind the consequences of the action taken, on the interests of the borrowers, and to see that these are not prejudiced – Prime commercial property originally worth more than Rs.24 crores has been purportedly sold for almost half the price with no one responsible – This kind of situation has to be avoided for which the Executing Court will have to maintain a vigilant eye on the auction proceedings.[Para 23]

Property worth 24 crores. Reserve price brought down drastically in a few months . Outstanding amount owed by the petitioner to the bank for a mortgaged property auctioned was more than Rs. 15 crores as of September 30, 2020. Even if the property had been sold for a price of Rs. 16 crores, the bank would have recovered their outstanding dues, and the petitioner would have had around Rs. 75 lakhs. However, the bank only received Rs. 13,75,00,000 from the sale, and an outstanding amount of almost Rs. 2.5 crores remains. The court has two options available, either to direct the purchaser to pay a sum of Rs. 16 crores towards the sale purchase, or to direct the Executing Court to record a satisfaction of the preliminary decree and the final decree for Rs. 13,75,00,000 to issue the Sale Certificate to the auction purchaser. The court has adopted the second course of action and disposed of the petition while directing the executing court to record satisfaction of the preliminary decree and the final decree, issuing the Sale Certificate recording that no further dues against this loan remain outstanding and payable by the petitioner to the respondent.

JUDGMENT

1. This petition has been filed under Article 227 of the Constitution of India for quashing/setting aside of the order dated 13th January, 2020 passed by the learned Additional District Judge/Executing Court, Saket Courts, in Ex. No. 337/2017. The petitioner is the Judgement Debtor and the respondent, as the Decree-Holder has sought the execution of the Final Decree dated 20th August, 1996.

2. Some of the relevant facts may be noted at this juncture. The petitioner had on 4th November, 1987 secured a loan of Rs 20 lakhs from the respondent against the mortgage of Plot No M-5, G.K.II, New Delhi.

A Mortgage Deed was executed on 15th January, 1988. The agreed rate of interest according to the petitioner was 18% simple interest per annum.

3. Since the petitioner defaulted in the repayment of the loan, a suit was filed in the High Court [CS (OS) No. 1174/1991] by the respondent for the recovery of Rs.20,19,158.65/- along with interest @ 18% p.a. from the date of filing of the suit till recovery, with a further prayer for the sale of the mortgaged property in case of non-payment.

4. A preliminary decree was passed on 21st February, 1992 upon an application filed under

Order XXIII Rules 1 & 3 CPC. In terms of the said preliminary decree based on a compromise arrived at between the parties, the petitioner had agreed to pay by 30th June, 1995 a sum of Rs.23,37,177/- along with costs of proceedings amounting to Rs.22,688.75/- The petitioner claims that the interest upon the decretal amount was simple and subject to RBI Guidelines. In 1994, the petitioner went into liquidation and defaulted in making payments. This resulted in a final decree being passed on 20th August, 1996 directing the sale of the mortgaged property.

5. Execution was filed on 26th May, 1997 being Ex. P. No. 180/1997 for the recovery of Rs.57,04,365.90/- as on 31st March, 1997. The petitioner was directed, vide orders dated 28th July, 2010, to deposit the decretal amount along with simple interest. This order of the Single Bench of this court was upheld by the Division Bench vide order dated 2nd April, 2013. A Special Leave Petition was filed by the petitioner which was dismissed by the Supreme Court on 21st April 2014 when the petitioner failed to comply with the earlier order dated 30th September, 2013 whereby the petitioner was directed to deposit a sum of Rs. One crore as it could deposit only Rs.50 lakhs.

6. Due to the enhancement in the pecuniary jurisdiction of this court, the Execution Petition was transferred to the District Court. An order of attachment of the property was issued on 12th March, 2018 and the possession taken on 13th April, 2018. The valuers at the behest of the respondent submitted a valuation report dated 18th May, 2018 valuing the property at Rs. 24,16,78,125/-.

7. Mr. Anant Aggarwal, the learned counsel for the petitioner has submitted that the grievance of the petitioner is two-fold. One is that the respondent has wrongly calculated the interest liability of the petitioner by taking a compound rate and thus exceeding 18% which is the upper limit fixed by the RBI under its Guidelines. Attention has also been drawn to the Circular of the RBI dated 26th August, 2002 (Annexure A-

10) that provided that the effective rate of interest should not be exceeded whereas here it was 18%. Secondly, the learned counsel has argued that despite the respondent's valuer fixing the valuation of the property at more than Rs 24 crores, when the property was to be put for auction, it reduced the reserve price to Rs.16,00,00,000/- from Rs. 18,13,00,000/- and thereafter, during Covid-19 pandemic times when real estate prices were depressed, chose to seek court directions to reduce the price further to Rs.13,75,00,000/-.

8. Learned counsel for the petitioner submitted that the rights of the petitioner had been severely affected on account of the reduction in value of the property by about 40-45 percent from the valuation made by the respondent itself. It was also submitted that since already Rs. 4 crores had been paid against the loan of Rs.20 lakhs, the respondent had no reason to reduce the reserve price even below the distress valuation of Rs 16 crores.

9. Mr. Surender Chauhan, learned counsel for the respondent, on the other hand, submitted that the petitioner was repeatedly raising the issue of interest rates even after this court had held that the respondent was entitled to compound interest. It was submitted that the respondent's Manager had on 16th October, 2018 made a statement before the Executing

Court that in case the petitioner was willing to abide by its undertaking given before the court on that day, then the respondent would not charge any interest from that day onwards, on the outstanding amount of Rs.10,62,96,813.15/- which was the amount payable calculated up to 30th September, 2018. Learned counsel submitted that since the petitioner failed to abide by that undertaking, the respondent became entitled to claim the interest i.e., at the rate of 18% which was in terms of the RBI Circular. Thus, now a sum of Rs.15,12,36,049.45/- was due as on 30th September, 2020. (Annexure A-6).

10. Learned counsel for the respondent also drew attention of this Court to Annexure A-8, which is an order of the learned Executing Court dated 26th November, 2018 recording that the High Court had clarified that the interest chargeable was not simple interest but compound interest with effect from 1st January, 1992 and accepting the calculation of the respondent that as on 31st March, 2018, a sum of Rs.9,73,16,217.15/- was due and rejecting the calculation of the petitioner that the amount due was Rs.7,51,15,440/- This order was not challenged by the petitioner. Thus, the learned counsel for the respondent submitted that the issue of interest cannot be re-agitated at this juncture.

11. Learned counsel for the respondent also submitted that the petitioner has been malafidely blocking the sale of the property by continuously moving applications but the courts have never accepted the plea of the petitioner to stay the auction proceedings. As a result, the sale has already been effected of the property for a sum of Rs.13,75,00,000/- except that the Sale Certificate had to be issued. Learned counsel for the respondent prayed that the petition be therefore dismissed.

12. There is weight in the contention of the learned counsel for the respondent that the issue of calculation and the interest rate cannot be agitated now. This court had in its order dated 02nd April, 2013 reiterated that the compromise was clear and specific in its stipulation of the charging of interest with quarterly rests and that interest was therefore to be charged on compound interest basis. As regards the RBI Circular which has been placed on record, the learned counsel for the petitioner has not been able to explain how the interest being charged by the respondent was violative of this Circular. It is just another attempt to get over the terms of the compromise by raising a vague plea that the Circular of the RBI was being violated, particularly in view of the observations of this court on this plea in the order dated 02nd April, 2013. The petitioner remains bound by the terms of the compromise on the basis of which the preliminary decree dated 21st February, 1992 was passed. Though the petitioner has been repeatedly making efforts to get the terms relating to interest modified by the court, it has repeatedly failed to obtain a favourable interpretation from this court. The plea sought to be raised now to again seek a modification is only to be rejected and is so rejected.

13. However, with regard to the grievance of the petitioner that the value of the property has been arbitrarily depressed causing immense loss to the petitioner, requires some consideration. Though it cannot be overlooked that the petitioner is singularly responsible for the amount repayable to the respondent increasing exponentially over decades, by not adhering to its undertakings for making payments on time, even when the respondent has been open to some accommodation, the petitioner cannot be so penalized that it should be

made to suffer grave prejudice on account of any arbitrary action taken by the respondent. While it does make business sense for the respondent to minimize its losses, this objective cannot authorize the respondent or any other similarly placed institutional decree holders, to force penury on its erstwhile customer.

14. On query by this Court, the learned counsel for the respondent submitted that by 30th September, 2020, the loan which was originally for a sum of Rs.20 lakhs, taken on 4th November, 1987, had become Rs.15,12,36,049.45p and further submitted that Rs.13,75,00,000/- which was the consideration for the mortgaged property would still leave a balance of about Rs.2 crores as due and payable on the loan, which the respondent would be recovering from the petitioner against other assets. It is in this context that it has become necessary to consider the question whether borrowers would have no protection against arbitrary disposal of the properties mortgaged to banks and financial institutions at low prices.

15. This Court is of the view that while the attempt of the banks and financial institutions such as the respondent to minimize their losses makes good business sense, there cannot be a free run for them at the cost of the borrowers who have mortgaged to them or furnished valuable property as security to assure repayment, which are worth multiple times the value of the loan.

16. Business entities take loans, no doubt, at commercial rates of interest, in order to conduct their business activities. The Banks such as the respondent thrive on the business of lending. If the Banks have to survive, then borrowers must exist and not mere borrowers but productive borrowers. The Banks seek collaterals and security to prevent losses to themselves. It is, but reasonable, to expect the Banks such as the respondent, to also respect the right of the borrowers to maximize their profits from the sale of collaterals/securities by the banks.

17. The non-payment of loans is, of course, not to be countenanced, but where, the Banks such as the respondent, seek to sell the immovable properties that are provided as security including through mortgage, it is incumbent on them to be earnest in their efforts so that the valuable security is not disposed of to the prejudice of the borrower.

18. These days, the attempt is to ensure that a business entity is not pushed into liquidation or insolvency when they are unable to repay the loans. To this end, the Insolvency and Bankruptcy Code, 2016 (IBC) as amended from time to time was passed by the Parliament. The objects and reasons for passing of the IBC included maximization of the value of the assets of the borrowers. It was also intended to ensure availability of credit while balancing the interest of all the stake holders. When major borrowers of banks and financial institutions have been given this kind of protection where the banks also take a ‘hair cut’ and the value of the assets of the borrowers are maximized, can smaller borrowers be denied the bare minimum of maximization of the value of their assets which have been provided as security to the banks, such as the respondent? This Court is of the view that similar balancing of interests of the stake holders would be imperative and there is an obligation on the banks and financial institutions to maximize the value of the assets

which have been furnished to them as security by the borrowers while they attempt to minimize their own losses.

19. To reiterate, when collaterals and securities are provided by borrowers, which would be available to the creditors for sale and transfer to recover outstanding dues, the creditors have the responsibility to get a fair and market value for the said collateral/security/immovable property. It is quite a common practice to claim that the value of the property has been depressed because the Bank's attachment/lien exists over the property. However, this kind of argument does not appeal, as the consideration is to be paid by the purchaser as per market rates, to whosoever is entitled to receive it i.e., either the original owner or the creditor. It is also incumbent on all Receivers of immovable property/security to maintain them in good condition and not to allow the property to waste. The creditor cannot later on claim that the property under its custody had become dilapidated and therefore, cannot command the market value. The creditor would be responsible for the loss of such value and such practices that lead to distress sales below par have to be completed rooted out not just discouraged.

20. In the present case, it is noteworthy that in the year 2018 when the property had been attached and the possession taken by the respondent, it had got the property valued. On 18th May, 2018, the bank valuer had placed the value of the property at Rs.24,16,78,125/-. The record shows that as on 16th October, 2018, the Manager of the respondent had stated in court that the outstanding loan amount was Rs.10,62,96,813.15/- as on 30th September, 2018. Again, as on 26th November, 2018, the Executing Court had accepted the contention of the respondent that what was due and payable by the petitioner to the respondent was a sum of Rs.9,73,16,217.15/- as on 31st March, 2018. Thus, the value of the property in the year 2018 as assessed by the respondent's valuer far exceeded the outstanding amount.

21. On 11th January, 2019, the respondent moved an application under Order XXI Rule 54(1A) read with Rule 64 read with Section 151 CPC for initiation of the auction proceedings. The order was issued for proclamation and sale with the reserve price of the property at Rs.18,13,00,000/-. But on 8th May, 2019, the respondent moved an application for re-scheduling the proclamation of sale with a revised reserve price of the property. The respondent sought the reduction of reserve price from Rs.18,13,00,000/- to Rs.16,00,00,000/-. The learned Executing Court allowed this reduction, rejecting the objections of the petitioner, vide order dated 10th July, 2019. On 24th October, 2019, the respondent again moved the Executing Court for further revising downwards the reserve price to Rs.13,75,00,000/-. This was also allowed by the Executing Court vide the impugned order.

22. What this means is that though when the respondent had come into the possession of the mortgaged property on 13 th April, 2018, and as on 18th May, 2018, the property was worth more than Rs.24 crores, while it remained in the hands of the respondent, the value of the same property had plummeted by about half. It may be that in the Covid-19 pandemic period, the Real Estate sector has seen some diminished activities, but it cannot be overlooked, that it was in the year 2019 itself, that the respondent had sought to revise downwards the value of the mortgaged property from Rs.24,16,78,125/-, to

Rs.18,13,00,000/- to Rs.16 crores and thereafter to Rs.13,75,00,000/-.

23. The property in question is a commercial building (plot measuring 195.0 square yards) consisting of a basement, ground, Mezzanine, 1st, 2nd and 3rd floors located in Greater Kailash-II. It is also to be noticed that when the impugned order was passed on 13th January, 2020, the pandemic was not so virulent. The plea taken by the respondent that the Covid situation had caused the depression in valuation cannot be accepted. This Court is of the view that the Executing Court ought not to have so readily agreed to the repeated downward revision of the reserved price between 2019 and 13th January, 2020 (the date of the impugned order). Rather, this Court is of the view that the Executing Court must always exercise caution and be circumspect while dealing with such applications, bearing in mind the consequences of the action taken, on the interests of the borrowers, and to see that these are not prejudiced. In the present case, prime commercial property originally worth more than Rs.24 crores has been purportedly sold for almost half the price with no one responsible. This kind of situation has to be avoided for which the Executing Court will have to maintain a vigilant eye on the auction proceedings.

24. Turning to the case at hand, as on 30th September, 2020 the outstanding was more than Rs.15 crores. Had the property been sold even for a sum of Rs.16 crores, clearly the Bank would have recovered all its outstanding dues, while the petitioner would have also had around Rs.75 lakhs in its kitty. Now the outstanding would have crossed another crore. But the Bank claims to have received only Rs.13,75,00,000/- from the sale of the mortgaged property. Thus, an outstanding amount of almost Rs.2.5 crores remains. This, the respondent will now seek to recover from the petitioner. The unjustness is writ large.

25. As this Court had allowed the auction to continue at the reserve price of Rs.13,75,00,000/-, subject to final orders in this petition, there are only two options now available. One is to direct the purchaser to pay a sum of Rs.16 crores towards the sale purchase, subject to which, the Sale Certificate be issued. The other option is to direct the Executing Court to record a satisfaction of the Preliminary Decree dated 21st February, 1992 and the Final Decree dated 20 th August, 1996 for a sum of Rs.13,75,00,000/-, at which the mortgaged property has been auctioned.

26. This Court is inclined to adopt the second course of action. The petition, is accordingly disposed of along with pending application, directing the learned Executing Court to record satisfaction of Preliminary Decree dated 21st February, 1992 and the Final Decree dated 20th August, 1996 while issuing the Sale Certificate to the auction purchaser recording that no further dues against this loan remains outstanding and payable by the petitioner to the respondent.

27. The parties are directed to appear before the learned Executing Court on 6th September, 2021 for this purpose.

28. Copy of this order be sent electronically to the learned Executing Court.

29. The judgment be uploaded on the website forthwith.