

(2020-4)200 PLR 700
PUNJAB AND HARYANA HIGH COURT
Before: Mr. Justice Rakesh Kumar Jain and Mr. Justice Ashok Kumar Verma.
M/S JAI SHRI RAM ENTERPRISES and others – Petitioners,
Versus
STATE BANK OF INDIA and another – Respondents.
CM-17101-CWP-2019 in/and CWP No. 29870 of 2019

(i) Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002) - Security Interest (Enforcement) Rules, 2002, Rule 8(5) - Sale of Secured Assets Through Private Treaty, circular 01.11.2017 - Loanee have no prior right of sale of the property in dispute by way of a private treaty - Though it is not so provided in the Act that the respondents shall sell the property in dispute firstly by way of a public auction or e-auction because Rule 8(5) of the Security Interest (Enforcement) Rules, 2002, provides four methods of sale in which the Authorized Officer may choose any one of them but in view of the decision rendered by the apex Court in the case of *Karnataka State Industrial Investment and Development Corporation Ltd. v. M/s Cavalet India Ltd.*, (2005) 4 SCC 456, Authorized Officer is supposed to sell the property firstly, by way of public auction/e-auction to secure maximum participation of the private bidders including the borrower who also has to be given an offer under Rule 8(6) of the Rules to participate so that the maximum price of property to be sold may come out for the purpose of discharging the dues of the Bank. [Para 23]

(ii) Constitution of India, Article 226 - Writ of mandamus shall be maintainable only if the petitioner has a right and the respondent has a corresponding duty to perform the right. [Para 13]

(iii) Sale of Secured Assets Through Private Treaty, circular 01.11.2017 - Constitution of India, Article 14, 226 - Vires - The argument that respondent should allow the petitioners to resort to private treaty at the first instance cannot be accepted and the vires of the circular, challenged on the ground of Article 14 of the Constitution of India being unreasonable or arbitrary is rejected because there is a reasonable nexus to achieve with the issuance of circular that the private treaty should not come at the first instance because in that process the best price may not come out from the sale of property which has to go to the kitty of the Bank for the discharge of its dues - Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002) - Security Interest (Enforcement) Rules, 2002, Rule 8(5). [Para 22]

Cases referred to:

1. (2005) 4 SCC 456, *Karnataka State Industrial Investment and Development Corporation Ltd. v. M/s Cavalet India Ltd*
2. 2009(55) RCR (Civil) 528, *Zarifkhan J. Pathan and another v. ICICI Bank Limited.*

Mr. Aditya Dassaur, for the applicants-petitioners. Mr. Rakesh Gupta, for the non-applicants-respondents.

Judgment (Oral)

Rakesh Kumar Jain, J. - (02.12.2019) - This petition is preferred by petitioner No. 1 (Firm) and petitioners No. 2 and 3 (partners of the Firm) who have made a prayer for the issuance of a writ in the nature of certiorari for quashing the auction notice dated 24.09.2019 (Annexure P-8) by which the mortgaged property was put for sale by way of e-auction on 05.11.2019, a writ in the nature of mandamus to direct the respondents-Bank to accept the proposal of the petitioners made by letter dated 17.09.2019 (Annexure P-6)

permitting them to sell two residential mortgaged properties by way of private treaty and also for the issuance of a writ in the nature of certiorari for quashing the rejection letter dated 21.09.2019 (Annexure P-7) by which the prayer made by the petitioners, in the letter dated 17.09.2019, has been declined.

2. The petitioners have also filed an application bearing CM-17101-CWP-2019 under Order 6 Rule 17 read with Section 151 of the [CPC](#) for seeking permission of this Court to amend the writ petition in order to lay challenge to internal instructions (Standing Operating Procedure), relied upon by the respondents for realizing their dues by way of a public auction at the first instance.

3. Notice in the application.

4. Mr. Rakesh Gupta, Advocate, has accepted notice in the application on behalf of the non-applicants/respondents and submitted that he does not want to file reply to the application and shall accept the challenge of the petitioners, raised in regard to the vires of the said instructions.

5. Be that as it may, in brief, petitioner No. 1 had availed CC Limit of Rs. 4.10 crores and term loan of Rs. 80.00 lakhs and petitioner No. 3 had obtained housing loan of Rs. 28.00 lakhs from the respondent-Bank and mortgaged the following properties:-

1. House No. 135, Phase III, Urban Estate, Dugri, Ludhiana measuring 200 square yards in the name of the petitioner No. 3

2. Flat No. 64/1-L Model Town, Near Old Krishna Mandir, Ludhiana, measuring 107 square yards in the name of petitioner No. 2.

3. Factory at B-XXXI/2220/1-A, Opposite Central Jail, Tajpur Road, Ludhiana measuring 1000 square yards in the name of petitioner No. 2.

6. Since, petitioners could not maintain the financial discipline, therefore, all the accounts of the petitioners were declared as Non Performing Asset (NPA) on 09.03.2016 and the proceedings in terms of provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the Act") were initiated with the issuance of a notice dated 22.06.2017 under Section 13(2) of the Act, recalling an amount of Rs. 5,18,94,190/-.

7. Though, the respondents have filed their reply after the receipt of notice, but before anything else could have been done by the respondents, they filed an Original Application (OA) before the Debt Recovery Tribunal, Chandigarh in respect of the outstanding dues in all the three accounts of the petitioners. The petitioners contested the said OA but it was ultimately decreed on 31.03.2018. Although the respondents had started execution proceedings but the petitioners made the first offer under the OTS scheme on 22.02.2019 of Rs. 3.35 Crore which was accepted by the respondents but after depositing only Rs. 17.00 Lakhs, the petitioners stopped paying the amount of the OTS in time and therefore, the said OTS had failed.

8. It is alleged that on 17.04.2019, the petitioners had made a request to the respondents to allow them to sell the mortgaged properties to realise the amount for discharging the debts. However, respondents did not give any reply to it rather they came with another OTS dated 28.08.2019 of an amount of Rs. 3.41 Crore but in respect of two accounts i.e. CCL Limit account and term loan account.

9. The petitioners again made a representation on 17.09.2019 to sell the mortgaged properties themselves. However, as per the respondents, it was not disclosed therein that how much amount is going to be realised for the purpose of discharging the debts of the respondents-Bank. However, the said application was rejected vide the impugned order dated 21.09.2019.

10. Ultimately, after the aforesaid rejection, the property in question was put to sale by

way of e-auction on 24.09.20019 and the date of sale was fixed as 05.11.2019 and thus, the present writ petition is filed.

11. Counsel for the petitioners has referred to Rule 8 of the Security Interest (Enforcement) Rules, 2002 (for short "the Rules") to contend that the petitioners have a prior right of sale of the secured asset in order to get its best price by way of private treaty. On the said premise, respondents were asked to appear by way of a notice to file reply.

12. On appearance, counsel for respondents has submitted that the petitioners do not have any prior right of sale of the mortgaged property by way of private treaty rather the right is vested with the Authorized Officer with consultation of the Secured Creditor. In this regard he has referred to Rule 8 (5) of the Rules, the decision of the Hon'ble Supreme Court rendered in the case of *Karnataka State Industrial Investment and Development Corporation Ltd. v. M/s Cavalet India Ltd and others*,¹ (2005) 4 SCC 456, and the circular 01.11.2017 issued in regard to Sale of Secured Assets Through Private Treaty under SARFAESI Act, 2002 (the vires of which has been challenged by the petitioner by way of an amendment). Counsel for the petitioners has otherwise relied upon the decision of the single bench of the Gujarat High Court rendered in the case of *Zarifkhan J. Pathan and another v. ICICI Bank Limited*,² 2009(55) RCR (Civil) 528.

13. We have heard counsel for the parties and perused the record with their able assistance.

14. In so far as the first prayer of the petitioner is concerned regarding the issuance of a writ in the nature of certiorari for quashing the notice dated 24.09.2019, the said prayer has become redundant because the e- auction which was fixed for 05.11.2019 has not taken place. The said prayer is, thus, hereby dismissed as redundant/infructuous.

15. The main issue involved in this case is as to whether the petitioners can seek a writ in the nature of mandamus for the purpose of a direction to the respondents that they have a prior right of sale of the mortgaged property by way of private treaty in view of Rule 8(5) of the Rules?

16. It is well settled that the writ of mandamus shall be maintainable only if the petitioner has a right and the respondent has a corresponding duty to perform the right. Therefore, in order to find out right of the petitioners, Rule 8(5) of the Rules has to be carefully looked into for the purpose of its interpretation. Rule 8(5) is reproduced as under:-

"8. *Sale of immovable secured assets.*—

(5) Before effecting sale of the immovable property referred to in sub-rule (1) of rule 9, the authorised officer shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods:-

- (a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or
- (b) by inviting tenders from the public;
- (c) by holding public auction; or
- (d) by private treaty."

17. Rule 8(5) has many parts. The first part is that before effecting sale of the immovable property referred to in sub-rule (1) of rule 9, the authorized officer shall obtain valuation of the property from an approved valuer. The second part is that after obtaining the valuation of the mortgaged property approved by the approved valuer, the Authorized Officer shall fix the reserve price of the property in consultation with the secured creditor. The third part is that he shall then sell either whole or a part of such immoveable secured asset and finally he has a right to adopt any of the methods of sale which are provided under Rules 8(5) (a),

(b), (c) and (d) of the Rules. Apparently, the Rules are silent about the powers of the Authorized Officer to choose any one of the method on priority. But in the case of *Karnataka State Industrial Investment and Development Corporation Ltd.* (Supra), Hon'ble Supreme Court, dealing with the matter in respect of a default by borrower under the State Financial Corporation Act, 1951, laid down the following legal principles which read as under: -

"From the aforesaid, the legal principles that emerge are :-

(i) The High Court while exercising its jurisdiction under Article 226 of the Constitution does not sit as an appellate authority over the acts and deeds of the financial corporation and seek to correct them. The Doctrine of fairness does not convert the writ courts into appellate authorities over administrative authorities.

(ii) In a matter between the corporation and its debtor, a writ court has no say except in two situations;

(a) there is a statutory violation on the part of the corporation or

(b) where the corporation acts unfairly i.e., unreasonably.

(iii) In commercial matters, the courts should not risk their judgments for the judgments of the bodies to which that task is assigned.

(iv) Unless the action of the financial corporation is mala fide, even a wrong decision taken by it is not open to challenge. It is not for the courts or a third party to substitute its decision, however more prudent, commercial or businesslike it may be, for the decision of the financial corporation. Hence, whatever the wisdom (or the lack of it) of the conduct of the corporation, the same cannot be assailed for making the corporation liable.

(v) In the matter of sale of public property, the dominant consideration is to secure the best price for the property to be sold and this could be achieved only when there is maximum public participation in the process of sale and everybody has an opportunity of making an offer.

(vi) Public auction is not the only mode to secure the best price by inviting maximum public participation, tender and negotiation could also be adopted.

(vii) The financial corporation is always expected to try and realize the maximum sale price by selling the assets by following a procedure which is transparent and acceptable, after due publicity, wherever possible and if any reason is indicated or cause shown for the default, the same has to be considered in its proper perspective and a conscious decision has to be taken as to whether action under Section 29 of the Act is called for. Thereafter, the modalities for disposal of seized unit have to be worked out.

(viii) Fairness cannot be a one-way street. The fairness required of the financial corporations cannot be carried to the extent of disabling them from recovering what is due to them. While not insisting upon the borrower to honour the commitments undertaken by him, the financial corporation alone cannot be shackled hand and foot in the name of fairness.

(ix) Reasonableness is to be tested against the dominant consideration to secure the best price.

18. According to the respondents, sub-para (v) of the aforesaid legal principles initiated by the Hon'ble Supreme Court is relevant in which it has been held that if there is sale of the public property, the main consideration of the seller is to secure the best price of the property which can be got only when there is maximum public participation in the process of sale. No doubt that in the case of public treaty, there would not be maximum public participation which can only be there in case the mortgaged property is sold either by way of public auction or e-auction. On this premise, it appears that the circular dated 01.11.2017 has been issued by the respondents-Bank in which Clause 2 deals with the

Methods of Sale of Immovable Secured Assets and Clause 3 deals with the Sale by Private Treaty.

19. Clause 3.1 of the said circular provides that *"In respect of sale immovable secured assets through private treaty, it should be resorted only when the other more transparent methods of obtaining quotations/inviting tenders or public auction etc. have not been successful."*

20. Clause 3.2 further provides that *"The minimum number of attempts for sale by public auction by the Bank, before resorting to sale by private treaty i.e. if the value of upto Rs. 1.00 crore one attempt and above Rs. 1.00 crore two attempts."*

21. In our considered opinion, the procedure which has been adopted by way of the circular is in tandem with the decision of the apex Court rendered in the case of *Karnataka State Industrial Investment and Development Corporation Ltd. (Supra)*, in which it has been categorically held that in order to get the best price of the property, maximum participation should be there in the process of sale and everybody should be given an opportunity.

22. The argument of counsel for the petitioners that respondent should allow the petitioners to resort to private treaty at the first instance cannot be accepted and the vires of the circular, challenged on the ground of Article 14 of the Constitution of India being unreasonable or arbitrary is rejected because there is a reasonable nexus to achieve with the issuance of circular that the private treaty should not come at the first instance because in that process the best price may not come out from the sale of property which has to go to the kitty of the Bank for the discharge of its dues. Rather the best price of the property to be sold would definitely come out from the public auction/e-auction because in that process of sale there would be maximum participation and even as per 8(6), the borrower himself can participate in the sale process i.e. public auction/e tender as the respondent-Bank/secured creditor is bound to give 30 days' prior notice of sale of the immovable property to the borrower.

23. Thus, in view of the aforesaid facts and circumstances, we are of the considered opinion there is no merit in the contention of the counsel for the petitioners that the petitioners have a prior right of sale of the property in dispute by way of a private treaty. We also hereby hold that though it is not so provided in the Act that the respondents shall sell the property in dispute firstly by way of a public auction or e-auction because Rule 8(5) of the Rules provides four methods of sale in which the Authorized Officer may choose any one of them but in view of the decision rendered by the apex Court in the case of *Karnataka State Industrial Investment and Development Corporation Ltd. (Supra)* particularly, with reference to sub-para V of Para 19 of the aforesaid judgement in which legal principles have been carried out that the Authorized Officer is supposed to sell the property firstly, by way of public auction/e-auction to secure maximum participation of the private bidders including the borrower who also has to be given an offer under Rule 8(6) of the Rules to participate so that the maximum price of property to be sold may come out for the purpose of discharging the dues of the Bank.

24. Thus, we dismiss the application of the petitioners for seeking amendment of the writ petition to challenge the vires of the circular because we do not find any reason to interfere with the circular much less on the ground being unreasonable and arbitrary.

25. In view of the aforesaid, there is no merit in the present petition and the same is hereby dismissed as such though without order as to costs.

SS – Petition Dismissed.