THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

WRIT PETITION NO.15371 of 2008

And

WRIT PETITION NO.560 of 2011

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W.P.No.15371/2008

Between:

Wasy Shakeel Ansari

PETITIONER

(in both the writ petitions)

AND

The Managing Director,

Charminar Bank

(The Charminar Cooperative Urban Bank Ltd.,)

Having office at Saifabad, Hyderabad.

RESPONDENT

(in both the writ petitions)

COMMON ORDER:

W.P.No.15371 of 2008 was filed questioning the action of the respondent-Bank in not releasing the collateral security papers even after payment of full and final debt amount as per One Time Settlement Scheme on the demand made by the respondent-Bank, Purani Haveli Branch vide A/c.No.34/2000.

The petitioner also filed W.P.No.560 of 2011 questioning the illegal action of the respondent-Bank in issuing sale notice dated 16.12.2010 in E.P.No.2 of 2003 and putting the property relating to A & B Schedule for sale and proposing to conduct auction on 25.01.2011.

The case of the petitioner was that he is the proprietor of Al-Ansari Poultry Farm. He availed loan of Rs.25,00,000/- from the respondent-Bank, Purani Haveli Branch, for development of poultry farm by mortgaging the property house bearing H.No.12-2-458/3, comprising of ground and first floors situated at Gudimalkapur, Hyderabad. In the year 2001 as bird flu was affected, the petitioner could not pay the monthly installments of loan to the respondent-Bank. While so, in the year 2007 the respondent-Bank introduced One Time Settlement (OTS) Scheme. Accordingly the petitioner made a representation to the respondent-Bank to avail OTS facility. The respondent-Bank issued notice dated 26.12.2007 informing the petitioner that they have accepted the offer made by the petitioner and directed him to pay a sum of Rs.18,00,000/- towards full and final settlement of outstanding loan amount within a period of one week. Accordingly the petitioner paid Rs.18,00,000/- on 27.12.2007 to the respondent-Bank under acknowledgement, and made a representation to the Bank for return of collateral security papers. The respondent-Bank, instead of retuning the documents, issued notice dated 05.01.2008 stating that the petitioner has to pay an amount of Rs.15,99,074/- to the Bank as per the modified OTS, towards final settlement of loan amount. Challenging the action of the respondents in not releasing the collateral security papers, the petitioner filed W.P.No.15371 of 2008.

As the petitioner did not pay the said modified amount, the respondent-Bank initiated Arbitration Proceedings vide A.R.C.No.19029 of 2002 before the Arbitrator under Section 62 of the Act, and the Arbitrator passed Award dated 23.08.2002 for a sum of Rs.32,42,468/-. Even after passing of the Award, as the petitioner did not pay the Award amount, the respondent-Bank filed E.P.No.2 of 2003 before the Deputy Registrar under Section 70(2) of the Act r/w Rule 52 of the A.P. Cooperative Societies Rules, 1964 and sought for auction of the property mortgaged and the same is pending.

Thereafter, considering the fact that the Bank went into financial troubles, at the intervention of the Government G.O.Ms.No.4, dated 27.02.2003 came to be issued offering OTS. Accordingly, a general notice dated 30.05.2007 was issued by the respondent-Bank to the petitioner to avail OTS Scheme. Thereafter, the petitioner made an application to the respondent-Bank on 30.06.2007 seeking OTS, by offering a total sum of Rs.15,00,000/- as one time settlement. Referring to the offer made by the petitioner, the respondent-Bank vide letter dated 26.12.2007 agreed to close the loan account subject to the condition of the petitioner paying a sum of Rs.18,00,000/- within a period of one week without fail. Immediately, on 27.12.2007 the petitioner remitted Rs.18,00,000/- in compliance of letter dated 26.12.2007 and the same was acknowledged by the respondent-Bank. In spite of the fact that the amount has been received by the respondent-Bank, the respondent-Bank has issued notice dated 16.12.2010 putting the property for sale on 25.01.2011 by way of public auction. The very notice issued in Form-9 proposing to bring the property mortgaged to the respondent-Bank into auction by issuing sale notice under Section 52(11)(e) of the Rules is challenged by the petitioner in W.P.No.560 of 2011 stating that since settlement has been arrived at between the parties wherein the petitioner had complied his part of contract and the same has been accepted by the respondent-Bank, E.P. proceedings cannot survive and issuance of sale notice is arbitrary and unwarranted.

This Court vide order dated 21.01.2011 in W.P.No.560 of 2011 granted interim stay of auction of schedule properties in pursuance of sale notice dated 16.12.2010 in E.P.No.2 of 2003 and the same was extended until further orders on 07.03.2011 while admitting the writ petition.

A counter affidavit has been filed on behalf of the respondent-Bank, admitting the OTS arrived at between the parties and compliance of the settlement by the petitioner. However, it is stated that OTS was accepted by the Bank on account of the fact that the petitioner made a representation that the poultry farm is situated at Sy.No.107 Kokapet, Ranga Reddy District and the same is ancestral property; that in view of the fact that there was Bird Flu in the year 2001 his business collapsed and there was capital loss to him; and that the said ancestral property was acquired by the Government without leaving an inch of land. Considering the said representation, the respondent-Bank has accepted for OTS for Rs.18,00,000/-. On coming to know that in fact there was no acquisition by the Government and the petitioner had misrepresented and made the respondent-Bank to believe that he does not have any means to pay the amount, the respondent-Bank is entitled to execute the Award made on 23.08.2002.

The learned counsel for the petitioner while reiterating the contents in the writ petition submitted that after passing of Award, as there is OTS arrived at between the parties, the respondent-Bank could not and did not proceed with the E.P. Proceedings and the very E.P. proceedings and issuance of sale notice are arbitrary and illegal.

On the other hand, Sri P. Rajasekhar, learned counsel appearing on behalf of the respondent-Bank by placing reliance on the judgments of this Court in **A. Vemanaidu v. Erracheruvupalle Primary Cooperative Society, Chittoor District and others** and **Choudhry Traders, rep. by its proprietor, Mr. Ramdhath Choudhry v. State Bank of India, Hyderabad and another**, submits that the sale notice issued under Rule 52 is appealable in terms of Section 76 of the Act and as such the writ petition is not maintainable.

While deciding an identical issue in **A. Vemanaidu v. Erracheruvupalle Primary Cooperative Society, Chittoor District and others** (1 supra) this Court at paragraphs 6 to 8 held as under:

> "6. Rule 52 of the Rules contains detailed procedure to be followed in execution of decrees, decisions or orders including orders passed under Section 71(1) as well as Section 101 of the Act.
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> 7. A reading of Sub-section (2) of Section 70 as well as Section 52 of the Act, it becomes clear that the amount covered by a certificate for recovery of the debt granted by the Registrar of Co-operative Societies under Section 71(1) of the Act can be executed in accordance with Sub-section (2) of Section 70 of the Act duly following the procedure under Rule 52 of the Rules. The Act is a self-contained Code.
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> 8. It provides for constitution of Cooperative Tribunal and Section 76 of the Act provides that any person aggrieved by any decision passed or order made under various provisions of the Act, inter alia, may file appeal to the Tribunal. An order for execution of a certificate of recovery under Section 71 of the Act and auction notice consequent thereto can only be under Section 70(2) of the Act read with Sub-rule (11) of Rule 52 of the Rules. Therefore, the impugned action is clearly appealable under Section 76 of the Act. A reference may be made to Section 76(1) of the Act which reads as under."

Heard learned counsel for the petitioner and learned counsel appearing for the respondent-Bank.

I am unable to accept the contention of the learned counsel for the respondent-Bank that appeal remedy is available to the petitioner, on the ground that what has been challenged in this writ petition is sale notice issued after repayment of loan amount under OTS, which is no longer subsisting. Thus the very enforceability of Arbitral Award is vitiated.

I am in agreement with the learned counsel for the petitioner that Rule 52(21)(a) does not provide for a situation where the very extinguishment of liability on account of OTS having been reached and thereby there being no liability on the part of the borrower, to be considered in the process of considering the executability or otherwise of the decree/Award.

Though the learned counsel for the respondent placed reliance on Rule 52 (21) (a) of the Rules, prima facie, the same does not deal with the situation.

For better appreciation, Rule 52 (21)(a) reads as under:

> "Where any claims is preferred or any objection is made to the attachment of any property under this rule on the ground that such property is not liable to such attachment, the officer shall investigate the claim or objection and dispose it of on the merits."

A careful reading of the above Rule would only point out that objections can be raised before the sale officer or executing officer only with regard to the disputes in relation to the property and not in relation to the debt.

In fact, the learned counsel for the respondent fairly points out that though Rule 52(5)(n) provides for a contingency about satisfaction of decretal amount, the peculiar situation as arisen in the present case is after passing of decree and OTS having been reached. However, he would submit that the petitioner may raise objection under Rule 52(21)(a) of the Rules.

A perusal of the entire Rule 52 does not indicate any discretion having been given to the Executing Officer/Sale Officer except in cases falling under Rule 52(5)(n) in considering the objections in relation to the property on account of third party claims or for any other reason. The contingency arising on account of OTS has not been provided for. In other words, there is no remedy available to the petitioner in such situation.

I am also unable to accept the argument of the learned counsel for the respondent-Bank that if there is no misrepresentation by the petitioner that Kokapet property has been acquired by the Government, the respondent-Bank would not have accepted for OTS at all and it is only on such misrepresentation the respondent-Bank is still proceeding with the enforcement of Award. Once it is admitted that there is OTS reached between them whereunder the respondent-Bank had agreed to forego and settle for a lesser amount, notwithstanding the fact that there was an enforceable decree in their favour, offer is binding on the respondent-Bank since there is no allegation that the petitioner has played fraud in collusion with the respondent-Bank authorities, as it is well settled that fraud vitiates every thing.

In the present case, it is not the case of the respondent-Bank that any fraud was played by the authorities of the Bank in accepting the OTS offer. On the other hand, the OTS, was, in fact, made by the petitioner as he was invited by the respondent-Bank through their letter dated 30.05.2007 to make an offer.

In the present fact situation, there being no extenuating circumstances, sale notice dated 16.12.2010 in E.P.No.2 of 2003 issued by the respondent-Bank proposing to conduct auction on 25.01.2011 is in clear violation of the OTS arrived at between the parties, which in fact has been accepted by the respondent. In that view of the matter, the sale notice cannot be sustained and the same is accordingly set aside.

The petitioner is at liberty to approach the Sale /Executing Officer seeking release of documents by placing on record the One Time Settlement reached between the petitioner and the respondent-Bank.

Accordingly, the writ petitions are disposed of. Pending miscellaneous petitions, if any, shall stand closed. No order as to costs.

CHALLA KODANDA RAM, J.

17th November, 2015

Js.

L.R. copy to be marked