(2022) 01 TEL CK 0057

In the Telangana High Court

Case No : Writ Petition No. 24098 Of 2020

Dinesh Kumar Agarwal And 7 Others — APPELLANT

Vs

Canara Bank And Another — RESPONDENT

Date of Decision : 28-01-2022

Acts Referred:

Constitution Of India, 1950 — Article 12
Security Interest (Enforcement) Rules, 2002 — Rule 8, 8(6), 8(9), 9, 9(1)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 — Section 13(2), 13(8)

Citation : (2022) 01 TEL CK 0057

Hon'ble Judges : A.Rajasheker Reddy, J;G. Sri Sevi, J

Bench : Division Bench

Advocate : Manav Gecil Thomas

Final Decision : Dismissed

Judgement

1. This writ petition is filed aggrieved by the conditional order dated 15-12-2020 passed by the Debt Recovery Tribunal in IA No.972 of 2020 in SA

No.70 of 2020 whereby and whereunder the confirmation of sale in favour of highest bidder i.e. 4th respondent in the auction held on 15-12-2020 was

stayed subject to the condition that petitioners deposit a sum of Rs.1.50 Crores in two instalments, pending disposal of the SA No.70 of 2020.

2. The brief facts of the case germane for the disposal of the writ petition are as follows:-

3. Petitioners 2 & 3 are partnership firms represented by their partners, availed loan of Rs.9 Crores and Rs.17 Crores respectively from 1st

respondentâ?"Bank, to which petitioners 1, 4 to 8 stood as guarantors and pledged certain properties against the said loans. Purportedly, due to

vagaries of life, the petitioners could not repay the loan amounts and they became non-performing assets (NPA) which necessitated the 1st respondent-Bank to issue demand notice dated 24-07-2017 under Section 13(2) of the SARFAESI Act. Thereupon, the petitioners approached the 1st respondent-Bank by way of One-time Settlement (OTS) and the same was permitted by the 1st respondent-Bank on 25-02-2019 for Rs.25 Crores for both the loan accounts and set 25-08-2019 as the date for payment of the agreed OTS amount. Thereafter, the petitioners stated to have paid Rs.11,79,55,000/- (from out of Rs. 25 Crores) and redeemed four properties, but failed to pay the rest of the amount within the date agreed i.e. by 25-08-2019. The petitioners sought for extension of the time for the payment of rest of the amounts, which was declined and the OTS was withdrawn and intimated the same vide letter dated 06-02-2020 to the petitioners.

3. As part of taking further steps, 1st respondent-Bank issued notice on 25-02-2020 which the petitioners challenged in SA No.70 of 2020 and the same is pending. Whileso, the 1st respondent-Bank had issued auction sale notice dated 22-09-2020 under Rule 9(1) of the SARFAESI Act against the properties which are subject matter of SA No.70 of 2020 fixing the date of auction on 31-10-2020, aggrieved thereby, the petitioners filed IA No.833 of 2020 seeking stay of the said auction pending disposal of SA No.70 of 2020. At the same time, the petitioners once again given two OTS offers, for Rs.11 Crores and for Rs.11.50 Crores, however both the offers were not considered by the 1st respondent- Bank, but the proposed auction to be held on 31-10-2020 was postponed to 18-11-2020 citing pendency of the OTS proposal. Before that could happen, the 1st respondentâ?"Bank issued another auction sale notice dated 09-11-2020 postponing auction and fixing the date of auction on 15-12-2020 in which the 1st respondent-Bank sold off all the six properties mortgaged, which are subject matter of SA. No. 70 of 2021 and the auction purchaser has been impleaded as 4th respondent in this case.

4. Aggrieved thereby, the petitioners filed IA No.972 of 2020 in SA No. 70 of 2020 wherein the Tribunal vide the impugned order dated 15-12-2020 granted conditional stay of confirmation of sale with respect to subject properties and directed the petitioners to deposit Rs.1.50 Crores (in two instalments), which the petitioners did not comply on the ground that there are formidable legal grounds on which the entire sale proceedings are liable

to be set at naught.

5. Counter affidavit is filed by the 1st respondent-Bank wherein it is stated that the petitioners had remitted Rs.11.79 Crores under OTS proposal and

redeemed four properties, however, as they failed to remit the remaining OTS amount, the OTS proposal was cancelled on 06-02-2020. That the 1st

respondent-Bank successfully sold off the remaining properties mortgaged to it, in the auction conducted on 15-12-2020 and there are no procedural

lapses as valuation reports are obtained as per the guidelines of SARFAESI Act, including fixation of â??reserve priceâ??. In E-auction sale notice

dated 22-09-2020, published in the newspapers on 27-09-2020, â??reserve priceâ?? was mentioned and, therefore, the reserve price was not once

again referred to in the postponement notices dated 23-10-2020 and 09-11-2020 as it was clearly mentioned in the postponement notices that â??all

other terms and conditions published in E-auction sale notice dated 22-09-2020 remains unchangedâ?. That the allegation that â??reserve priceâ?? is

not mentioned in the postponement notices is false and baseless. That acceptance of OTS proposal is discretionary and not mandatory and the Bank

reserves the right to accept or deny any OTS proposal. The act of the petitioners in giving an OTS proposal just before the auction date speaks

volumes of the conduct of the petitioners to delay the auction and in not paying the amounts due their sincere effort to pay amounts due and payable to

the Bank. That the petitioners have alternative remedy of filing appeal before the Debts Recovery Appellate Tribunal and without exhausting the same

and without complying the conditional order passed by the Tribunal, straightaway filed this writ petition which is not maintainable and liable to be

dismissed.

6. Counter affidavit is filed by the 4th respondentâ?"Auction purchaser of the properties (Items nos.2, 3 & 4) which are subject matter of SA No.70

of 2021. It is stated that the petitioners without disclosing the inter-se disputes with the 1st respondent-Bank, offered to sell the subject properties to

her on the ground that the petitioner entered into One time Settlement (OTS) and settle the outstanding dues and release the said properties from the

Bank. That she came to know of the proceedings initiated by the Bank under the SARFAESI Act when E-auction sale notice dated 22-09-2020 in

respect of the subject properties was issued. That prior to all this, the petitioners have entered into agreement of sale with her in respect of the same

subject properties and at the behest of the petitioners, she deposited Rs.One Crore to the Bank towards repayment of the loan amounts in No-Lien

account as she is interested in the properties and as an agreement of sale holder of those properties. But, as terms of the petitioners with the 1st

respondent-Bank did not fructify, the properties were put to auction, she was compelled to participate in the auction and ultimately became the highest

bidder in respect of the said properties. That she is the bona-fide purchaser and her rights and interest needs to be protected, to meet the ends of

justice.

7. Heard Sri S.Ravi, learned senior counsel appearing for petitioners, Sri Manav Gecil Thomas, learned senior counsel appearing for 1st respondent-

Bank, Sri Resu Mahender Reddy, learned senior counsel appearing for 3rd respondent, Sri K.B.Ramanna Dora, learned counsel for 4th respondent

and Sri Rupendra Mahendra, learned counsel for the 5th respondent.

8. The main ground on which the entire proceedings are sought to be nullified is that the 1st respondent-Bank failed to provide the required information

as to the mention of â??reserve priceâ? in the postponement of E-auction sale notices on two occasions and the quantum of EMD amount in respect

of the properties to be auctioned, which is in violation of the Rule 8(6) of the Security Interest (Enforcement) Rules, 2002. Learned senior counsel also

seeks to contend that once the sale has not taken place on the scheduled date, due to a reason solely not attributable to the borrower, under Section 13

(8) of the SARFAESI Act, the Bank has to necessarily take recourse to proceedings afresh from the stage of Rule 8 (6) & (9) of the Rules.

9. In this case it is to be seen that scheme for One Time Settlement (OTS) is one mode of settlement of dues in respect of a NPA account, subject to

the guidelines issued by the Reserve Bank of India, and the petitioners were permitted to settle their NPA account through OTS and in pursuance

thereof, the petitioners offered four OTS proposals before the properties in question were sold in E-auction on 15-12-2020. It is a matter of record that

by the time E-auction could take place on 15-12-2020 wherein all the six properties, which are subject matter of SA No.70 of 2021 are sold, the

proposals of the petitioners for OTS were in active consideration. Out of all the OTS proposals submitted by the petitioners, it is worth while to notice the conduct of the 1st respondent-Bank and on many occasions it was inclined to consider the OTS proposal offered by the petitioners, which is

discernable from their letter dated 20-11-2020, which intimated the petitioners to improve their OTS proposal substantially and in-spite of the

petitioners improving their OTS Proposal vide letter dated 12-12-2020 to Rs.12 Crores from Rs.11.5 Crores, the 1st respondent- bank conducted E-

auction on 15-12-2020 which goes to show that the 1st respondent-Bank was actively running two parallel proceedings, one consideration of OTS

proposal and another proceeding with E-auction of the properties, which is held to be impermissible by the Division Bench of Allahabad High Court in

M/s. SHYAM ICE & COLD STORAGE (P) LIMITED vs. SYNDICATE BANK AIR 2012 ALL 87, wherein it was held that during the pendency

of OTS proposal, initiation of recovery proceedings under the Act of 2002 will not be permissible. At paragraph 12 of the said decision, it was

observed as under:-

â??12. Although there may not be a bar in the Bank proceeding under the Act of 2002 even when the One Time Settlement proposal is under active

consideration, but permitting simultaneous proceedings against the borrower would amount to wielding the sword and the stick at the same time, which

would not be appropriate. Even a defaulter has his rights. He can be proceeded against only in accordance with law. Merely because he has defaulted

in payment of some instalments would not mean that he should be dealt a double or multiple blow...â??

10. It is further borne out from the record that the total proceeds derived from the E-auction dated 15-12-2020 is Rs.12.94 Crores for all the

properties, whereas the petitioners further improved their OTS proposal vide their letter dated 23-01-2021 to Rs.14.01 Crores and the 1 t respondent-

Bank has acted upon it and replied to the OTS proposal of the petitioners vide its letter dated 09-02-2021, which is in the following terms:-

â??With reference to the subject matter, your OTS proposal was placed for consideration before the competent authority. The Competent authority

has rejected the OTS offer.

(emphasis added)

Hence, we request you to improve the OTS offer substantially. This is without prejudice to our legal rights pending at various Courts.â??

11. A reading of the above proceeding indicates that on one hand, the Bank states that it had rejected the OTS offer, on the other hand, it reserved

liberty to the petitioners to improve the OTS offer substantially which is very contradictory. Even assuming the petitioners further improves

â??substantiallyâ? the OTS offer, how could the 1st respondent-Bank justify their action to the 4th respondent, who is a highest bidder, in case the

â??substantiallyâ? improved OTS offer of the petitioners is accepted. It is not open for the 1st respondent-Bank to make such offer for improvement

of OTS amount, at-least after sale of the properties in question in the E-auction held on 15-12-2020, as legal rights have been accrued in respect of

properties thereof to the highest bidder i.e. the 4th respondent. This conduct of the 1st respondent-Bank in offering to improve the OTS amount after

sale of properties in E-auction is nothing short of arm-twisting tactics meted out to the petitioners and to extract the maximum starch from them, who

are owners of the properties. Such conduct of the of the 1st respondent-Bank is depreciable and the Bank ought to have followed Rule of Law

governing the field being an instrumentality of the State within the meaning of Article 12 of the Constitution of India.

12. Another aspect that is noticed in the matter is postponement of E-auction notified by the Bank on two occasions and the reasons for postponement

of the E-auction was on the ground of pendency of OTS proposal of the petitioners. In MATHEW VARGHESE vs. M. AMRITHA KUMAR (2014)

5 SCC 610, the Honâ??ble Supreme Court, in an identical fact situations held that once the sale does not take place pursuant to notice issued under

Rules 8 & 9 of the Rules, R/w. Section 13(8) of the Act, it is imperative that for effecting the sale, the fresh procedure will have to be followed, as the

notice issued earlier would lapse in that respect.

13. In the case on hand, the entire blame for not conducting the E-auctions on 31-10-2020 & 18-11-2020 cannot be attributed to the petitioners alone

as it was the 1st respondent-Bank which kept matters pending on the ground of consideration of OTS proposal of the petitioners. There are also other

procedural lapses stated to have been committed by the Bank such as, non-mention of the â??reserve priceâ? as also the quantum of EMD amount in

the subsequent auction notices, which the Bank though states that it was mentioned in the notice issued in the first instance and it holds good for the subsequent notices, nowhere in the Rules such an inference is permitted nor contemplated.

14. Admittedly, the SA No.70 of 2021 filed by the petitioners is pending before the Tribunal and this writ petition is filed against the conditional interim order passed by the Tribunal. Since contentious questions are involved including the rights of the parties including the 4th respondent, who became the highest bidder and the petitioners, who have deposited certain amounts earlier towards repayment of loan including by the 4th respondent at the instance of the petitioners, without expressing any opinion on the merits of the matter, suffice it direct the 2nd respondent-Debt Recovery Tribunal to dispose of the SA No.70 of 2021 within a timeframe not later than three months from the date of this order, keeping it open to the parties to raise all contentions as are available to them under law. However, in view of the facts and circumstances of the case, the interim order of stay granted by the Tribunal is maintained, but partly modified in so far it relates to deposit of amount and the amount directed to be deposited is reduced to Rs.75 lacs, which is to be deposited by the petitioners within a period of two months from the date of receipt of a copy of this order.

15. With the above directions, the writ petition is disposed of. Pending miscellaneous applications, if any, also stand disposed of. There shall be no order as to costs.