

(2016) 07 AP CK 0034

In the Andhra Pradesh High Court

Case No : Writ Petition No. 33614 of 2015.

**Polisetty Haranadh Muralidhar - Petitioner @HASH Authorised Officer,
Indian Overseas Bank, Kirlampudi Layout, Visakhapatnam and Others**

Date of Decision : 15-07-2016

Acts Referred:

Citation : (2016) 6 ALT 59 : (2016) 6 AndhLD 409 : (2016) 3 BankJ 601 :
(2017) 2 BC 396

Hon'ble Judges : Sri. P.V. Sanjay Kumar and Dr. B. Siva Sankara Rao, JJ.

Bench : Division Bench

Advocate : Sri. Chavali Ramanand, Advocate, for the Petitioner; Sri. K. Suryanarayana, Advocate, for the Respondent No. 1; None, for the Respondent Nos. 2 to 6 and 8; Sri. G. Ramagopal, Advocate, for the Respondent No. 7

Final Decision : Allowed

Judgement

Sri. P.V. Sanjay Kumar, J. - The petitioner calls in question the order dated 15.09.2015 passed by the Debts Recovery Tribunal, Visakhapatnam, in S.A.No.201 of 2015. Consequently, he seeks an order allowing S.A.No.201 of 2015 and setting aside the proceedings initiated by the Indian Overseas Bank (hereinafter, "the bank") under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter, "the Sarfaesi Act"), including the auction sale held on 15.07.2015. This sale related to the land admeasuring 393 square yards with a two storied R.C.C. building thereon, bearing Door No.9-19-20A, Layout No.212/61, T.P.No.200/59, Plot No.107, Block No.46, T.S.No.1035, CBM Compound, Visakhapatnam. The 7th respondent herein was the auction purchaser in the said sale. Further directions are sought to the bank not to confirm this sale and issue a sale certificate, register the same or deliver possession to the 7th respondent.

2. By order dated 12.10.2015, this Court directed the bank not to register the sale certificate in favour of the auction purchaser till 28.10.2015. The said order was extended thereafter from time to time. On 02.12.2015, this Court took note

of the petitioner's allegation that though the auction was conducted on 15.07.2015, the 7th respondent/auction purchaser did not deposit 25% of the bid amount on the day of the auction and also failed to deposit the balance 75% of the bid amount within 15 days as required, and directed the Chief Manager and Authorised Officer of the bank to file an additional affidavit indicating the date when the bid of the 7th respondent/auction purchaser was confirmed and also the details of its payment of 25% and the balance 75% of the bid amount. The interim order granted on 12.10.2015 also stood extended and is operative as on date.

3. The impugned order dated 15.09.2015 in S.A.No.201 of 2015 reflects that the case was disposed of upholding the auction sale, which admittedly took place after the date stipulated in the sale notice, but giving an opportunity to the petitioner herein, the applicant in S.A.No.201 of 2015, to pay the outstanding dues of the bank along with interest within thirty days from the date of the order. The Tribunal further directed that in the event he failed to pay the dues within the time stipulated, the sale would stand confirmed. In the event he paid the amount, the bank was directed to refund the amount paid by the auction purchaser with simple interest thereon at 4% per annum which would be recoverable from the applicant. The bank was further directed to defer delivery of possession to the auction purchaser for a period of thirty days.

4. Admittedly, the petitioner was a guarantor for the loan availed by the 2th respondent company from the bank and is therefore a "borrower", as defined under Section 2(1)(f) of the Sarfaesi Act. The said loan account was classified as a non-performing asset and the bank issued a demand notice under Section 13(2) of the Sarfaesi Act on 14.05.2014. Thereunder, the total outstanding dues as on 31.03.2014 aggregating to Rs. 2,50,74,745/-, with further interest at 13% with monthly rests, were directed to be paid within sixty days. Upon non-compliance, the bank initiated proceedings under Section 13(4) of the Sarfaesi Act by issuing possession notice dated 10.09.2014 in terms of Rule 8(1) of the Security Interest (Enforcement) Rules, 2002 (hereinafter, "the Rules of 2002"). It appears that the bank then initiated auction sale proceedings which did not fructify. Thereafter, sale notice dated 29.05.2015 was issued by the bank in terms of Rule 8(6) of the Rules of 2002 [wrongly mentioned as Rule 8(5)] informing the borrowers that the secured assets would be put to sale on 01.07.2015. This sale notice was also published in Eenadu Telugu Newspaper and Hindu English Newspaper on 30.05.2015. It is however an admitted fact that the proposed sale did not take place on 01.07.2015, the notified date, and it was actually held on 15.07.2015. Two bidders participated in this auction and the 7th respondent herein emerged as the successful bidder, offering Rs. 2,53,13,000/- as against the reserve price of Rs. 2,52,88,000/-.

5. The petitioner alleged that the 7th respondent failed to deposit 25% of the bid amount on the day of the auction and also failed to deposit the balance 75% within fifteen days. He further contended that the sale was contrary to the

mandate of the Sarfaesi Act and the Rules of 2002. Significantly, the petitioner raised the issue of postponement of the sale from 01.07.2015 to 15.07.2015 in S.A.No.201 of 2015, but the same was brushed aside on the ground that the petitioner, being the applicant therein, was fully aware of the extension of the date of auction and the Tribunal held that the sale could not be set aside on this ground. The Tribunal seems to have been of the opinion that as the petitioner and his family members were not coming forward to pay the bank's dues, the technical issue as to extension of the date of auction did not warrant quashing of the sale. Before this Court, the petitioner again contended that the bank had no power or authority to postpone the sale from 01.07.2015 to 15.07.2015 without issuing a fresh sale notice.

6. In its counter-affidavit, the bank stated that after issuance of the auction sale notice dated 29.05.2015 to the borrowers under Rule 8(6) of the Rules of 2002, it published the same in the newspapers, viz., Eenadu Telugu Newspaper and Hindu English Newspaper, on 30.05.2015, notifying the date of auction as 01.07.2015. The bank further stated that as bidders had problems logging in due to non-availability of digital signatures, its Authorised Officer extended the date of the auction sale to 15.07.2015. Publication of the postponement of the auction sale was carried out in Eenadu Telugu Newspaper and Hindu English Newspaper on 01.07.2015. The bank stated that on 15.07.2015, the sale was knocked down in favour of the 7th respondent and a sale certificate was issued on 13.08.2015. The bank however admitted that actual possession of the secured asset sold was not taken despite issuance of the sale certificate.

7. In its additional counter-affidavit, the bank stated that the auction sale was completed on 15.07.2015 at 2.00 P.M. but the sale was confirmed in favour of the highest bidder on 16.07.2015 at 10.57 A.M. The auction purchaser, the 7th respondent herein, was stated to have paid 15% of the bid amount on 16.07.2015. 10% of the bid amount was paid by the 7th respondent by way of the earnest money deposit on 29.06.2015 itself. The balance 75% of the bid amount, being Rs. 1,89,84,750/-, was deposited by the 7th respondent on 11.08.2015, as extension of time was sought by it under letter dated 29.07.2015 and the bank granted extension till 12.08.2015 under its letter dated 29.07.2015.

8. This being the factual position, the question before us is whether the procedure followed by the bank is in accordance with the statutory mandate of the Sarfaesi Act and the Rules of 2002.

9. This issue is no longer *res integra*. In *Mathew Varghese v. M. Amritha Kumar*, (2014) 5 SCC 610, this very issue fell for consideration. That was a case where after issuance of the sale notice dated 14.08.2007 under Rule 8(6) of the Rules of 2002 and the newspaper publication on 23.08.2007 under Rule 9(1) of the Rules of 2002, the sale proposed to be held thereunder on 25.09.2007 did not materialise owing to the Debts Recovery Tribunal's order and stood postponed. After dismissal of the case by the Tribunal on 27.12.2007, the bank straightaway accepted the tender of the bidder on 28.12.2007 and confirmed the sale in his

favour. The property was also transferred to him. Dealing with this fact situation, the Supreme Court observed that a secured creditor must ensure that the borrower is put on notice of the date and time by which the sale would be effected in order to provide him the required opportunity to take all possible steps for retrieving his property or at least ensure that in the process of sale, the secured asset derives the maximum benefit and the secured creditor, or any one on its behalf, is not allowed to exploit the situation. Apropos the statutory procedural prescriptions in Rules 8 and 9 of the Rules of 2002, the Supreme Court opined that the requirement under Rule 8(6) and Rule 9(1) contemplates a clear 30 days individual notice to the borrower and also a public notice by way of publication in the newspapers. In other words, per the Supreme Court, while the publication in a newspaper should provide 30 days clear notice, as Rule 9(1) also states that such notice of sale is to be in accordance with the proviso to sub-rule (6) of Rule 8, 30 days clear notice to the borrower should be ensured as stipulated under Rule 8(6) as well. It was therefore held that the use of the expression "or" in Rule 9(1) should be read as "and" as that alone would be in consonance with Section 13(8) of the Sarfaesi Act. This, according to the Supreme Court, was intended to provide an opportunity to the borrower to redeem his property in terms of Section 13(8) of the Sarfaesi Act.

10. In paragraph 53 of the judgment, the Supreme Court further pointed out that in the event any sale, properly notified after giving 30 days clear notice to the borrower, does not take place as scheduled for reasons which cannot be solely attributed to the borrower, the secured creditor cannot effect the sale of the secured asset on any subsequent date by relying upon the notification issued earlier and once such sale does not take place pursuant to a notice issued under Rules 8 and 9, read along with Section 13(8), for which the entire blame cannot be thrown on the borrower, it is imperative that for effecting the sale, the procedure prescribed will have to be followed afresh as the notice issued earlier would lapse.

11. In effect, once the sale proposed to be held on a particular date does not materialize, for reasons not solely attributable to the borrower, the secured creditor would have to start afresh from the stage of issuing a sale notice under Rule 8(6) of the Rules of 2002. As in that case the bank had effected the sale on 28.12.2007 by accepting the tender of the bidder straight away and went about confirming the sale thereafter, the Supreme Court condemned the whole procedure followed by the bank and the ultimate confirmation of the sale was also held to be vitiated as it was not in conformity with the provisions of the Sarfaesi Act and the Rules framed thereunder. This was the result, notwithstanding the fact that the bank had already confirmed the sale and had transferred the asset to the bidder.

12. It is however contended by Sri. G. Rama Gopal, learned counsel for the 7th respondent/auction purchaser, that postponing of the auction sale scheduled on 01.07.2015 to 15.07.2015 would be permissible even as per the law laid down in

Mathew Varghese's case (supra). He would place reliance in this regard on para 52 of the judgment which reads as under:

"52. Keeping the said basic principle in applying the above provisions in mind, when we refer to Rule 15 of Schedule II Part I of the Income Tax Act, 1961, in the first place it will have to be stated that a reading of the said Rule does not in any way conflict with either Section 13(8) of the Sarfaesi Act or Rules 8 and 9 of the 2002 Rules. As far as sub-rule (1) of Rule 15 is concerned, it only deals with the discretion of the Tax Recovery Officer to adjourn the sale by recording his reasons for such adjournment. The said Rule does not in any way conflict with either Rules 8 or 9 or Section 13, in particular sub-section (1) or sub-section (8) of the Sarfaesi Act. Therefore, to that extent there is no difficulty in applying Rule 15. As far as sub-rule (2) is concerned, the same is clear to the effect that a sale of immovable property once adjourned under sub-rule (1) for a longer period than one calendar month, a fresh proclamation of sale should be made unless the defaulter consents to waive it. The said sub-rule also does not conflict with any of the provisions of the Sarfaesi Act, in particular Section 13 or Rules 8 and 9. In fact there is no provision relating to grant of adjournment or issuance of a fresh proclamation for effecting the sale after the earlier date of sale was not adhered to in the Sarfaesi Act. In such circumstances going by the prescription contained in Section 37 of the Sarfaesi Act, as we have reached a conclusion that the provision contained in Section 29 of the RDDB Act will be in addition to and not in derogation of the provisions of the Sarfaesi Act, the provisions contained in Rule 15, which is applicable by virtue of the stipulation contained in Section 29 of the RDDB Act, whatever is stated in sub-rule (2) of Rule 15 should be followed in a situation where a notice of sale notified as per Rules 8 and 9 (1) of the 2002 Rules, read along with Section 13(8) gets postponed. In our considered view such a construction of the provisions, namely, Sections 37, 13(8) and 37 of the Sarfaesi Act, read along with Section 29 with the aid of Rule 15 could along be made and in no other manner."

13. However, para 53 of the judgment, wherein the ratio decidendi has been spelt out, is most relevant and reads as under:

"53. We, therefore hold that unless and until a clear 30 days" notice is given to the borrower, no sale or transfer can be resorted to by a secured creditor. In the event of any such sale properly notified after giving 30 days" clear notice to the borrower did not take place as scheduled for reasons which cannot be solely attributable to the borrower, the secured creditor cannot effect the sale or transfer of the secured asset on any subsequent date by relying upon the notification issued earlier. In other words, once the sale does not take place pursuant to a notice issued under Rules 8 and 9, read along with Section 13(8) for which the entire blame cannot be thrown on the borrower, it is imperative that for effecting the sale, the procedure prescribed above will have to be followed afresh, as the notice issued earlier would lapse. In that respect, the only other provision to be noted is sub-rule (8) of Rule 8 as per which sale by any

method other than public auction or public tender can be on such terms as may be settled between the parties in writing. As far as sub-rule (8) is concerned, the parties referred to can only relate to the secured creditor and the borrower. It is, therefore, imperative that for the sale to be effected under Section 13(8), the procedure prescribed under Rule 8 read along with Rule 9(1) has to be necessarily followed, inasmuch as that is the prescription of the law for effecting the sale as has been explained in detail by us in the earlier paragraphs by referring to Sections 13(1), 13(8) and 37, read along with Section 29 and Rule 15. In our considered view any other construction will be doing violence to the provisions of the Sarfaesi Act, in particular Sections 13(1) and (8) of the said Act."

(emphasis is ours)

14. To some extent, there seems to be a contradiction between the afore stated two paragraphs. While holding, on the one hand, that Rule 15 of Schedule-II, Part-1 of the Income Tax Act, 1961, is also applicable to sale proceedings under the Sarfaesi Act and that the same should be followed in a situation where a sale notified as per Rules 8 and 9(1) of the Rules of 2002 gets postponed, the Supreme Court however held in para 53 that if any sale, properly notified after giving 30 days" clear notice to the borrower, did not take place as scheduled for reasons which cannot be solely attributed to the borrower, the secured creditor cannot effect the sale or transfer of the secured asset on any subsequent date by relying upon the notification issued earlier. This aspect was further clarified by the observations in para 55 of the judgment wherein, while dealing with the facts of that case, the Supreme Court observed that the bank in the said case should have issued fresh notice in accordance with Rules 8(6) and 9(1) of the Rules of 2002 once the sale notified earlier did not take place on the scheduled date.

15. Given the clear mandate of the afore stated judgment, notwithstanding the seeming contradiction between paragraphs 52 and 53, we are of the opinion that the Authorised Officer of the bank could not have resorted to postponing the date of auction even by 15 days by taking recourse to Rule 15 Schedule-II, Part-1 of the Income Tax Act, 1961. Once the sale did not take place on 01.07.2015, due to a reason not at all attributable to the petitioner, the bank necessarily had to take recourse to proceedings afresh from the stage of Rule 8(6) of the Rules of 2002. The auction sale held on 15.07.2015 was therefore incurably tainted by illegality and cannot be sustained. Once the said sale is held to be illegal, the consequential steps taken, by way of confirmation and issuance of a sale certificate, would be equally unsustainable in law.

16. That apart, Rule 9 of the Rules of 2002 details the procedure to be followed after an auction sale. Rule 9(3) mandates that upon the sale of immovable property, the purchaser shall "immediately" make the deposit of 25% of the sale price with the Authorised Officer and in default of such deposit the property shall forthwith be sold again. Rule 9(4) of the Rules of 2002 mandates that the balance amount of the purchase price shall be paid to the Authorised Officer on

or before the 15th day of the confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the parties. In the present case, the bank admits that the sale was held on 15.07.2015 but strangely goes on to state that confirmation thereof took place on the next day, i.e., 16.07.2015. This methodology was itself alien to the procedure contemplated under Rule 9 of the Rules of 2002. The provision clearly and categorically posits that the purchaser must immediately pay 25% of the sale price on the day of the sale itself. Further, if the balance purchase price is not paid on or before the 15th day from the confirmation of the sale, time can only be extended as agreed upon in writing by the parties. According to the bank, the 7th respondent/auction purchaser sought extension of time under its letter dated 29.07.2015 and the same was granted by the bank up to 12.08.2015. Perusal of the bank's letter dated 29.07.2015 granting such extension does not reflect the petitioner being taken into confidence or his consent being obtained for granting such extension.

17. As to whether the petitioner, being the borrower, was required to be taken into confidence while granting such extension is not open to question. The provision itself stipulates that the extended period has to be agreed upon in writing between the parties. In *General Manager, Sri Siddeshwara Cooperative Bank Ltd. v. Iqbal*, (2013) 10 SCC 83, the Supreme Court dealt with the connotation of the word "parties" used in the Rules of 2002 and held that it would include not only the "secured creditor" and the "auction purchaser" but also the "borrower". Therefore, if the bank wanted to extend time for deposit of the balance sale consideration, it could have done so only by taking the petitioner, the borrower, into confidence and after obtaining his consent. Admittedly, this procedure was not followed.

18. On the above analysis, we are of the opinion that the Tribunal erred in brushing aside the statutory mandate of Rules 8 and 9 of the Rules of 2002, and passing the order dated 15.09.2015.

19. However, we are conscious of the fact that the 7th respondent/auction purchaser is put to loss owing to a lapse primarily attributable to the bank in following the mandatory procedure stipulated in the Rules of 2002. Be it noted that the judgment in *Mathew Varghese's* case (supra) was delivered as long back as on 10.02.2014, but the bank chose to ignore the legal position as settled therein and resorted to its own procedure, nearly a year and a half later, in July, 2015. The 7th respondent/auction purchaser would therefore be entitled to be suitably compensated for the loss caused to it in this regard. We therefore direct refund of the amounts deposited by the 7th respondent with the bank along with interest thereon at the rate of 18% per annum from the date of each deposit. Significantly, this was the rate of interest awarded by the Supreme Court to the bidder in *Mathew Varghese's* case (Supra), who had also parted with his monies. The amount so determined shall be refunded by the bank to the 7th respondent within two weeks from the date of receipt of a copy of this order by way of a pay

order/banker's cheque.

20. The writ petition is accordingly allowed setting aside the order dated 15.09.2015 passed by the Debts Recovery Tribunal, Visakhapatnam, in S.A.No.201 of 2015. We further hold that the sale held by the Indian Overseas Bank on 15.07.2015 was illegal, being in utter violation of the statutory mandate of Rules 8 and 9 of the Rules of 2002. All steps taken by the bank pursuant to the said illegal sale are also set aside. S.A.No.201 of 2015 is allowed.

21. This order shall however not preclude the bank from initiating proceedings afresh under the Sarfaesi Act, if warranted, in accordance with law.

22. Pending miscellaneous petitions shall stand closed in the light of this final order. No order as to costs.