FARAD CONTINUATION SHEET No.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO. 3009/2015

(LOKESH PRABHAKAR RANDIVE & ANOTHER **VERSUS** BANK OF MAHARASHTRA & OTHERS)

Office Notes, Office Memoranda of Coram, appearances, Court's orders of directions and Registrar's orders	Court's or Judge's orders

Shri R.H. Chandurkar, counsel for the petitioners.
Shri M.N. Phadke, counsel for the R-1 & 2.
Shri P.V. Bansod, counsel for the R-3.
Shri S.S. Ghate, counsel for the R-4 to 6.

CORAM : SMT. VASANTI A. NAIK AND
A.I.S. CHEEMA, JJ.
DATE : SEPTEMBER 7, 2015.

By this petition, the petitioners seek an appropriate writ, order or direction for a fair and proper opportunity to the petitioners before dealing with their valuable property as the respondent no.1-Bank has agreed to sell the property to the auction purchaser after the auction was cancelled. The petitioners also seek to set aside the order dated 26.03.2015 in Writ Petition No.4453 of 2014.

The petitioners had secured financial assistance to the tune of Rs.6,00,000/- from the respondent nos.1 and 2 on 21.09.2009. Since the amount due and payable by the petitioners was not repaid to the respondent no.1-Bank, the respondent no.1-Bank initiated action against the petitioners under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The proceedings filed by the petitioners before the Debts Recovery Tribunal were dismissed and an appeal filed before the Debts Recovery Appellate Tribunal against the order of the Debts Recovery Tribunal was also dismissed. The respondent nos.1 and 2 filed an application before the District Magistrate under

Section 14 of the Act of 2002 for securing the possession of the property. The said application was allowed and an auction notice was issued by the respondent no.1 on 20.01.2014. The property of the petitioners was put to auction. The respondent nos.4 to 6 had sought to purchase the property of the petitioners by their highest bid. The auction notice was challenged by the petitioners before the Debts Recovery Tribunal. In the said proceedings, a pursis was filed by the respondent no.1-Bank stating therein that the bid of the respondent nos.4 to 6 was accepted but, since the balance sale price to the extent of 75% was not deposited, the respondent no.1-Bank had informed the highest bidder (Respondent nos.4 to 6 herein) that the property would be resold and that the earnest amount of 25% deposited by the respondent nos.4 to 6 had been forfeited. It was stated in the pursis that nothing remains to be decided in the securitization application and the same has been rendered infructuous. The Debts Recovery Tribunal passed the following order on 13.08.2014 on the basis of the statements made in the pursis.

> "*13.08.2014: Applicant called absent. No representation. A pursis has been filed by the counsel for the respondent bank stating that the auction which is under challenge in the above un-numbered S.A. has been failed due to the non-deposit of the balance amount by the auction purchaser and, therefore, the property would be resold by the respondent bank, in which event the applicant will get cause of action to file separate S.A. Considering the submission of the counsel appearing for the respondent bank and the Memo, M.A. No.22/2014 is dismissed. The applicant can re-agitate his remedy at a proper stage. No order as to costs.*"

It appears from the order dated 13.08.2014 that the application was disposed of on the basis of the statement made by the respondent no.1-Bank in the pursis. The Tribunal observed that the challenge in the securitization application has failed due to the non-deposit of the balance amount by the auction purchaser as per the Bank and that since the property would be resold by the Bank, the applicants (petitioners herein) would get a cause of action to file separate Securitization Application. On a consideration of the statements made in the pursis and the submissions made by the counsel for the Bank before the Tribunal, the miscellaneous application was dismissed after granting liberty to the petitioners to re-agitate the remedy at a proper stage.

The matter did not end there. The respondent nos.4 to 6, i.e. the highest bidders filed Writ Petition No.4453 of 2014 with the following prayers.

> i. quash and set aside the communication dated 26.03.2014 issued by the respondent-Bank whereby the respondent-Bank informed the petitioner that 25% of the amount deposited at the time of auction has been seized;
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> ii. a direction was sought to the respondent-Bank to refund the amount of Rs.13,20,000/-, i.e. 25% of the sale consideration deposited by the respondent nos.4 to 6 (the petitioners in the said writ petition).

The only prayer made in the said petition was for a direction to the respondent-Bank to refund the earnest amount. In the said writ petition, the following order was passed with the consent of the learned counsel for the parties, on 26.03.2015.

"The writ petition is disposed of with the consent of the learned counsel for the parties on the following terms.

1. The petitioners would pay the balance amount towards purchase of the property, i.e. Rs.39,60,000/- along with interest at the rate of 16.5% per annum to the respondent-Bank on or before the 15th of April, 2015;

2. The respondent-Bank would handover the possession of the property purchased by the petitioners in the auction within a period of three months from today subject to the payment of Rs.39,60,000/- along with interest at the rate of 16.5% per annum by the petitioners, till 15th of April, 2015;

3. If the respondent-Bank does not handover the possession of the property to the petitioners within a period of three months, the respondent-Bank would refund the amount that is paid by the petitioner to the respondent-Bank before 15th of April, 2015 along with interest at the rate of 16.5% per annum, immediately;

4. In case, the possession is not handed over to the petitioners within a period of three months, the petitioners would be at liberty to file a writ petition or any other proceedings for the relief sought in the instant petition, in accordance with law.

5. No costs."

It is necessary to note that the petitioners in this writ petition were not parties to Writ Petition No.4453 of 2014 and the order dated 26.03.2015 was passed behind the back of the petitioners though the same adversely affected the petitioners, specially when the miscellaneous application filed by the petitioners before the Debts Recovery Tribunal was disposed of on the statement made on behalf of the respondent no.1-Bank that the property would be resold by the respondent no.1-Bank and the petitioners herein would get a cause of action to file a separate securitization application. Since the petitioners are greatly prejudiced by the order dated 26.03.2015 in Writ Petition No.4453 of 2014, the petitioners have approached this Court with a prayer that the petitioners should be heard by the concerned respondents before any steps for the sale of the property are taken. The petitioners have also sought to set aside the order dated 26.03.2015 that has been passed behind the back of the petitioners in a petition wherein the respondent nos.4 to 6 had only sought for a direction to the respondent-Bank to return the earnest amount of Rs.13,20,000/- to the respondent nos.4 to 6.

In the aforesaid set of undisputed facts, the petitioners have sought to set aside the order in Writ Petition No.4453 of 2014.

The learned counsel for the respondent no.1-Bank opposes the prayer made on behalf of the petitioners. The learned counsel for the respondent no.1-Bank has made the following submissions.-----

a. The sale in favour of the respondent nos.4 to 6 (highest bidder) was never cancelled;

b. that, the respondent no.1-Bank had waived its right under Rule 9(5) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

c. the District Magistrate need not have given notice to the borrower but, despite the said position of law, a notice was given to the petitioners;

d. the petitioners were not diligent in prosecuting their remedies and the law helps only the diligent;

e. nothing remains to be performed in pursuance of the order dated 26.03.2015 as both the parties have complied with the terms mentioned in the consent order dated 26.03.2015 and the possession of the property is secured by the respondent nos.4 to 6.

The learned counsel for the respondent nos.4 to 6 states that the respondent nos.4 to 6 have paid an amount of approximately Rs.60,00,000/- in pursuance of the consent order dated 26.03.2015 and the possession of the property is secured by the respondent nos.4 to 6 after the sale certificate is issued. It is, however, stated that if this Court is inclined to set aside the order dated 26.03.2015 in Writ Petition No.4453 of 2014, a direction may be issued to the Bank to repay the approximate amount of Rs.60,00,000/- to the respondent nos.4 to 6, with interest.

Though we have recorded the submissions made on behalf of the respondent no.1-Bank, it would not be necessary for us to apply our mind to the said submissions. They are not relevant for deciding the question involved in this writ petition as the facts mentioned at the outset are undisputed. It would be only necessary for us to consider whether in the circumstances of the case, Writ Petition No.4453 of 2014 could have been disposed of on the consent terms. The property of the petitioners was put to auction in terms of the auction notice dated 20.01.2014. Admittedly, the respondent nos.4 to 6 had not deposited 75% of the amount within the prescribed time and, hence, a notice was issued by the respondent no.1-Bank to the respondent nos.4 and 6 that 25% of the amount (earnest amount) deposited by the respondent nos.4 to 6 had been forfeited. The petitioners had challenged the auction notice issued by the respondent no.1-Bank in the Securitization Application before the Debts Recovery Tribunal. An application for condonation of delay in filing the application was also filed. In the said proceedings, the respondent no.1-Bank had made it known to the Court and also to the parties that the Bank would resale the property as the concerned bidder (respondent nos.4 to 6 herein) had failed to deposit 75% of the amount within the stipulated period. It was stated in the pursis that the respondent no.1-Bank had informed the respondent nos.4 to 6 herein that 25% amount (earnest amount) that they had deposited, was forfeited by the Bank. Though the petitioners herein were not present on 13.12.2014, on a statement made by the learned counsel for the Bank and on the basis of the statement made in the pursis, the Tribunal disposed of the miscellaneous application with liberty to the petitioners herein to re-agitate their remedy at a proper stage as the property of the petitioners was liable to be resold in which event, the petitioners would get a fresh cause of action to file another securitization application. The petitioners would have believed that for reselling the property, the respondent no.1-Bank would be required to take appropriate steps as required by law and the petitioners would be aware of the subsequent auction notice, if issued. In the meantime, the respondent nos.4 to 6 had filed Writ Petition No.4453 of 2014 only with a prayer for a direction to the respondent no.1-Bank to refund the earnest amount deposited by the respondent nos.4 to 6 at the time of auction. In that writ petition, no other prayer was made against the respondent no.1-Bank. No direction was sought to the respondent no.1-Bank to execute the sale certificate in favour of the petitioners, (respondent nos.4 to 6 herein) in the said writ petition. In the absence of that prayer, the consent terms should not have been recorded by the order dated 26.03.2015. Bona fide believing that the statements, made on behalf of the petitioners (respondent nos.4 to 6 herein) in the said writ petition and the Bank, would not affect or prejudice anybody, the compromise terms were recorded in the order dated 26.03.2015 and the writ petition was disposed of. One of us was a party to the order dated 26.03.2015. We were kept in dark about the pursis filed by the Bank before the Debts Recovery Tribunal and the order passed by the Tribunal on 13.08.2014 on the basis of the pursis. Had we been aware of the same, we would surely not have recorded the compromise terms. It was necessary for the Bank and the respondent nos.4 to 6 to have informed us about the pursis filed by the Bank in the Tribunal and the order passed thereon. It is rightly submitted on behalf of the petitioners that the compromise terms adversely affect the petitioners and the order dated 26.03.2015 is liable to be set aside as the petitioners were bona fide under an impression and rightly so, that the Bank would initiate fresh steps for re-auctioning the property after the Bank had decided to forfeit the earnest amount deposited by the respondent nos.4 to 6 and resale the property in auction. It was necessary for the Bank to abide by the undertaking tendered by it in the Debts Recovery Tribunal in terms of the pursis. The Bank had clearly stated in the pursis that the Bank would resale the property as it has forfeited the earnest amount deposited by the respondent nos.4 to 6. Be that as it may, the order being prejudicial to the interest of the petitioners, is liable to be set aside as the petitioners were not parties to the writ petition filed by the respondent nos.4 to 6. It would not be necessary to consider the submissions made on behalf of the respondent no.1-Bank while setting aside the order dated 26.03.2015 in Writ Petition No.4453 of 2014. Suffice it to state that such an order, adversely affecting the petitioners, could not have been passed with the consent of the respondent nos.4 to 6 and the respondent no.1-Bank when the property belonged to the petitioners herein and the petitioners were not parties to the said writ petition. The judgment reported in **(2013) 10 SCC 83** (*General Manager, Sri Siddeshwara Cooperative Bank Limited & Another Versus Ikbal & Others*) is not relevant for deciding the issue involved in this writ petition.

Hence, for the reasons aforesaid, the writ petition is allowed. We hereby set aside our order dated 26.03.2015. Since the order dated 26.03.2015 in Writ Petition No.4453 of 2014 is hereby set aside, we direct the respondent nos.4 to 6 to handover the possession of the property to the respondent no.1-Bank on the respondent no.1-Bank refunding the amount of deposited by the respondent nos.4 to 6 towards balance consideration (except 25% amount that was liable to be forfeited) with interest at the rate of 16.5% per annum (as interest was charged at that rate while securing the balance consideration from the respondent nos.4 to 6). We direct the respondent no.1-Bank to refund the amount to the respondent nos.4 to 6 within a period of ten days and the respondent nos.4 to 6 to deliver the possession of the property to the respondent no.1-Bank within a period of two days therefrom. At the request made on behalf of the respondent nos.4 to 6, it is needless to mention that the question in regard to the stamp duty paid towards execution of the sale-deed/sale certificate would be kept open between the respondent no.1-Bank and the respondent nos.4 to 6. Since the order dated 26.03.2015 is recalled, Writ Petition No.4453 of 2014 may be listed for admission.

Order accordingly. No costs.

JUDGE **JUDGE**

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