IN THE HIGH COURT OF JUDICATURE AT HYDERABAD

FOR THE STATE OF TELANGANA AND THE STAE OF ANDHRA PRADESH

***

WRIT PETITION No.12280 OF 2014

Between:

K. Chandrasekhar .. Petitioner

AND

Government of India,
Rep. by its Secretary,
Ministry of Finance & 3 others .. Respondents

DATE OF JUDGMENT PRONOUNCED: 22-07-2015

SUBMITTED FOR APPROVAL:

HON'BLE SRI JUSTICE R. SUBHASH REDDY

AND

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

1. Whether Reporters of Local newpapers Yes

may be allowed to see the Judgments?

2. Whether the copies of judgment may be Yes

Marked to Law Reporters/Journals.

1. Whether Their ladyship/Lordship wish Yes

to see the fair copy of the Judgment?

*** HON'BLE SRI JUSTICE R. SUBHASH REDDY**

AND

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

+ <u>WRIT PETITION No.12280 OF 2014</u>

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% Date**:** 22-07-2015

K.Chandrasekhar .. Petitioner

v.

$ Government of India,

Rep. by its Secretary,

Ministry of Finance & 3 others .. Respondents

! Counsel for the petitioner : Sri Sricharan Telaprolu

^ Counsel for respondent No.1 : -

Counsel for respondent Nos.2 to 4 : Sri E. Madan Mohan Rao

< GIST:

> HEAD NOTE:

? CASES REFERRED:

1. (2014) 5 SCC 610

C/15

HON'BLE SRI JUSTICE R. SUBHASH REDDY

AND

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

<u>W.P. No.12280 OF 2014</u>

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ORDER: (Per Hon'ble Sri Justice A. Shankar Narayana)

The petitioner herein was successful bidder of the auction conducted by respondent No.3, the Authorised Officer, Indian Overseas Bank, Brodipet Branch, Guntur, on 25-10-2012, concerning item No.1 of the properties mentioned in the e-auction notice, dated 22-09-2012, and he has deposited Rs.6,62,500/- (Rupees six lakhs sixty two thousand and five hundred) towards 25% of the sale price (bid amount) as required by the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act).

2. He filed the instant writ petition praying to declare the action of respondent No.3 in forfeiting the amount deposited by him, on the ground that when the e-auction notice, dated 22-09-2012, was issued by respondent No.2 - Indian Overseas Bank, Brodipet Branch, Guntur, pendency of S.A. No.221 of 2012 before the Debts Recovery Tribunal, Visakhapatnam (DRT) is not notified therein.

3. The petitioner states that on 25-10-2012, respondent No.3, having declared him as highest bidder of the e-auction, issued letter, dated 06-11-2012, confirming sale of the subject property in his favour for Rs.26,50,000/- and directed him to remit the balance sale price of Rs.19,87,500/- on or before 09-11-2012. In the said confirmation letter, respondent No.3 incorporated a clause that sale confirmation was subject to outcome of S.A. No.221 of 2012 pending on the file of DRT and when he questioned respondent Nos.2 and 3 as to mentioning such a condition, which was newly incorporated, as he was not even informed about the same at the time when the bid was confirmed, and demanded to return the earnest money deposited by him as it would disable him from obtaining any loan from Nationalised Banks by mortgaging the subject property. Respondent No.3 said to have promised him to return the amount, but there was no pursuant action till 18-01-2013. When respondent No.3 raised the

demand for payment of balance amount through the notice, dated 06-02-2013, he again approached respondent Nos.2 to 4, and respondent No.4 promised that necessary steps will be taken to return the amount. Since there was no further action from the respondents' side, he made representations, dated 16-08-2013, 23-10-2013,
but respondent No.2 communicated to him through the letter, dated 31-10-2013, addressing that since he did not remit the balance amount, they have forfeited the amount deposited by him.

4. Therefore, it is his case that respondent No.3 suppressing all previous facts, published e-auction notice, dated 25-10-2012, and received 25% bid amount and in the letter, dated 06-11-2012, incorporated the condition that sale confirmation was subject to out come of S.A. before the DRT and since his demands proved abortive and as there is no other alternative efficacious remedy, he invoked the original jurisdiction of this Court requesting to direct the respondents to return the amount deposited by him with interest at 12% per annum.

5 . With their counter, respondents resisted the writ petition. They admitted petitioner taking part in e-auction pursuant to the tender-cum-auction notice, dated 25-10-2012, becoming successful bidder, depositing Rs.6,62,500/- towards 25% of the sale price pursuant to the auction. But, according to the respondents, any auction under Section 13(4) and measures taken under the SARFAESI Act, has to be challenged by way of an appeal under Section 17 of the SARFAESI Act before the appellate authority and the writ petition is, therefore, not maintainable on the alleged grounds of violation of principles of natural justice under Article 226 of the Constitution of India. It is also stated that their action in forfeiting the amount is in accordance with Rule 9(4) and (5) of the Rules and since the order, dated 06-02-2013, is unchallenged, the writ petition is

liable to be dismissed.

6 . Respondents reiterated exchange of communication and correspondence between them and the petitioner. While contending that till forfeiture of the amount by letter, dated 06-02-2013, the petitioner has not expressed objection with regard to observation made by the authorized officer in the confirmation letter, dated 06-11-2012, as to pendency of S.A. before the DRT, and therefore, sought to dismiss the petition on the ground that very forfeiture order is not challenged.

7 . Heard Sri Sricharan Telaprolu, learned counsel for the petitioner, and Sri E. Madan Mohan Rao, learned counsel for the respondents.

8 . Learned counsel for the petitioner would submit that the respondents failed to notify in the e-auction notice about pendency of S.A. before the DRT and the respondents while communicating through the letter, dated 06-11-2012, as to confirmation of sale of the subject property, introduced a clause in the said letter stating that the confirmation of sale is subject to outcome of the S.A. pending on the file of the DRT and thus, there has been infirmity in observing the due formalities as required by the provisions of Rule 8(6) of the Rules. It is also his submission that had the respondents notified pendency of S.A., the petitioner would not have ventured to purchase the subject property, which was under litigation and thus, on account of suppression of said fact in the e-auction notice, requirements of Rule 8(6) of the Rules were not complied with. Since the petitioner sought direction for return of the forfeited amount of Rs.6,62,500/-, it has to be construed as the very letter, dated 06-02-2013, being challenged in the instant writ petition.

9. Per contra, learned counsel for the respondents would contend that the petitioner failed to deposit the balance amount of sale price i.e., 75% bid amount on or before 09-11-2012 and, therefore, the respondents invoked Rule 9(4) and (5) of the Rules and forfeited the earnest money deposit and the same was communicated to the petitioner through the letter, dated 31-10-2013. It is also his submission that when efficacious remedy is available to approach the appellate authority, the instant writ petition is not maintainable.

10. In the above context, we would like to answer two issues. The first being whether the request for setting aside the letter, dated 06-02-2013, through which forfeiture of earnest money deposit made by the petitioner was communicated, is liable to be set aside; and the second, whether it is a case where extraordinary power under Article 226 of the Constitution of India can be invoked?

11. Touching the request of the petitioner to set aside the letter of forfeiture, the relevant facts are not in dispute.

12. We have perused the e-auction, notice, dated 22-09-2012. As urged by the petitioner, we found pendency of S.A. No.221 of 2012 on the file of DRT is conspicuously absent in the e-auction notice. The respondents have not controverted it. We have also gone through the counter filed by the respondents. Except raising vague denials, no specific plea is taken to explain away as to why the pendency of S.A. is omitted in the e-auction notice. We would like to extract what has been answered by the respondents in paragraph No.10 of their counter touching the said omission in the e-auction notice.

> "10. The allegation that the 3rd respondent in connection with the auction conducted on 08.06.2012 pursuant to auction notice dated 22.05.2012, in respect of the subject

> property returned the 25% of the bid amount deposited by the previous auction purchaser without confirming the sale as it seems that the said purchaser having come to know about the pendency of the said S.A. raised objection is misconceived and incorrect. Due to non compliance of procedure as only bidder is participated as per minimum two bidders are to be participated the auction proceedings could not be completed, as such, the property was put for auction and once again the Petitionber (*Sic.* Petitioner) participated in the said auction. It is submitted that as the amount has been forfeited as per law, the Petitioner is not entitled for any reliefs under Article-226 of Constitution of India and the writ petition is devoid of merits."

13. Incidentally, we would like to examine whether there is strict compliance of the proviso to Rule 8 (6) of the Rules. The said proviso reads, thus:

> "**8 . Sale of immovable secured assets:-** (6) The authorized officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5):
>
> Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which shall include,-
>
> (a) The description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;
>
> (b) The secured debt for recovery of which the property is to be sold;

> (c) Reserve price, below which the property may not be sold;
>
> (d) Time and place of public auction or the time after which sale by any other mode shall be completed;
>
> (e) Depositing earnest money as may be stipulated by the secured creditor;
>
> (f) Any other thing which the authorized officer considers it material for a purchaser to know in order to judge the nature and value of the property."

14. We are concerned with clause 'f ' of proviso to sub-rule (6) of Rule 8 of the Rules. Though, some discretion is vested with the authorized officer, respondent No.3, still, notifying the pendency of S.A. before the DRT in the e-auction notice is absolutely indispensable, when examined in the light of the other part of clause 'f', since it would be material for a purchaser to know in order to judge the nature and value of the property. At this juncture, we are of the view that it would be profitable to place reliance on a decision of the Hon'ble Supreme Court in **Mathew Varghese v. M. Amritha Kumar and others,** where, while explaining the object of the proviso to Rule 8(6) of the Rules, the Hon'ble Supreme Court held in paragraph No.33.2, thus:

> "33.2. Secondly, when such a secured asset of an immovable property is brought for sale, the intending purchasers should know the nature of the property, the extent of liability pertaining to the said property, any other encumbrances pertaining to the said property, the minimum price below which one cannot make a bid and the total liability of the borrower to the secured creditor. Since,

> the proviso to sub-rule (6) also mentions that any other material aspect should also be made known when effecting the publication, it would only mean that the intending purchaser should have entire details about the property brought for sale in order to rule out any possibility of the bidders later on to express ignorance about the factors connected with the asset in question."

15. Thus, it is clear that mentioning of pendency of S.A. before the DRT in the e-auction notice was significantly important, not only to know the nature of the property and extent of the liability but also to know any other encumbrances pertaining to the property.
When viewed in the said context, certainly, non-mentioning of pendency of the S.A. before the DRT in the e-auction notice accounts for non-adherence to the procedure prescribed by the proviso to Rule 8(6) of the Rules. This apart, in our view, the conduct of the respondents is worth mentioning. The respondents not only failed to mention about pendency of the S.A. before the DRT in the e-auction notice, but also when the auction was held on 25-10-2012, on which day, the petitioner deposited Rs.6,62,500/- towards 25% of sale price (bid amount), he was not made known about the pendency of S.A.
Only when respondent No.3 issued letter, dated 06-11-2012, confirming sale of the property in favour of the petitioner for a total sale consideration of Rs.26,50,000/-, a clause was incorporated therein that sale confirmation was subject to outcome of the S.A. pending before the DRT. This conduct of the respondents is sufficient enough to accede to the request of the petitioner in setting aside the forfeiture letter, which the respondents sought to construe that it was an order of forfeiture, dated 06-02-2013. Thus, we have no hesitation to set aside the letter of forfeiture, dated 06-02-2013 forfeiting the amount of Rs.6,62,500/-, which was deposited by the petitioner towards 25% of the sale price of the bid and direct respondents 1 to 3 to return the said amount to the petitioner. However, though, the petitioner claimed interest at 12% per annum, we are of the view that the same cannot be granted.

16. Adverting to the contention of the learned counsel for the respondents that the instant writ petition is not maintainable under Article 226 of the Constitution of India, since the action of the respondents in forfeiting the amount is in accordance with sub-rules (4) and (5) of Rule 9 of the Rules through the order, dated 06-02-2013, which is not challenged by the petitioner and that the remedy available to the petitioner has been by way appeal before the appellate authority under the SARFAESI Act, we are not in agreement with the learned counsel, for the reason that there has been clear violation of principles of natural justice as the very pendency of S.A. before the DRT was not disclosed in the e-auction notice besides not disclosing the same at the time when auction was held on 22-09-2012 and it was communicated through the letter, dated 06-11-2012. This apart, as mentioned by us in the above, respondents put forth evasive answer despite the petitioner ventilating that in the e-auction notice, dated 25-10-2012, pendency of S.A. before the DRT is not mentioned; when such is the conduct of the respondents, we intend to put an end to the controversy, since we are not inclined to drive the petitioner to approach the DRT at this distance of time.

17. Therefore, the letter of forfeiture, dated 06-02-2013, issued by respondent No.3 forfeiting the amount of Rs.6,62,500/- (Rupees six lakhs sixty two thousand and five hundred), which was deposited by the petitioner towards 25% of the sale price of the bid, is set aside and consequently respondent Nos.2 to 4 are directed to return the said amount to the petitioner within eight (8) weeks from today. However, the petitioner is not entitled to any interest on the above sum.

18. With the above directions, the Writ Petition is allowed. There shall be no order as to costs.

19. As a sequel thereto, Miscellaneous Petitions, if any, pending stand disposed of.

R. SUBHASH REDDY, J

A. SHANKAR NARAYANA, J

July 22, 2015.

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