

Mrs. Leelamma Mathew Vs. M/s. Indian Overseas Bank & Ors.

Civil Appeal No. 7128 of 2022
2022-01-01 | M.R. Shah, J.
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Full judgment text

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[Civil Appeal No. 7128 of 2022]

M.R. Shah, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court of Kerala at Ernakulam in RFA No.379 of 2014 by which the High Court has allowed the said appeal preferred by respondent no.1 herein - Bank and has quashed and set aside the judgment and decree passed by the learned Trial Court dated 31.01.2014 in OS No.630 of 2012 directing the Bank to pay to the plaintiff a sum of Rs.58,10,000/with interest at the rate of 12% per annum from the date of suit till realization, the original plaintiff has preferred the present appeal.

2. That the defendant Bank secured the property in Survey No.48/1 in Tirur Taluk, Tanur Village in exercise of powers under the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (hereinafter referred to as 'SARFAESI Act, 2002')

2.1 That the Bank secured the possession and thereafter by notice for auction dated 23.01.2007 the secured asset admeasuring 54 cents was put to auction. The appellant - original plaintiff after inspection of the property submitted the quotation for sale of 54 cents of land and offered Rs.32,05,000/-. It appears that in the quotation the original plaintiff specifically stated that the offer of Rs.32,05,000/ is subject to the condition that absolute ownership and vacant possession of full extent of property without encumbrances is handed over.

However, by communication dated 05.03.2007, the Bank replied that as in the invitation to the public for tenders, it is stated that the property would be sold in "as is where is" and "as is what is" condition, the original plaintiff may confirm that he is ready and willing to offer the bid and take the property in the present condition. It appears that vide communication dated 08.03.2007, the original plaintiff reiterated that she is ready to purchase the property only if, absolute ownership, vacant possession and full enjoyment of 54 cents of land, free from all encumbrances is given, otherwise, she is not ready to purchase the property, if the Bank is not able to assign absolute ownership, vacant possession and full enjoyment of the property admeasuring 54 cents.

2.2 It appears that thereafter the Bank took the possession of the property pursuant to the order passed by the CJM, Manjeri in an application under Section 14 of the SARFAESI Act. That thereafter the plaintiff paid a total sale consideration in the month of October, 2007. That thereafter the Tehsildar submitted the report dated 21.11.2007 submitting that the actual measurement of the land is 39.60 cents and that the debtor had already transferred 14.40 cents out of land admeasuring 54 cents prior to the creation of the mortgage with the Bank. Despite the above the Bank issued the sale certificate for 54 cents dated 21.11.2007 and handed over the possession of the secured property admeasuring 39.60 cents only however, the sale consideration is issued for 54 cents.

That thereafter the sale deed on the basis of the sale certificate was actually executed in favour of the plaintiff only on 01.10.2010 for 54 cents. That thereafter the plaintiff instituted the suit for recovery of damages/compensation with respect to 14.40 cents. It was the case of the plaintiff that as the plaintiff paid a total sale consideration for 54 cents of the land and even the sale certificate and the sale deed was executed for 54 cents the plaintiff has been handed over the possession of 39.60 cents of the land only and therefore the plaintiff is entitled to the damages/compensation with respect to the 14.40 cents which was less than the area for which the plaintiff paid the amount i.e. 54 cents.

It was the case on behalf of the plaintiff that it was the duty of the bank when accepted the total sale consideration for 54 cents, to hand over the peaceful and vacant possession of the land admeasuring 54

cents. It was also the case on behalf of the plaintiff that as the bank was aware of the true facts that the area of the property/land is less despite that the bank did not disclose the true facts to the plaintiff and suppressed the material fact and played a fraud.

2.3 The suit was resisted by the defendant - Bank by submitting that the sale was on "as is where is" and "as is what is" basis and that the plaintiff was aware that the area of the property is less than 54 cents and still she purchased the secured property. It was the case on behalf of the defendants that there was no fraud committed by them. It was submitted that the documents submitted to them by the borrowers were relating to the total extent of 54 cents of land which was put to auction. That it was the case on behalf of the defendants that the plaintiff is not entitled to any compensation from the defendants. The learned Trial Court framed the following issues:

"(i) Whether the suit is maintainable?

(ii) Whether the plaintiff is entitled to get a decree as prayed for?

(iii) Reliefs and Costs?"

2.4 That the learned Trial Court decreed the suit and directed the defendant - Bank to pay to the plaintiff a sum of Rs.58,10,000/with future interest @ 12% pa from the date of suit till realization.

2.5 Feeling aggrieved and dissatisfied with the judgment and decree passed by the learned Trial Court, the defendant - Bank filed the present appeal before the High Court. By the impugned judgment and order the High Court has allowed the appeal preferred by the defendants and has quashed and set aside the decree passed by the learned Trial Court inter alia on the grounds (i) that as the fraud has not been established and proved the suit was barred in view of Section 34 of the SARFAESI Act;

(ii) That the plaintiff was aware of the fact that the actual area of the secured property put to auction is less than 54 cents and therefore it cannot be said that there was any nondisclosure on the part of the Bank; (iii) that the property was put to auction "as is where is" and "as is what is" basis? 2.6 Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court allowing the appeal and quashing and setting aside the decree passed by the learned Trial Court and consequently dismissing the suit, the original plaintiff has preferred the present appeal.

3. Shri M.T. George, learned counsel appearing on behalf of the appellant has vehemently submitted that in the facts and circumstances of the case the Hon'ble High Court has seriously erred in quashing and setting aside the decree passed by the learned Trial Court. It is submitted that as the suit was for damages/compensation the same cannot be barred under Section 34 of the SARFAESI Act.

3.1 It is submitted that therefore the Hon'ble High Court has materially erred in observing and holding that the suit was barred by Section 34 of the SARFAESI Act.

3.2 It is further submitted by learned counsel for the appellant that the appellant purchased 54 cents of the secured property auctioned by the defendant - Bank in exercise of the powers vested with it under the provisions of the SARFAESI Act. That the offer made by the bank through the auction notice dated 23.01.2007 was for sale of 54 cents of land in Survey No.48/1. That the appellant offered Rs.32,05,000/specifically stating that the absolute ownership and possession of 54 cents of lands would be transferred without any encumbrances. It is submitted that as the offer was conditional the bank by letter dated 05.03.2007 informed the appellant that the bank had invited tenders on the basis of "as is where is" and "as is what is" condition and if the appellant is willing to buy the property on the said condition, she has to inform the Bank.

It is submitted that thereafter the appellant replied on 08.03.2007 the tender bid be considered only if the bank could transfer absolute ownership and possession over the entire 54 cents of land without any encumbrances and if not, she would withdraw her offer and the earnest money would be returned. It is submitted that the bank took the possession of the auctioned property through the intervention of the Court under Section 14 of the SARFAESI Act and asked the appellant to pay the balance sale consideration which was done by the appellant on 17.10.2007.

Consequently, the bank issued certificate of sale for 54 cents of land on 21.11.2007 and thereafter the sale certificate was registered and the sale deed was executed on 01.02.2010 for 54 cents of land. It is submitted that therefore when the bank transferred to the appellant only 39.60 cents of land a fact which was known to the bank and the appellant paid an amount of Rs.32,05,000/for 54 cents of land the appellant

original plaintiff is entitled to the remaining area of land i.e. 14.40 cents. It is submitted that therefore the Trial Court had rightly decreed the suit.

3.3 Learned Counsel appearing on behalf of the appellant has further submitted that the respondent - bank while exercising the powers provided under the SARFAESI Act failed to comply with Rule 8(6)(a) and (f) of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as Rules 2002) and Section 55(1)(a) of the Transfer of Property Act (hereinafter referred to as 'TP Act'). It is submitted that the disclosures can be said to be fraudulent in view of Section 55(1)(a) of the TP Act and the relevant provisions of the Rules, 2002 a duty is cast upon the Authorised Officer to disclose to the auction purchaser any material defect in the title failing which it could be construed that the purchaser was misled. Reliance is placed on the decision of this Court in the case of Haryana Financial Corporation and Anr. Vs. Rajesh Gupta, (2010) 1 SCC 655.

3.4 It is submitted that Rule 8(6)(a) and (f) of the Rules 2002 mandates additional duty on the Authorised Officer to make known to the bidders before auction 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. It is submitted that therefore the immunity claimed by the bank on the pretext "as is where is" and "as is what is" basis is no more a defence.

3.5 It is submitted that out of the total road frontage of 70.1 meters which portion consisted of 14.40 cents has captured 46.3 meters and remaining 39.60 cents were only 23.8 as road frontage which has a direct bearing on the market value of the property. Making above submissions, it is prayed to allow the present appeal and confirm the judgment and decree passed by the learned Trial Court.

4. Present appeal is vehemently opposed by Shri Kunal Tandon, learned counsel appearing on behalf of the Respondent - Bank. It is submitted that as the property in question was put to auction on "as is where is" and "as is what is" basis and the plaintiff - auction purchaser was from the very beginning aware that the area of the land is less than what was advertised and despite that the offer was made which was accepted, the High Court has rightly set aside the judgment and decree passed by the learned Trial Court.

4.1 It is submitted that as rightly observed by the High Court it was not the case that the Bank had no saleable interest at all. It is submitted that the Tehsildar gave its report on 21.11.2007 about the exact extent of the auction property. Thus, no fault was said to be found with the Bank.

4.2 It is submitted that the Hon'ble High Court after looking at the evidence as concluded that the original plaintiff was fully aware of the deficiency in extent.

4.3 It is further submitted that even otherwise as observed and held by Hon'ble High Court the suit itself was barred under Section 34 of the SARFAESI Act.

4.4 It is submitted that in terms of Section 34 of the SARFAESI Act, the jurisdiction of the Civil Court is absolute barred except in case the plaintiff is able to show fraud or misrepresentation. It is submitted that in the present case from the communications on record and that the possession was handed over to the bank pursuant to the order under Section 14 of the SARFAESI Act on 08.10.2007 and thereafter the plaintiff made the payments on various dates, leading to the issuance of the sale certificate on 21.11.2007, which was registered almost 3 years later on 01.02.2010, it is very much clear that the plaintiff was aware of the extent of the property and no case of fraud is made out.

4.5 Even the claim of the plaintiff was barred by limitation. It is submitted that the suit was filed in the year 2012 while the auction sale took place on 05.02.2007 and the sale certificate was issued on 21.11.2007. The payments were made on October, 2007. It is submitted that thus the cause of action arose on 05.02.2007 and thereafter on 21.11.2007. It is submitted therefore as per Article 113 of the Limitation Act, the suit was barred by limitation being beyond three years from the first date of knowledge. Making above submissions it is prayed to dismiss the present appeal.

5. We have heard learned counsel appearing for the respective parties at length.

5.1 At the outset, it is required to be noted that after the Bank received the possession of the secured property in exercise of powers under the SARFAESI Act, the property in question admeasuring 54 cents was put to auction, by Auction Notice dated 23.01.2007. The plaintiff on the basis of the representation made and the auction notice in which the land was put to auction was stated to be 54 cents submitted her offer of Rs.32,05,000/for sale of 54 cents. At this stage, it is required to be noted that in the quotation itself the

plaintiff specifically stated that the offer of Rs.32,05,000/is subject to the condition that the absolute ownership and vacant possession of full extent of property without encumbrances is handed over. However, the Bank replied that as in the invitation to the public for tenders, it is stated that the property would be sold on "as is where is" and "as is what is" condition, the plaintiff may confirm that the plaintiff is ready to offer the bid and take the property in the present condition.

However, immediately vide communication dated 08.03.2007 the plaintiff reiterated that she is ready to purchase the property only if, absolute ownership, vacant possession and full enjoyment of 54 cents of land, free from all encumbrances is given, otherwise, she is not ready to purchase the property, if the Bank is not able to assign absolute ownership, vacant possession and full enjoyment of the property admeasuring 54 cents. At this stage it is required to be noted that the Bank took the possession of the property auctioned on paper. However, the actual possession was handed over to the Bank in the month of October, 2007 pursuant to the order passed by the CJM, Manjeri in an application under Section 14 of the SARFAESI Act.

That thereafter the Tehsildar submitted the report dated 21.11.2007 submitting that the actual measurement of the land is 39.60 cents and that the debtor had already transferred 14.40 cents out of land admeasuring 54 cents prior to creation of the mortgage with the Bank. Despite the above the Bank issued the sale certificate dated 21.11.2007 for 54 cents of land, however, handed over the possession of the secured property admeasuring 39.60 cents only. The sale consideration received by the Bank was for 54 cents.

That thereafter the sale certificate was registered in the month of October, 2010. Thereafter the plaintiff filed the suit for recovery of damages with respect to 14.40 cents. The final certificate was registered on 01.10.2010 and thereafter when the suit was filed in the year 2012 it cannot be said that the suit was barred by limitation. At this stage, it is required to be noted that as such no issue was framed by the learned Trial Court on whether the suit is barred by limitation or not.

5.2 Now so far as the submission on behalf of the plaintiff and the finding recorded by the High Court that the suit was barred by Section 34 of the SARFAESI Act is concerned, at the outset it is required to be noted that the suit was for damages/compensation, with respect to the balance land, which could not have been decided by the DRT or Appellate Tribunal, Section 34 of the SARFAESI Act shall be applicable only in a case where the Debt Recovery Tribunal and/or Appellate Tribunal is empowered to decide the matter under the SARFAESI Act. The plaintiff was not challenging the sale/sale certificate. The plaintiff claimed the damages/compensation with respect to the less area. Therefore, the High Court has seriously erred in holding that the suit was barred by Section 34 of the SARFAESI Act.

5.3 Now so far as the submission on behalf of the Bank that as the property was put to auction on "as is where is" and "as is what is" basis and the plaintiff was aware that the actual area of the property auction is less and thereafter entered into the transaction and therefore the plaintiff cannot claim/pray compensation/damages with respect to the deficiency in the area is concerned, at the outset, it is required to be noted that right from the very beginning the plaintiff insisted for handing over the possession of the 54 cents. When the property was put to auction even the Bank was not in actual possession.

The Bank got possession pursuant to the order passed by the District Magistrate and thereafter the measurement was done by Tehsildar in which it was found that the actual area of the land auctioned was 34.60 cents and 14.40 cents was already transferred by the debtor much earlier.

Therefore, at the relevant time when the property was put to auction even the Bank was not aware of the actual measurement and had gone by the document and 54 cents was put to auction. Considering the fact that the auction notice was for 54 cents; the plaintiff submitted the offer of Rs.32,05,000/for 54 cents; the plaintiff paid the actual amount of sale consideration i.e. Rs.32,05,000/for 54 cents; the sale certificate was issued for 54 cents and even the sale certificate which was registered in the year 2012 was for 54 cents, thereafter it was not open for the Bank to contend that though the Bank had handed over the possession of 34.60 cents still the sale consideration recovered would be for 54 cents.

It was not open for the financial institution like the Bank to take such a plea. Even otherwise it is required to be noted that at least in the month of November, 2007 when the Tehsildar submitted the report, the Bank was aware that the actual area is 34.60 cents and not 54 cents. Thereafter the Bank ought not to have issued the sale certificate for 54 cents. The Bank ought to have been fair and ought to have issued the sale certificate only for 34.60 cents. This shows the conduct on the part of the bank.

5.4 Rule 8 of the 2002 Rules cast a duty on the authorized officer to take all precautions before putting the secured asset to sell. As per subrule 5 of Rule 8 before effecting sale of the immovable property (secured assets) the authorised officer shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor and fix the reserve price of the property and may sell the whole or any part of such immovable secured asset. Therefore, when the reserve price was fixed the same was for 54 cents.

Therefore, it can be presumed that the Bank was aware that the actual area of the secured asset is less than 54 cents. As per Section 54 of the Transfer of Property Act the seller was bound to disclose any buyer any material defect in the property of which the buyer is not aware and which the buyer could not ordinarily discover. Under the circumstances also the submission on behalf of the Bank that the property was put to auction on "as is where is" and "as is what is" condition, thereafter the plaintiff shall not be entitled to compensation of the less area cannot be accepted.

6. In view of the above and for the reasons stated above, the High Court has committed an error in allowing the appeal and quashing and setting aside the judgment and decree passed by the learned Trial Court. Consequently, the impugned judgment and order passed by the High Court is hereby quashed and set aside. The judgment and decree passed by the learned Trial Court decreeing the suit is hereby restored. The respondent - Bank to pay the decretal amount to the appellant with interest as per the judgment and decree passed by the learned Trial Court within a period of 8 weeks from today.

The present appeal is allowed with costs which is quantified at Rs.25,000/which also shall be paid by the Bank to the original plaintiff within a period of eight weeks from today.

Source disclosure: Complete sanitized public judgment text retained for research. Official-primary replacement and later-history closure remain pending.

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