



REAL ESTATE

Mandatory for Bank to inform all auction participants about encumbrances on Property to be auctioned

AUTHOR Shyam Mohite

PUBLISHED 20 December 2022

In a judgment passed on 30/11/2022 by the Hon'ble [High Court of Jammu and Kashmir](#) in Writ Petition (C) No. 456/2021 – S K Bakshi v/s. Punjab National Bank and Ors., it was held that a property can be auctioned by Bank even if there are encumbrances thereon provided that all those who participate in the auction must be informed about the encumbrances. It was also held that the Bank is duty bound to put the successful bidder in physical possession of the property.

In the said Writ Petition, the Petitioner sought issuance of an appropriate writ of Mandamus, order or direction to the Respondents to put the Petitioner in physical possession of the subject Property. The Petition was allowed.

Brief Facts:

The Petitioner was declared as a successful auction purchaser by the Respondent No.1 Bank in an e- auction process. On payment of the entire bid amount, a sale certificate was issued in the Petitioners favour by the Respondent No.1 however delivery of the subject Property was not handed over to the Petitioner.

Contention of the Petitioner:

Though the Sale Certificate acknowledged the receipt of the entire sale price and stated that the sale of the subject property was made free from all encumbrances known to the Secured Creditor, the Petitioner was not put in physical possession of the Property. Apparently Respondent Nos. 6 and 7 had taken forceful possession of the subject property and it was the responsibility of Respondent No. 1 to evict Respondent Nos. 6 and 7 and handover physical possession thereof to the Petitioner.

Contention of Respondent No.1:

1. Respondent No. 1 submitted 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 of action and the Respondent would not be responsible, therefore, Bank fulfilled its obligations. In the objections, the Respondent No. 1 had admitted that the Borrower became 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 subject 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 subject Property will result in closure of this business. Accordingly, a week's time was granted to Respondent No.6 on 21/10/2020 on humanitarian ground to settle the issue. However, the Respondent No. 6 and 7 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.
2. 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.
3. It was 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.

Contention of Respondent Nos. 6 and 7:

1. In their reply, Respondent Nos. 6 and 7 submitted that Lessee of the subject Property had executed a formal agreement to sell, besides acknowledgment receipt in their favour, fortifying the sale agreement and they had all along been 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 and 7 submitted 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 regarding 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.

Observations of the Hon'ble High Court:

1. 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."

2. 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.

3. 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."

4. 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.

5. 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. The Petitioner being a bona fide purchaser was entitled to the sale certificate and 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).

Respondent Nos. 6 and 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.

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.