HON'BLE SRI JUSTICE S.V.BHATT

W.P.No.7462 OF 2015

ORDER:

The petitioner prays for Mandamus declaring the auction notice dated 10.03.2015 published in Hans India newspaper on 12.03.2015, proposing to auction the movable properties viz.,

(i) Wheel Loader (ii) Intermediate Bin (iii) Secondary Crusher-1

(iv) Secondary Crusher-2 (v) Conveyer-2 (vi) Return Conveyor-2

(vii) Finished Product Storage Bin (viii) Vibrating Screen and

(ix) Diesel Generator on 23.03.2015, as unconstitutional, illegal and contrary to guidelines issued by the RBI.

The circumstances in issue are as follows:

The petitioner is doing business in stone quarry and crusher. The petitioner for business needs availed financial assistance from the Bank of Baroda, ARM Branch, Himayatnagar, Hyderabad/

1st respondent. The 1st respondent Bank sanctioned to the petitioner cash credit facility of Rs.190 lakhs and term loan of

Rs.50 lakhs. The loan accounts are secured by movable and immovable properties. Admittedly, the petitioner has not adhered to the repayment schedule and the loan account was treated as non-performing asset. The 1st respondent Bank filed O.A.No.397 of 2012 before the Debts Recovery Tribunal, Hyderabad, to recover outstanding sum of Rs.2,72,65,355/- with future interest at 16.25 % per annum, till the date of payment. The petitioner alleges that

the petitioner is contesting the claim in O.A.No.397 of 2013. On 05.01.2015, the 1st respondent issued notice opting to possess and sell movable properties viz., hydraulic excavators-2, rock breaker, poclainers and other plant and machinery under hypothecation. On 30.01.2015, the petitioner sent a reply by stating that except hydraulic excavators, the other items which were opted to be possessed are not under hypothecation agreement. Therefore, the respondent cannot exercise the option of taking possession of movable properties not hypothecated to 1st respondent Bank. It is further stated that as the loan facilities are secured through the mortgage of immovable properties, the recourse to possessing the hypotheca, much less selling the same in auction while O.A.No.397 of 2013 is pending, is untenable and illegal. On 05.03.2015, the officers of 1st respondent visited the stone crushing unit at Jiyapally Village, Bibinagar Mandal, Nalgonda District and took inventory of the available movables. The petitioner claims to have lodged a police complaint on 07.03.2015. The copy of panchanama of inventory dated 05.03.2015 is annexed as Ex.P-6. On 17.03.2015, the 1st respondent informed the date of auction as 23.02.2015. Hence, the writ petition.

The objections against the impugned auction are that the

1st respondent Bank has no manner of right to sell the movables detailed in the auction notice, for the movables detailed in the auction notice are not hypothecated to 1st respondent. The failure to mention the details of hypothecation in O.A.No.397 of 2013 shows that the movables now auctioned are not under hypothecation to 1st respondent Bank. The outstanding amount is fully secured and the impugned auction is illegal and highhanded.

The petitioner relies upon the decision reported in **B.SURESH v. A.P.MAHESH COOPERATIVE DEPARTMENT** and also the decisions reported in **SYNDICATE BANK V. OFFICIAL LIQUIDATOR, M/S PRASHANT ENGG.CO.(P) LTD**.

The 1st respondent on receipt of notice filed counter affidavit opposing the prayer both in fact and law. Briefly stated, the case of 1st respondent is that the petitioner in all has availed sanctioned loan facilities of Rs.240 lakhs as early as September 2010. The loan facilities are secured by movable and immovable properties. The 1st respondent filed O.A.No.397 of 2013 before the Debts Recovery Tribunal, Hyderabad to recover a sum of Rs.2,72,65,355/- together with future interest. The filing of OA conforms to the procedure stipulated by RDB and SARFAESI Act. The 1st respondent refers to exchange of notices and also the notice of intimation of auction dated 17.03.2015. As the contents of notices do not have any bearing on the issue for decision, I am not considering the contents of notices exchanged between the parties.

The undisputed fact is that the petitioner executed composite hypothecation agreement on 19.10.2010 in favour of 1st respondent. The schedule of composite hypothecation agreement reads as follows:

FIRST SCHEDULE

Nature of Limit Rate of Int./ Security Margin of

Banking Commission stipulated security

facility

Cash credit 1,90,00,000/- 4% D.P.Note

Over base rate Ex.of …..security

Composite Hypo. Agreement

1. Eq. mortgage of non-agrl

Land 15.00 acs. Sy.No.100, 100 e, 100/ee, 100 ru, situated

at Jiyapally vill., Bibinagar

(M), Nalgonda Dt.

2. Agrl. Land – 10.00 Acs

Sy.No.100, situated at Jiyapally vill., Bibinagar

(M), Nalgonda Dt.

SECOND SCHEDULE

I. The whole of the Borrower's stocks, both present and future and including but without prejudice to the generality of the foregoing words, all stocks of raw materials, work in process, semi-finished goods and finished goods such as Machinery, granite, granite powder etc…………"

and instrument of hypothecation of vehicle dated 19.10.2010.

The schedule of hypothecation agreement reads as under:

Schedule-A

(Description of Vehicle)

Veh.No

1. Tipper – I CAT 320 D: AGMT No.NGOLE 0912250004
2. Tipper - CAT 320 D : AGMT No.NGOLE 0912250005

3. Rock breaker & Poclainer

From the above composite hypothecation agreement and instrument of hypothecation of vehicle, it is the case of 1st respondent that the movables are covered by the composite hypothecation agreements and according to the binding covenant between the parties and the 1st respondent, the 1st respondent claims right to inspect the subject matter covered by hypotheca and if necessary possess hypotheca for realization of the amount due from the petitioner. The applicable clause reads as under:

> "….It was also open to the bank to enforce the security by the suit that it filed but there again the bank choose to seek a simple money decree. Mere mentioned of the hypothecation in the suit was not sufficient. The bank would, therefore, be deemed to have waived its right as hypothecate and was satisfied with a simple money decree. The bank having filed suit for the recovery of the money and having failed to make a claim on security, any claim on the security or the sale proceeds thereof would now be barred under Order 2 Rule 2 of Civil Procedure Code, 1908, with the result that the bank has no subsisting claim on the machinery of any part of sale proceeds thereof and must rank as an unsecured creditor along with other creditors of the company, and prove its claim before the Official Liquidator at the appropriate time".

It is stated that the inventory prepared on 05.03.2015 deals with the properties covered by composite hypothecation agreement, in exercise of the available option hypotheca is possessed and is scheduled to be auctioned on 23.03.2015. The 1st respondent submits that the decisions on which the petitioner relies upon are distinguishable and have no application to the auction notice impugned in the writ petition. It is the further case of 1st respondent that the remedy of recovery by 1st respondent Bank is in addition to the remedy available before the Debts Recovery Tribunal, SARFAESI and under the provisions of hypothecation agreement dated 19.10.2010. Hence, it is stated the writ petition is misconceived and liable to be dismissed.

Apart from the maintainability of writ petition in respect of a simple dispute under a loan/composite hypothecation agreements, the writ petition deserves to be dismissed, for the very premise of filing the writ is that the movables sought to be auctioned on 23.03.2015 are not included in the hypothecation agreement, except hydraulic excavators-2, rock breaker, poclainers.

The petitioner should have disclosed the correct details of schedule under the composite hypothecation agreement for vindication of right under Article 226 of Constitution of India. As already noticed, the machinery is covered under agreement of hypothecation and the petitioner having not filed any rejoinder to the reply and documents placed on record by 1st respondent cannot be heard to complain that the impugned auction is unauthorized and unconstitutional. In my considered view, the decisions relied on by the petitioner are distinguishable on the fact situation of this case, and as tried to be persuaded by petitioner, this Court is not prepared to exercise the jurisdiction under Article 226 of Constitution of India.

The writ petition fails and is, accordingly, dismissed. There shall be no order as to costs.

S.V.BHATT, J

1st June, 2015

Lrkm