

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

WP(C) No. 465/2021
CM No. 4507/2021

Pronounced on: 30.11.2022

S. K. Bakshi

.... Petitioner/Appellant(s)

Through:- Ms. Mandeep Reen, Advocate

V/s

Punjab National Bank and
others

.....Respondent(s)

Through:- Mr. Parveen Kapahi, Advocate
for R-1 to R-3
Mr. Sumir Pandita, Advocate
for R-6 and R-7

CORAM: HON'BLE MRS. JUSTICE SINDHU SHARMA, JUDGE

JUDGMENT

01. The petitioner in this petition seeks issuance of appropriate writ of mandamus, order or direction to the respondents to put him into physical possession of the property being a double story commercial building constructed on a plot measuring 20' x 60' on shop site No. 115 Phase-I Fruit Market Complex, Narwal Jammu. The case set up by the petitioner is that respondent No. 1/Punjab National Bank had issued an e-auction sale notice in the newspaper on 04.09.2019 as per SARFAESI Act and Rules with respect to auction of Double Story Commercial Building constructed on a plot measuring 20' x 60' on Site No. 115 Phase-I Fruit Market Complex, Narwal Jammu owned and possessed by late Sh. Vipin Kumar Gupta. This premise was leased out and possessed by legal heirs of deceased lessee namely Vipin Kumar Gupta, who had mortgaged the lease hold rights of the property which were granted to him by the Jammu &

Kashmir Horticulture Department by way of Lease Deed dated 15.01.2011 executed by the said department in his favour. As the borrower of the property, i.e., M/s N. S. Walnut became defaulter, the property was proceeded against and ultimately, e-auction of the property was held on 09.10.2019. The petitioner participated in the public e-auction process initiated by respondent No. 1 for sale of its secured assets and was declared as successful auction purchaser on 09.10.2019 of Double Story Commercial Building constructed on a plot measuring 20' x 60' on Site No. 115 Phase-I Fruit Market Complex, Narwal, Jammu.

02. The petitioner was directed by the respondents to make payment of entire bid amount within a period of fifteen days i.e., before 24.10.2019, failing which, earnest money submitted by him would be forfeited. The petitioner, accordingly, deposited the entire bid amount of Rs.1, 67, 50,000/- (Rupees one Crore Sixty Seven Lakh and fifty thousand only) with the bank. After receiving the entire amount, the respondent No. 1 had to issue a sale certificate as well as give physical possession of the property. The contention of the petitioner is that the sale certificate of the property was issued to the petitioner on 03.01.2020, which stated handing over the delivery of possession but, in fact, the physical possession of the property was not given to the petitioner. The petitioner immediately approached the respondents for handing over the physical possession of the property to him but he was informed that some trespassers had taken possession of the said property and the Bank has initiated the proceedings against them. The petitioner, accordingly, again vide his e-mail dated 16.03.2020 requested the Bank to deliver the physical possession of the property sold to him which had not been given till date.

03. Respondent No. 1 in reply to this e-mail had stated that the Bank had sold the property on the basis of symbolic possession and the Bank had moved to the appropriate authority for removing encumbrances from the property in question. However, during the process, some self claimed owners of the property had managed to get restraining order from the Court and immediately after getting the said order, the Bank had also moved to the Court and on 03.01.2020, though the Bank was successful in taking the physical possession of the said property and on the same day had also issued a sale certificate to the successful bidder, i.e., the petitioner but unfortunately on the same day, some miscreants broke open the seal and locks of the Bank from the aforesaid property and regarding this, the Bank has already lodged an FIR with the competent authority. It was further stated that the respondent No. 1 is in procedure of getting back the possession of the aforesaid property which is under process as per the law.

04. The grievance of the petitioner is that the sale certificate was issued to the petitioner as the respondent No. 1 had auctioned the aforesaid premise and the petitioner has purchased the same in auction by paying the entire auctioned amount of Rs. 1,67,50,000/- (Rupees one crore sixty seven lakh and fifty thousand only). The respondents after depositing the bid amount were duty bound to handover not only the sale certificate but also to deliver the physical possession of premise purchased by him in the auction. The respondents, as per the Sale Certificate dated 03.01.2020, acknowledged the receipt of the sale price in full and have stated that the sale of scheduled property was made free from all encumbrances known to the secured creditor. However, the petitioner was

not put in physical possession of the property as reflected in the reply to e-mail by respondent No. 1 which stated that some miscreants had broken the seal and locks of the Bank from the property and the Bank is in procedure to get back the same. Thus, it is submitted that respondent Nos. 6 & 7 are the trespassers over the property purchased by the petitioner, for which, an FIR has been lodged and as such, the respondents are duty bound to take an action to evict respondent Nos. 6 & 7 and hand over the physical possession of the property which is purchased by the petitioner in auction. Thus, the petitioner seeks a writ of mandamus directing the respondents to put the petitioner into physical possession of the property i.e., Double Story Commercial Building constructed on a plot measuring 20' x 60' on Site No. 115 Phase-I Fruit Market Complex, Narwal Jammu.

05. Learned counsel for the respondent No. 1 submits that the property was intended to be transferred or conveyed on 'as is where is' basis as per the terms and conditions of e-auction notice without any warranties by the respondent and their particulars were given in the notice and the respondent would not be responsible, therefore, Bank fulfilled its obligations. In the objections, the respondent No. 1 had admitted that M/s N. S. Walnut become defaulter in loan amount, as such, the provisions of SARFAESI Act were invoked against him and the property is mortgaged and proceeded against which has resulted in public auction of the aforesaid property. The petitioner was declared successful bidder and had deposited the bid amount after being declared as successful bidder. The respondent has also stated that the Bank had taken symbolic possession of the property and in terms of Section 14 of the SARFAESI Act, the Bank had applied to the District Magistrate, Jammu for taking physical

possession of the property auctioned by them and the District Magistrate, Jammu has passed an order No. SARFAESI/234/2018 dated 12.03.2018 directing Tehsildar, Bahu to take over the possession of the property and also directed to take assistance of the police for the same. At the time of taking over the physical possession of the property, respondent No. 6 requested the authorities to grant some reasonable time to vacate the premises and settle the matter as taking over of the property will result in closure of this business. Accordingly, a week's time was granted to him on 21.10.2020 on humanitarian ground to settle the issue. However, the private respondents resorted to civil litigation with respondent No. 1 on the basis of Agreement to sell the property. Two parallel suits were filed, challenging the same order and interim order was also passed in their favour by the City Judge, Jammu which was set aside by the court of 1st Additional District Judge, Jammu holding that the civil suits are not maintainable. Subsequently, the possession of the property was taken on spot by the authorized officer in presence of the Naib-Tehsildar concerned and other witnesses on 03.01.2020.

06. According to respondent No. 1, the physical possession of the property was delivered to the petitioner free from all encumbrances on the strength of sale certificate, as such, they had discharged their duties.

07. It is submitted that after issuance of sale certificate, the physical possession of the property was delivered to the petitioner on 03.01.2020 and *Panchnama* was prepared on spot. Though, as a matter of abundant caution on the request of the petitioner, security guards were kept on the said property. On the same day, however, respondent No. 1 was informed that respondent Nos. 6 & 7 had made forceful entry in the auctioned

property, therefore, legal action was taken against them by lodging an FIR. The respondent No. 1 had, in fact, written to the Inspector General of Police on 24.06.2020 seeking direction to the Police Station Bahu fort to remove the trespassers who have broken the locks of the Bank from the property illegally without any authority. They had also written to the District Magistrate, Jammu on 02.09.2020 seeking direction for restoration of possession over the property which had been taken over by the miscreants on 03.01.2020.

08. In their reply, respondent Nos. 6 & 7 submitted that Vipin Kumar Gupta had executed a formal agreement to sell, beside acknowledgment receipt in their favour, fortifying the sale agreement and they had all along be conducting their business under the name of M/s N. S. Walnut Industry. In the year 2017, they have received a notice from respondent No. 3, the authorized officer of respondent No. 1, under the SARFAESI Act and accordingly, they challenged the same before the City Judge, Jammu on 29.08.2017 who passed an interim order in their favour by which respondents were directed to maintain status quo qua the physical possession of the property which was made absolute on 02.02.2018 and Respondent No. 1 preferred an appeal against the said order before the 1st Additional District Judge, Jammu, who has allowed the appeal and set aside the order of the City Judge, Jammu. Respondent Nos. 6 & 7 submit that they had filed a suit in the Court of Sub-Judge, Jammu by which respondent No. 3 was restrained from interfering into the peaceful possession of the answering respondents with regard to the suit property. Respondent No. 1 thereafter resorted to muscle power and barged into the shop of the petitioner and caused huge loss to them, for

which, they have filed the complaint. They have refuted the fact that the suit property was never vacated by them. It is categorically stated that the suit property and possession all along remained with the respondents and in fact, this is a civil dispute between the parties, as such, the respondents cannot seek physical possession of the property.

09. The procedure under which the secured creditors can enforce the liability discharged by the borrower is provided under Section 13(4) of the SARFAESI Act. If the borrower fails to discharge his liability after issuance of notice under Section 13(2), the secured creditor can take possession of the secured asset of the borrower and has a right to transfer the same by way of lease agreement or sale. Section 13(4) of the Act being relevant reads as under:

“(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:—

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset;

[(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;]

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.”

10. The respondent No. 1, as per the submissions had taken over the possession of the secured asset and auctioned the same for recovery from the borrower by way of e-auction and the property was being sold on ‘as is where is’ basis. Therefore, as per the e-auction, it is apparent that the respondent No. 1 had not taken actual physical possession of the property.

11. As per Section 13(4) of the SARFAESI Act read with Clause 9 & 10 of Rule 9 of the Security Interest (Enforcement) Rules, 2002, it was incumbent upon the authorized officer/respondent No. 1 to deliver the property to the purchaser free from all encumbrances on deposit of money in the Bank. Rule 9 Clause 9 & 10 are to be read with Section 13(4) of the Act which reads as under:

“(9) Time of sale, Issue of sale certificate and delivery of possession, etc. –

(9) The authorized officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in sub-rule (7) above.

(10) The certificate of sale issued under sub-rule (6) shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not.”

12. No doubt, the Bank could auction the property even with encumbrances attached to property but it was incumbent upon the Bank to disclose the encumbrances and litigations on the same or tenancy, if any, attached to the property to all the persons who wanted to participate in the same and to the successful bidder. By including a clause of 'as is where is' it would not be sufficient for respondent No. 1 from disclosing encumbrances or handing over the property to the petitioner.

13. In terms of the Security Interest (Enforcement) Rules, 2002, specifically Rule 9(9) which states that the authorized officer had to deliver the property to the purchaser free from encumbrances, known to the secured creditor on deposit of the money as specified in Sub-Rule 7 but in fact respondent No. 1 has suppressed all litigations and encumbrances relating to the auction property and further auctioned the property and though a sale certificate was issued to the effect that the property is free from all encumbrances and the possession has been delivered to the auction purchaser but in fact on the same day, *panchnama* of the possession of the property was done. However, in terms of the reply to e-mail, respondents have themselves admitted that though they were successful in taking over the physical possession of the property but on the same day, some miscreants broken the seal and locks of the bank from the property and a complaint was lodged by the Bank before the authorities. Thus, the fact remains that the possession of the property mentioned in the auction notice was not taken by the bank till 03.01.2020 and this possession was not with the bank on the very same day, as such, could not be delivered to the petitioner.

14. The petitioner being a bona fide purchaser was entitled not only to the sale certificate but also to the physical possession of the property which was to be provided to him by the respondents under the Security Interest (Enforcement) Rules, 2002. In terms of Rule 9(9) the authorized officer had to deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in sub-rule (7). Where the immovable property sold is subject to any encumbrances, the authorized officer may, if he thinks fit, allow the purchaser to deposit with him the money required to discharge the encumbrances and any interest due thereon together with such additional amount that may be sufficient to meet the contingencies or further cost, expenses and interest as may be determined by him.

15. The respondent No. 1, categorically had in the notice as well as in the sale certificate stated that the property is free from all encumbrances, therefore, respondent No. 1 was bound to deliver the physical possession of the property to the purchaser. The petitioner despite paying a huge amount in the auction has not been delivered the property, rather entire auction proceedings have lost their value and come to naught. Though, the physical possession of the property need not be taken before being put to auction but the respondents cannot shirk from their duty to hand over the physical possession of the property to the auction purchaser. If respondent No. 1 was not in a position to take the physical possession of the same before the sale, then they had to adopt course under Section 14 of the Act. The contention of respondent No. 1 that there is no statutory obligation on their part to put the auction purchaser in possession thus does not hold any merit. Ordinarily, the sale

would be complete on the receipt of the entire sale consideration and handing over the possession but if there was encumbrances mentioned in the sale certificate or in the auction, then it could be argued that the petitioner had entered into an agreement knowing this fact and had purchased the property, thus, taken the risk which came with it. But in the present case, it has been specifically mentioned in the sale certificate that there is no encumbrance in the property, the petitioner could not be expected to know that the property is already in use by some persons. It was the responsibility of respondent No. 1 to specify the encumbrance attached to the property which was there in their knowledge and having failed to do so, respondent No. 1 is duty bound to provide the physical possession of the property to the petitioner.

16. Respondent Nos. 6 & 7 by breaking the locks of the bank and by forcefully entering have in fact committed trespass in the property and the entire purpose of proceedings of the auction have been set to naught.

17. It is also submitted by respondent Nos. 6 and 7 that this petition is not maintainable as the only remedy is available to the petitioner is under Section 17 of the SARFAESI Act. Reliance is placed on the judgment of the Hon'ble Supreme Court, in case titled '*Agarwal Tracom Pvt. Ltd. vs. Punjab National Bank and others*' dated 27.11.2017. This, however, is opposed by learned counsel for the petitioner by submitting that by not delivering the possession of the property to the petitioner by the Bank is not one of the measures specified under Section 13(4) of the SARFAESI Act, therefore, provisions of Section 17 of the SARFAESI Act are not attracted, as such, this action of the respondents cannot be challenged under Section 17 of the said Act.

18. Thus, in terms of this Act, an application under Section 17 can be made to DRT by “any person” including borrower to challenge any of the measures referred to in Section 13(4) once taken by the secured creditor. But, in this case, the petitioner who is the auction purchaser of the property and has been promised by the Bank that the delivery of the property is free from all encumbrances cannot proceed under Section 17 as it does not envisages any of the grounds enumerated in Section 13(4). Thus, the judgment relied upon is not applicable to the facts of this case.

19. The third party, who comes forward to purchase the secured asset, must have a confidence that he would get the title to the property at the earliest. If the transferring of the property by way of title is going to be delayed endlessly, then the object of the Act which is meant for speedy recovery would be defeated as a whole. The duty is on the respondent No. 1 to hand over the possession of the property.

20. In view of the aforesaid discussion, this petition is allowed and respondent No. 1 is directed to deliver the clear physical possession of the double story commercial building constructed on plot measuring 20’ x 60’ on shop site No. 115 Phase-I Fruit Market Complex, Narwal, Jammu at the earliest to the petitioner by taking any measures available to them as per law.

(Sindhu Sharma)
Judge

Jammu
30.11.2022
Michal Sharma

Whether the Judgment is speaking	:	Yes/No
Whether the Judgment is reportable	:	Yes/No