

2024:DHC:526

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

BEFORE

HON'BLE MR. JUSTICE PURUSHAINDR KUMAR KAURAV

+ **W.P.(C) 2829/2023 & CM APPL 10919/2023**

Between: -

M/S KALYANI (INDIA) PRIVATE LIMITED
THROUGH ITS DIRECTOR SH. NARESH KUMAR,
BJ-25 EAST SHALIMAR BAGH,
NEW DELHI-110028

....PETITIONER

(Through: Ms. Vaishali Gupta and Mr. Anubhav Gupta, Advocates)

AND

PUNJAB NATIONAL BANK
THROUGH ITS CHIEF MANAGER
PLOT NUMBER 4, DELHI ROAD,
DWARKA SECTOR 10, DELHI-110075
(NEAR WELCOME HOTEL, PETROL PUMP)

....RESPONDENT NO. 1

BRANCH MANAGER
PUNJAB NATIONAL BANK
ARMB, MAYUR VIHAR PHASE-II BRANCH,
NEW DELHI-110091

....RESPONDENT NO. 2

*(Through: Mr. Santosh Kumar Rout, Standing Counsel for PNB
alongwith Ms. Dharna Veragi, Advocate)*

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Pronounced on: 24.01.2024

J U D G M E N T

1. The petitioner in the instant writ petition has prayed for the following reliefs:

i. issue a writ of mandamus order direction thereby directing the respondents to grant refund of INR 5,38,72,536/- (Five Crore Thirty Eight Lakhs Seventy Two Thousand And Five Hundred Thirty Six Rupees) alongwith applicable interest paid on account of auction for property bearing Plot No. 38, Block-D, Masjid Moth, Pansheel Enclave, New Delhi-110017; And/Or;

ii. pass any other order(s) which this Hon'ble Court deems fit and proper in the interest of justice;

FACTUAL SCENARIO

2. The dispute in the present writ petition emanates from the publication issued by the respondents on 14.12.2018 under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter 'SARFAESI Act') for the sale/auction of the residential property bearing Plot No. 38, Block-D, Masjid Moth, Panchsheel Enclave, New Delhi, 110017, having built up area ad-measuring 216 Sq. Mt. which consists of basement, ground floor, first floor (hereinafter 'the subject property').

3. Pursuant to the said publication, the petitioner participated in the bidding and was declared as the highest bidder as the petitioner made a total final bid of Rs. 4,90,25,000/-.

4. Thereafter, the respondents on 01.01.2019, issued a confirmation letter outlining the property specifications and

requirements. The petitioner was granted a pre-determined window of time to complete the payment. The petitioner paid the complete consideration amount to the respondents and on 15.02.2019, sale certificate was issued in favour of the petitioner. In addition, the petitioner paid stamp duty of Rs.34,10,000/- on 12.06.2019, and thus, the sale certificate was registered *vide* Registration No. 4, 175 in Book No. 1, Volume No. 2, 879 on page nos. 70 to 77 on 14.06.2019 in the Office of the Sub-Registrar-VA, Hauz Khas, New Delhi.

5. The petitioner further parted with a sum of Rs.5,42,536/- on 07.06.2019 and Rs.8,95,000/- on 31.05.2019, towards the house property tax of the property in question. Details of the payment made by the petitioner in the year 2018-19 are reproduced as under:-

Sr. No.	Purpose of Payment	Amount
1.	<i>Sale consideration to the Punjab National Bank for the Property Bearing No. Plot No.38, Block-D, Masjid Moth, Panchsheel Enclave, New Delhi, 110017</i>	<i>Rs. 4,90,25,000/-</i>
2.	<i>Stamp Duty paid at the office of Registrar Office at New Delhi E stamp certificate no. IN-DL-02281630887019R dated 12.06.2019 Sub-Registrar-VA, Hauz Khas, New Delhi</i>	<i>Rs. 34,10,000/-</i>
3.	<i>Payment for House Property Tax Vide Receipt dated 07.06.2019 and 31.05.2019</i>	<i>Rs. 14,37,536/-</i>
	Total Payment	<i>Rs. 5,38,72,536/-</i>

6. Notably, the sale certificate dated 15.02.2019 clearly stipulated that the sale was made free from all encumbrances known to the

secured creditors. A copy of the original sale certificate is reproduced as under:-

“The undersigned being Authorized Officer of Punjab National Bank, ARMB MayurVihar Phase II, Delhi 110091 (hereinafter called "the Bank") under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and in exercise of the powers conferred under Section 13 read with rule 12 of the Security Interest (Enforcement) Rules, 2002 sold on behalf of the Punjab National Bank, ARMB, MayurVihar Phase II, Delhi 110091 in favor of M/s Kalyani (India) Pvt Ltd, Through its Director - Sh.Naresh Kumar, Behind Jyoti Weigh Bridge, Vijay Boro Compound, NH-37, Beltola, Guwahati-22 (Assam), the immovable property shown in the schedule below secured in favour of Punjab National Bank by ShKrishan Sharma (since deceased) and Smt Santosh Sharma in the account of M/s 3 Dimension Architectural Design Studio (3 DADS) towards the financial facility offered by Punjab National Bank. The undersigned acknowledges the receipt of the sale price of Rs. 4,90,25,000/= (Rs. Four Crore Ninety Lakh Twenty Five Thousand only) in full and handed over the delivery and possession of the scheduled property. The sale of the scheduled property was made free from all encumbrances known to the secured creditor listed below on deposit of the money demanded by the undersigned.

DESCRIPTION OF THE IMMOVABLE PROPERTY

“Residential leasehold property consisting of basement, ground floor and first floor built up at plot no 38, block D, in layout plan of Masjid Moth residential Scheme (now known as Panchsheel Enclave), Chirag Delhi, Revenue Estate, New Delhi 11001 measuring 216 sqmtr in name of ShKrishan Sharma (since deceased, through leg: heir Mr Nitin Sharma and Smt Santosh Sharma) and Smt Santosh Sharma”.

List of encumbrances:

Not known to the Bank

*Authorised Officer Punjab
National Bank BO:ARMB,
Mayur Vihar Phase II
Delhi-110091*

*Date: Friday, February 15, 2019
Place: Delhi”*

7. To the dismay of the petitioner, even after obtaining the sale certificate in its favour, the petitioner never got the physical possession of the subject property as the property was not free from encumbrances and was found to be subject of several litigations pending before different forums.

PETITIONER'S SUBMISSIONS

8. Ms. Vaishali Gupta, learned counsel appearing on behalf of the petitioner submits that the respondents deceived the petitioner from the very beginning itself. She submits that after receiving the consideration amount, the respondents ignored the interests of the petitioner and failed to notify the petitioner about the date and time of the transfer of physical possession of the subject property to it. She submits that the respondents did not pay any heed to the petitioner's repeated requests for the physical possession of the aforementioned property and continued to withhold information about the property's undetermined and disputed title and rights.

9. Learned counsel appearing for the petitioner further submits that the respondents purposefully withheld from the petitioner the information that the bank had already applied to the CMM, Saket District Courts, New Delhi, in the year 2016 to take physical possession of the subject property. This application was allowed and a Receiver was appointed by an order issued by the CMM, Saket District Courts, New Delhi on 20.03.2016. It is advanced that the bank failed to acquire actual possession of the property in question, even after obtaining the order for physical possession of the subject property.

10. In addition, learned counsel appearing for the petitioner claims that the respondents were fully aware that the original borrower's

family had filed a petition in this court to maintain *status quo*. She placed reliance on the case of **Mayank Sharma v. Santosh Sharma**¹, wherein, this court *vide* order dated 21.12.2018, granted an interim protection with respect to the subject property to the legal heir of the original borrower. However, as soon as the petitioner learnt of the aforementioned order, it proceeded to file an impleadment application, which was allowed and the earlier-granted interim protection stood revoked by this court *vide* order dated 31.01.2020.

11. Learned counsel appearing for the petitioner further submits that the respondents chose to conceal another legal proceeding from the petitioner pending before the Debt Recovery Tribunal-1, New Delhi (hereinafter as 'DRT') titled as **Subhas Arora v. PNB**². In the said proceeding, the original borrowers/family members of the original borrowers had filed a securitization application claiming the rights/interest/title in the subject property.

12. She further submits that over and above the aforementioned litigations, of which the respondents were fully aware being a party in the said proceedings, the respondents intentionally chose to conceal the factum of another pending litigation before this court from the petitioner titled as **Subhas Arora v. Kishan Sharma & Ors**³. In the said case, the plaintiff therein filed a suit for specific performance for the subject property and the alienation of the subject property has been stayed *vide* orders dated 16.07.2013 and 06.04.2014.

13. According to her, after becoming aware of the several litigations involved in the property in question, the petitioner promptly made a written request dated 13.02.2023, to the respondents to return

¹ CS(OS) 664/2018

² SA/NDN/243/2019

³ CS(OS) No. 1033 of 2013

the money paid against the bank auction for the aforementioned property along with interest rate of 18% per annum. But, the respondents opted to turn a blind eye and remained silent. They neither responded to the petitioner's representation nor took any steps to refund the amount paid by the petitioner.

14. Learned counsel appearing for the petitioner, to buttress the point, has placed reliance on various decisions of the Hon'ble Supreme Court in the cases of *Wazir Chand v. The State of Himachal Pradesh*⁴, *State of Jharkhand v. Jitender Kumar Srivasatava*⁵, *Mohd. Shariq v. Punjab National Bank*⁶, *ABL International Limited & Ors v. Export Credit Guarantee Corporation of India & Ors*⁷, *Surya Constructions v. State of Uttar Pradesh & Ors*⁸, *Unitech Limited & Ors v. Telangana State Industrial Infrastructure Corporation & Ors*⁹, *Surjit Singh & Others v. Harbans Singh & Others*¹⁰ and *K.N. Guruswamy v. State of Mysore & Ors*¹¹.

15. Learned counsel for the petitioner further relied on the decisions of the Calcutta High Court in the cases of *Ku Chih Choi v. Central Bank of India and Others*¹² and *Corporation Bank and Another v. Dr. Jayesh Kumar Jha*¹³, the decision of this court in the matter of *Rajesh Gems and Jewels Pvt. Ltd. v. Indian Overseas Bank*¹⁴ and the

⁴ AIR 1989 SC 378

⁵ (2013) 12 SCC 210

⁶ (2023) SCC OnLine SC 392

⁷ (2005) 10 SCC 495

⁸ (2019) 16 SCC 794

⁹ (2021) SCC OnLine SC 99

¹⁰ (1995) 6 SCC 50

¹¹ AIR (1954) SC 592

¹² (2023) SCC OnLine Cal 136

¹³ AIR (2019) Cal 328

¹⁴ (2017) SCC OnLine Del 10679

decision of the Madras High Court in the case of *V. Sridhar v. The Authorized Officer, Indian Bank, Grindy Branch*¹⁵.

16. Learned counsel for the petitioner further submits that the respondents are at fault for this entire imbroglio and the petitioner was made to part with its valuable monies with no consequential benefit. Whereas, the respondents enjoyed the amount paid by the petitioner for a significant period of time, the petitioner could never enjoy the subject property for which it paid the entire consideration. The petitioner has prayed for award of interest at the rate of 24% per annum on the amount paid by the petitioner at the time of auction of the subject property along with refund of stamp duty, registration amount and the property tax paid by the petitioner.

17. She also contends that the respondents were duty bound under Section 13(4) of the SARFAESI Act and Rule 8 and 9 of Security Interest (Enforcement) Rules, 2002 to deliver the property free from all encumbrances known to them. She further submits that mere usage of the phrase 'as is where is' basis on the auction/sale notice cannot absolve the respondents of their responsibility to act fairly and transparently and deliver the property free from all encumbrances. She, therefore, submits that the respondents are liable to pay interest on the principal amount paid, amount lost in pursuance of the payment of the stamp duty, registration amount and property tax etc.

18. Learned counsel appearing for the petitioner, to aid her submissions, has placed reliance on the decisions of the Karnataka High Court in the cases of *M/s Paramount Constructions Company v. The Authorized Officer and Chief Manager, PNB and Ors.*¹⁶ and *P.*

¹⁵AIR 2018 Mad 87

¹⁶ W.P. No. 33034/2019

*Balaji Babu v. State Bank of India*¹⁷, the decisions of the Madras High Court in the cases of *Deendayalan v. N. Sathish Kumar*¹⁸ and *V Sambandan v. The PNB*¹⁹, *R. Shanmugachandran (deceased) v. The Chief Manager, Indian Bank Asset Recovery Management*²⁰ and *Jai Logistics v. The Authorised Officer, Syndicate Bank*²¹, the decision of the High Court of Judicature at Allahabad in the cases of *Rakesh Kumar Kaushal v. State of U.P.*²² and *Rekha Sahu v. UCO Bank*²³, the decision of the Jammu and Kashmir High Court in the case of *S.K. Bakshi v. Punjab National Bank and Ors.*²⁴, decision of the Hyderabad High Court in the case of *Mandava Krishna Chaitanya v. UCO Bank*²⁵ and the decision of the Andhra Pradesh High Court in the case of *Mandava Srinvasu v. SBI & Ors.*²⁶

RESPONDENTS' SUBMISSIONS

19. *Per contra*, Mr. Santosh Kumar Rout, learned counsel appearing on behalf of the respondents stands in vehement opposition against the stance taken by the petitioner. He submits that the petitioner was well aware of all the legal proceedings pending in respect of the subject property. Further, the petitioner was equally aware of the continuous efforts taken by the respondents in getting the physical possession of the subject property.

20. He further submits that the petitioner itself has participated in various legal proceedings alongwith respondent no.1-Bank in getting

¹⁷ (2022) SCC OnLine Kar 853

¹⁸ (2021) SCC OnLine Mad 16531

¹⁹ (2017) SCC OnLine Mad 4570

²⁰ (2012) SCC OnLine Mad 3504

²¹ (2010) SCC OnLine Mad 3830

²² (2018) SCC OnLine All 5757

²³ (2013) SCC OnLine All 13203

²⁴ (2022) SCC OnLine J&K 1075

²⁵ (2018) SCC OnLine Hyd 196

²⁶ (2023) SCC OnLine AP 1301

the stay orders by various legal forums/courts. According to him, the petitioner is party to all the legal proceedings pending before the DRT as well as before this court.

21. He, therefore, contends that the petitioner cannot now claim to have no knowledge about the said proceedings in order to claim a refund of the amount paid as consideration at the time of e-auction of the subject property.

22. He further contends that the petitioner has concealed and suppressed the fact that its representation dated 29.01.2022, given to the respondents, by the petitioner, was duly replied by the respondents *vide* reply notice dated 03.06.2022. He also submits that the petitioner had immediately filed the present writ petition on 01.03.2023, immediately after sending representation dated 13.02.2023, therefore, leaving no scope or opportunity for the respondents to reply to the representation.

23. Learned counsel submits that respondent no.1-Bank is a nationalized public sector bank and there is no reason to cheat and defraud any citizen, as it is duty-bound to follow the terms of the guidelines and directions passed by the Reserve Bank of India (RBI) and the Government of India (GoI). He contends that respondent no.1-Bank is duly aware about the responsibility to recover its dues and at the same time, to handover the physical possession of the subject property to the auction purchaser i.e., the petitioner.

24. Learned counsel appearing for the respondents further submits that respondent no.1-Bank is continuously taking all measures/legal recourse for getting the physical possession of the subject property, as

discussed hereinabove, and for handing it over to the petitioner in a peaceful manner.

25. He contends that respondent no.1-Bank, in order to take physical possession of the subject property, filed applications before the CMM, South Delhi in the year 2015, 2016, 2018, 2019 and lastly in 2020. However, every attempt of taking physical possession of the subject property was countered with applications/petitions before different courts of law by the original borrower. He, therefore, submits that the DRT had directed to maintain *status quo* of the secured asset *vide* its order dated 20.03.2020 in the case of ***Subhas Arora (supra)***.

26. He further submits that the petitioner *vide* representation made on 29.01.2022, asked for physical possession of the subject property only and did not demand for the refund of the money. He submits that if the petitioner had requested for the refund of the amount, the respondents would have allowed the same at that time itself. He also contends that the judgments relied upon by the petitioner deals with different sets of facts and circumstances from the present case and therefore, none of them can be applied to the facts and circumstances of the present case.

27. Learned counsel appearing for the respondents, while opposing the demand of the petitioner regarding payment of interest, stated that as the petitioner was well aware of all the encumbrances, therefore, they are not liable for payment of any interest rate. He has relied on the decision of the Calcutta High Court in the case of ***Anita Tosinwal v. The Reserve Bank of India & Ors.***²⁷ Reliance has been placed on paragraph no.18 of the said decision, which reads as under:-

²⁷ (2023) SCC OnLine Cal 1433

“18. At the time of the execution of the sale deed the appellant had paid an amount of Rs. 2,65,722/- as stamp duty and Rs41,843/- as registration fee. The said amount was not paid to the bank and it did not utilise the same. The sale price of Rs 35,00,000/- paid by the appellant had been received and retained by CB. The appellant also had not made a proper enquiry about the property before participating in the auction and she ought to have been more diligent. For such laches we are not inclined to allow the appellant’s prayer for interest and refund of the stamp duty and registration fee. However, it would be iniquitous to deny the appellant’s prayer for refund of the consideration money of Rs. 35,00,000/-.”

28. In light of these submissions, it is urged that this court may direct the petitioner to cooperate with the respondents in getting the physical possession of the secured asset/auctioned property peacefully, till the time it is handed over to the petitioner.

29. On 10.11.2023, it was submitted by the learned counsel appearing on behalf of the respondents along with Mr. Kamal Bajpayee, AGM that there is no dispute with respect to the return of the amount deposited by the petitioner. For, the physical possession of the property in question has admittedly not been handed over to the petitioner on account of pending litigation.

30. Therefore, this court *vide* order dated 10.11.2023, directed respondent no.1-Bank to return the sum of Rs.4,90,25,000/- (deposited by the petitioner) with respect to the subject property within a period of 20 days from the date of the order.

31. The relevant paragraphs of the said order dated 10.11.2023 are reproduced as under:-

“2. Today, when the matter is called out for hearing, learned counsel appearing on behalf of the respondent no.1-Bank along with Mr.Kamal Bajpayee, AGM submits that there is no dispute with respect to return of the amount deposited by the petitioner for the reason that the physical possession of the property in question has admittedly not been handed over to the petitioner on account

of various litigation. He, however, submits that the petitioner is not entitled for any interest and for any other charges.

3. In view of the aforesaid, at this stage, this court deems it appropriate to direct for return of a sum of Rs.4,90,25,000/- (deposited by the petitioner) with respect to the property in question within a period of 20 days from today. Let the said amount be returned to the petitioner by way of a demand draft in the name of the petitioner.

4. Let the parties to assist this court as to whether, under the facts of the present case, this court can award interest, appropriate compensation and other ancillary payments like payment of stamp paper etc.”

32. The said order was complied with by respondent no.1-Bank and a sum of Rs.4,90,25,000/- was returned to the petitioner.

33. Therefore, the short controversy left to be adjudicated in the instant petition relates to whether, under the facts of the present case, the petitioner is entitled to interest, appropriate compensation and other ancillary amounts in lieu of the payment of stamp paper duty and house property tax etc. by the petitioner.

34. I have heard the learned counsel appearing on behalf of the parties and have also given a careful consideration to the record.

ANALYSIS

35. It is to be noted that as per the e-auction sale notice dated 14.12.2018 issued by respondent no.1- Bank under Section 13(2) of the SARFAESI Act with respect to the sale of the subject property, the terms and conditions of the aforesaid sale notice stipulates the following :-

“BRIEF TERMS AND CONDITION OF E-AUCTION SALE: The sale shall be subject to the Terms & Conditions prescribed in the Security interest (Enforcement) Rules 2002

(1) The properties are being said on As is where is Basis.

(2) *The auction sale will be online through e-auction portal <http://pnbindia.biz>*

(3) *Interested bidders are required to obtain login id and password in advance through SMS, E-Mail contacting the nodal officers mentioned above against each property which is mandatory for E-bidders.*

(4) *The undersigned reserves the right to accept any or reject all bids if not found acceptable or to postpone cancel the auction at anytime without assigning any reason whatsoever and his decision in this regard shall be final.*

(5) *In case bid is placed in last 5 minutes of the closing time of auction, the closing time will automatically get extended by 5 minutes*

(6) *The bidders shall upload scanned copies of PAN card and proof of residential address. The bidder other than individual shall also upload proper mandate for e-bidding.*

(7) *The successful bidder shall have to deposit 25% of the bid amount immediately including the earnest money already deposited.*

(8) *The successful bidder shall be required to deposit the balance 75% of the bid amount within 15 days from the date of confirmation of the sale.*

(9) *In case of default in depositing the 25% bid amount immediately of balance 75% of the bid amount within the prescribed period the amount already deposited will be forfeited and secured asset will be resold.*

(10) *All statutory duties/attendant charges/ other dues including registration charges, stamp duty, taxes etc shall be borne by the purchaser.*

(11) *This publication is also 15 days notice to the abovementioned borrower/guarantors/mortgagers. For further details and complete terms & conditions.*

Please visit the following website and/or contact the nodal officers/Authorized officers mentioned above against each property: www.pnbindia.biz; www.pnbindia.in; www.tenders.gov.in.

Date: 14.12.2018, Place: New Delhi

*Authorized Officer,
Punjab National Bank”*

36. It is pertinent to note that a bare perusal of the aforesaid terms and conditions would reveal that the subject property was sold on ‘as is where is basis’. Undeniably, the entire controversy revolves around the clause of ‘as is where is basis’ and its implications. The concept of

‘as is where is basis’ under the provisions of the SARFAESI Act has been dealt with by the High Court of Hyderabad in the case of *Mandava Krishna Chaitanya (supra)*, wherein, it has been held as under:-

“23. Further, the concept of ‘as is where is’ and ‘as is what is’ basis has lost its significance in the current commercial milieu and the principle of caveat venditor is more on the rise as compared to the outdated principle of caveat emptor. The Transfer of Property Act, 1882, requires the seller to own up to certain duties and it is not open to a responsible bank totake an innocent auction purchaser for a ride by selling to him a tainted property and thereafter claim protection under the principles of ‘buyer beware’. The counter-affidavit filed by the bank clearly demonstrates that the bank undertook no exercise whatsoever to verify and ascertain as to what encumbrances attached to the subject property at any stage. No details are forthcoming of any efforts having been made by the bank, be it before the registration authorities or any other authority at any stage. Now, it has come to light that the property in question is tainted on grounds more than one. It falls within the full tank level of a lake and, surprisingly, it is also treated as a ceiling surplus land. That apart, the possession of the property cannot even be handed over by the bank to the petitioner as the sale was effected without the bank securing actual physical possession thereof and the bank does not deny the factum of a lease having been created by the borrower in relation thereto. The bank therefore cannot comply with the statutory mandate of delivering actual possession of the property sold under the sale certificate. The decisions of various Courts referred to supra would come to the aid of the petitioner in this regard. That apart, the registration authorities already indicated to the petitioner that the subject land is noted as a ceiling surplus land. Therefore, even if they do entertain the sale certificate issued by the bank for registration, it would be subject to this cloud and would not amount to clear conveyance of title. It is therefore manifest that the bank made the innocent petitioner a victim by failing to exercise due diligence, not only in terms of the statutory scheme of the SARFAESI Act and the Rules of 2002, but also in its own commercial interest, let alone public interest, when it accepted this property as security for the loan sanctioned by it. This utter carelessness on the part of the bank in sanctioning loans, by use of public monies, on the strength of secured assets which are not even worthy of being mortgaged, requires to be deprecated in the strongest terms. Banks necessarily have to exercise more care and caution while using public monies available with them, be it through deposits by customers or otherwise, when sanctioning loans without caution or worse and cannot be permitted to claim protection under outdated legal principles so asto victimize innocent auction

purchasers, such as the petitioner. This Court therefore has no hesitation in holding that the auction sale held by the bank, without even exercising minimum care to ascertain the encumbrances attaching to the subject property and without informing the petitioner or other bidders of the same, vitiates the sale proceedings, culminating in issuance of the sale certificate which is yet to be registered.

24. The writ petition is accordingly allowed setting aside the said sale. The bank shall refund the sale consideration of Rs. 4,80,44,000/- paid by the petitioner, with interest thereon at 18% per annum from the date of the deposit till the date of realization, within two weeks from the date of receipt of a copy of this order. As the bank is itself at fault for this entire imbroglio and the petitioner was made to part with his valuable monies with no consequential benefit therefor and the bank enjoyed the custody of these monies all through, the rate of interest as applied by the Supreme Court in like circumstances in *Mathew Varghese v. M. Amritha Kumar* is adopted.”

[Emphasis supplied]

37. Furthermore, the High Court of Jammu and Kashmir in the case of *S.K. Bakshi (supra)* while dealing with the similar issue, in terms of paragraph no.12, has held as under:-

“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.”

38. In the case of *Paramount Constructions (supra)*, the Karnataka High Court under similar facts and circumstances, considered the ‘as is where is’ clause and the practice of taking shelter under the same adopted by the banks. The relevant paragraphs of the said decision is reproduced hereinunder:-

“18. *In the teeth of the aforesaid facts what would unmistakably emerge is that an innocent auction purchaser is made to bear the brunt of unnecessary litigation all for the acts of the Bank in not delivering a property which was free from all encumbrances. If*

*the Bank has done due diligence at the time of grant of loan in the year 2010 to the Company, the situation now would not have arisen. The Bank is now seeking to wash off its hands by contending that it is not responsible for any problem that would crop up after the sale, as the e-auction notice clearly indicated that the property is being sold “as is where is basis, as is what is basis”. **That would not mean that an auction purchaser could be put in possession of the property which is not free from encumbrance. ‘As is where is’ cannot mean that the property did not have title itself for it to be sold in a public auction. The responsibility undoubtedly rests on the part of the Bank to have not conducted any due diligence either while granting the finance or while putting the property to sale or even at a time when the petitioner was delivered documents and possession of the property. It appears, all that the Bank wanted was to redeem its charge over the property and somehow finds its way in getting back the amount. Several litigations have emerged after the sale of the property to the petitioner and the petitioner having invested huge amount in 2014 is yet to reap the benefits of the said sale all for the reason that litigations galore. Therefore, it is for the Bank now to refund the amount as is claimed by the petitioner.***

[Emphasis supplied]

39. The expressions ‘as is where is’ basis and ‘as is what is’ basis are commonly used in the commercial agreements, especially in property auctions. The expressions are indicative of an unconditional transfer wherein a buyer purchases the property subject to all encumbrances, rights, title and liabilities. In such cases, the buyer generally gets a fair opportunity to conduct due diligence and is expected to conduct an inspection of all relevant aspects of the property. It is premised on the concept of *caveat emptor*, which puts the onus on the buyer. However, the real effect of an ‘as is where is basis’ clause is to be seen in light of the specific facts and circumstances of the case, as recently observed by the Hon’ble Supreme Court in *K.C. Ninan v. Kerala State Electricity Board & Ors.*²⁸, in the following paragraph:-

²⁸ 2023 SCC OnLine SC 663

“148. While examining the effect of an “as is where is” clause, the facts and circumstances of each case individually, along with the terminology of the clauses governing the auction sales must be taken into consideration, to arrive at an equitable decision.”

40. Therefore, an ‘as is where is’ clause is not a clause of blanket application. The meaning to be placed on an ‘as is where is’ clause must result in a just and equitable outcome. The need for caution, while giving effect to such a clause, arises because of the potential of abuse that it carries. Such clauses have the tendency to become the tools of abuse at the hands of unscrupulous sellers. If a buyer suffers, not because he was not vigilant enough, but because of an act of active and deliberate concealment by the seller, the brunt thereof must not fall upon the buyer. At times, the principle of *caveat emptor* did give rise to such undesirable consequences and therefore, the duty of the buyer to be vigilant was coupled with the duty of the seller to not indulge in an act of egregious fraud.

41. It is pertinent to accentuate the rise in the principle of *caveat venditor* i.e., the seller beware as compared to *caveat emptor* i.e., the buyer beware, due to the changes in the orientation of market dynamics, which is becoming more consumer-oriented. There is an emerging need to find a balance between the respective responsibilities and due diligence standards of buyers and sellers. In a case where the Bank conceals the encumbrance on physical possession, despite undertaking to disclose fully as per its knowledge, liability could not be fixed on the buyer on the ground that he should have been more vigilant. Such a consequence would be grossly unjust and would be against the very foundation of good conscience and justice. Law is not expected to place an unrealistic burden on either side as it would lead to absurdity. An ‘as is where is’ clause must be

construed in a pragmatic sense and a buyer cannot be held responsible if the seller indulged in an active concealment of foundational facts. What could be such foundational facts is a matter of judicial application of mind and it would not be apposite to lay down any rule of law in that regard. Therefore, the Bank cannot take shelter under the guise of 'as is where is' clause to shed away the responsibilities enshrined upon it.

42. Having expressed the view on the contemporary standing of the 'as is where is basis' clause, this court may now address the question of payment of interest. A useful reference can be made to the case of *State of U.P. v. Jaswant Sugar Mills Ltd.*²⁹, wherein the Hon'ble Supreme Court addressed the question of interest and directed the state to pay the interest on the refunded auction amount at the rate of 6% per annum. The relevant paragraph is reproduced herein as under:-

“37. In the present case, we find that there was no misrepresentation on the part of the auction-purchasers; they deposited the total auction amount within the time stipulated. It has not been in dispute that the title of the land was also transferred in their favour. But for the reasons mentioned by the High Court the sale has been cancelled. It has been ordered to refund amount in favour of the auction-purchaser/appellant(s). We find no reason as to why on equitable grounds the appellants should not get interest on the said amount. Taking into consideration the aforesaid factor while working out equities, it would, therefore, be appropriate to direct the State to pay interest at the rate of 6% on the amount to be refunded as per the High Court's order with effect from 27-4-2001 and 3-9-2001, the day the High Court passed the impugned order. The respondents concerned are directed accordingly.”

43. The High Court of Andhra Pradesh in the case of *Mandava Srinvasu (supra)*, exhaustively dealt with the question of payment of

²⁹ (2014) SCC OnLine SC 503

interest, wherein the court in paragraph nos.22, 23 and 24, has held as under:-

“22. As far as interest is concerned it is clear that there is no provision either in the Act, in the Rules or in the auction notice for payment of interest. The petitioner is relying upon (a) the notice dated 23.11.2015 claiming refund of Rs. 57,88,900/-; (b) the notice dated 17.04.2018 claiming refund of Rs. 39,10,000/- and (c) the notice dated 17.04.2018 claiming refund of Rs. 1,08,250/- Subsequent notices also issued by the writ petitioner did not evoke any response. The law is also clear that if there is no agreement etc., between the parties the Interest Act, 1978 or a similar statute providing for payment of interest can be pressed into service to claim interest. In the case in hand the petitioner has issued notices demanding interest. As mentioned earlier no fault can be attributed to the writ petitioner in this case. The Division Bench of the combined High Court reported in Mandava Krishna Chaitanya case (supra) directed the refund of amount along with interest at the rate of 18% p.a. The power of this Court and to grant interest while directing refund of the amount has also been upheld in many cases including the judgment in Union of India v. Willowood Chemicals Private Limited. Both on grounds of equity, as there is no provision in the statute etc., and as a notice was issued, this Court is of the opinion that the petitioner is entitled to refund of the amount payable along with interest. This Court also draws support from State of U.P. v. Jaswant Sugar Mills Ltd.

23. However, interest rates keep fluctuating, they are not static and they depend on market condition. This Court cannot directly award interest at 24% as prayed for. No clear proof is filed for this rate of interest. The respondent Bank did not expressly deny or contest this claim for interest. A person deprived of the use of his money is entitled to compensation/interest/damages by whatever name it is called (Irrigation Deptt., Govt. of Orissa v. G.C. Roy).The ratio of this case is applicable to this Writ also. At the same time this Court notices that no proof is filed about the contemporaneous interest rates. This duty has to be discharged by a party claiming interest. However, when such proof is not forthcoming and the Court finds that the petitioner is not guilty of any default etc., rules of justices/equity will allow the Court to grant reasonable rate of interest. Considering the fact that this is a public sale of commercial property by a Bank which is in the business of lending money award of interest at the rate of 12% p.a. is deemed to be reasonable in the circumstances.

24. Hence, the writ petition is allowed (a) directing the payment of interest at the rate of 12% p.a. on Rs. 57,88,900/- from 01.09.2014 till 01.02.2019; (b) directing the respondents to refund the amount of Rs. 39,10,000/- with interest at the rate of 12% from 21.08.2014 till the date of realization; and (c) a further direction to the respondent is given to refund the sum of Rs. 1,08,750/- with interest at the rate of 12% p.a. from 28.08.2014 till the date of realization. There shall be no order as to costs.”

44. Further, reliance can be placed on the decision of the High Court of Madras in the case of *S. Shanmuganathan v. Indian Overseas Bank*³⁰, wherein, the court addressed the question as to whether the petitioner is entitled to interest or not and it was held as under:-

“32. The other question is as to whether the petitioner is entitled to interest.

33. The petitioner deposited the sale consideration on 24.07.2008. The bank retained the money all these years without delivering the property to the petitioner. The bank is therefore liable to pay interest to the petitioner.

34. In *Ambalavanan v. Canara Bank* (order dated 01.04.2016 in Review Application (Writ) No. 302 of 2015) a Division Bench of this court considered the question regarding payment of interest. The Division Bench made the following observation, while directing payment of interest to the purchaser of a secured asset:—

“9. The Bank issued the sale notice to auction the property mortgaged by the first respondent. The applicant participated in the auction. The bid submitted by the applicant was accepted by the Bank and the sale was confirmed in his name. The applicant paid a sum of Rs. 65,07,000/- to the Bank. The amount was deposited on 27 August 2010. The sale was subsequently set aside by this Court. The Bank refunded the amount deposited by the applicant. However, interest was not paid. The Bank cannot be heard to say that the purchaser of the property is not entitled to interest. The money was deposited with the Bank. The Bank was having the money throughout the proceedings. The Bank utilized the money. The Bank charges different rates for different transactions. The Bank is charging 14% for mortgage loans. There are other transactions wherein the Bank charges even 18% interest per annum. Such being the factual position, the Bank cannot be heard to say that the

³⁰ (2017) SCC OnLine Mad 1549

applicant has to be satisfied only with the principal amount. We are of the view that the Bank having kept the amount for years together, is bound to pay interest to the applicant.”

35. The petitioner is entitled to interest which we fix at 12% per annum.

36. We direct the bank to refund the sale consideration viz. Rs. 62,00,000/- (Rupees Sixty Two Lakhs only) to the petitioner with interest at the rate of 12 % per annum, calculated from 24.7.2008 within a period of four weeks from the date of receipt or production of a copy.”

45. In the instant case, the respondents were aware about the ongoing litigations, with respect to the property in question, since the very beginning and they were also parties to some of those ongoing litigations. Knowledge of the respondent is undisputed. Thus, they have erred by not informing the petitioner about the encumbrances associated with the said property at the time of the auction. The subsequent participation of the petitioner in the pending litigations would not absolve the respondents from their elementary obligation of full and true disclosure of the pendency of several litigations to the petitioner at the time of auction. As it is seen from the factual matrix of the case, there is no fault of the petitioner; rather, entire auction amount was deposited within the prescribed period. At the same time, there is no disagreement over the respondents' compliance of the order dated 10.11.2023, which was passed by this court regarding the reimbursement of the principal sum paid by the petitioner.

46. It be noted that when a buyer participates in an auction to buy a property, he relies on the auction notice and the documents that the secured creditor provides to him/her. The disclosure is essentially of a unilateral nature and the transaction proceeds on trust. One has a legitimate belief, and rightly so, that the secured creditor has disclosed all the material information about the property, since the secured creditor is required to disclose all information that the Authorized

Officer deems necessary for the buyer to know, in order to determine the nature and worth of the property. Litigations/disputes certainly affect the worth of the property. Thus, the pending litigations/disputes ought to have been disclosed at the time of auction.

47. The mandate of full and true disclosure would emanate from the concept of legitimate expectation, which has an established place in our constitutional scheme. This concept operates in such circumstances when a duty is implicit in the performance of a certain act, although it may not be explicit. The legitimacy of the expectation stems from the fact that non-performance of such duty may result in unreasonable, arbitrary and unjust consequences. Notably, the said legitimate expectation becomes more prominent and onerous when the seller is an instrumentality of the State. For, a common man indulges more openly with the State in a commercial transaction. The expectation of credibility is on the higher side and consequently, the standards of justness, fairness and transparency ought to be higher.

48. The respondents in the instant case did not abide by their responsibility to disclose about all the encumbrances and pending litigations attached to the subject property at the time of auction. In the aforesaid circumstances, the respondents cannot take refuge under the clause 'as is where is' and 'as is what is'. To permit so would be tantamount to letting the respondents take the benefit of their own wrong. In other words, since the petitioner was unaware of the litigations at the time of auction and the respondents could not deliver the possession of the subject property in question despite accepting the entire consideration, they cannot now shirk away the responsibility to pay interest on the amount deposited by the petitioner along with stamp duty and house property tax.

49. For the aforesaid reasons, the respondents are directed to refund Rs.34,10,000/- paid as stamp duty and Rs.14,37,536/- paid as house property tax to the petitioner within a period of six weeks from today.

50. Needless to state that in the instant case, for the reasons discussed hereinabove and relying upon the series of the abovementioned judicial pronouncements, the petitioner is also entitled to the payment of interest on the amount enjoyed by the respondents. The amount was unjustly obtained and retained by the respondents for a considerable period of time, without any fault of the petitioner. In such circumstances, equity must come into play so as to secure a fair outcome for the petitioner. The evolution of equitable jurisprudence in the exercise of writ jurisdiction is well recognized and needs no iteration. Accordingly, the respondents are hereby also directed to pay the interest at the rate of 8% per annum on the principal sum of Rs.4,90,25,000/-, from the date of the deposit of the amount till the date of refund, within six weeks from today.

51. With the aforesaid directions, the petition is disposed of alongwith the pending application.

(PURUSHAINDR KUMAR KAURAV)
JUDGE

JANUARY 24, 2024

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