THE HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY

AND

THE HON'BLE SRI JUSTICE G. SHYAM PRASAD

**WRIT PETITION Nos.27707 and 33761 of 2015
and 30994 of 2016**

Date: 26.09.2016

WRIT PETITION No.27707 of 2015

Between:

Smt. Erukulla Padma,
Karimnagar District.

.. Petitioner

and

The Indian Bank,
Peddapalli Branch,
Kaman Road, Peddapalli Town,
Karimnagar District, and others.

.. Respondents

Counsel for the petitioner: Smt. P. Padmavathi

Counsel for respondent No.1: Sri Ambadipudi Satyanarayana

Counsel for respondent No.2: Sri A. Rama Krishna Reddy

Counsel for respondent No.3: Sri Arun Kumar Doddla

The Court made the following:

<u>COMMON ORDER</u>: ***(Per Hon'ble Sri Justice C.V.Nagarjuna Reddy)***

W.P.No. 27707 of 2015 is filed by a third party to the loan transaction for a *mandamus* declaring the action of respondent No.1- Indian Bank in issuing auction-cum-sale notice dated 22.07.2015 published in Nava Telangana, Daily Newspaper, Karimnagar District, as illegal and arbitrary. W.P.No.33761 of 2015 is filed by one of the principal borrowers for a *mandamus* to set aside the auction notice dated 22.07.2015 and also to declare the auction held on 02.09.2015, as illegal and arbitrary. W.P.No.30994 of 2016 is filed by the other borrower for similar relief.

For convenience, the petitioner in W.P.No.27707 of 2015 is referred to as third party purchaser; the petitioner in W.P.No.33761 of 2015 is referred to as principal borrower No.1 and the petitioner in W.P.No.30994 of 2016 is referred to as principal borrower No.2. The respondent, which is common in all these writ petitions, is the Indian Bank (hereinafter referred to as 'the bank').

The facts, which are not in dispute, are that both the principal borrowers are brothers. Principal borrower No.1 availed the loan of OCC limit of Rs.24,00,000/- towards business requirements and executed loan documents on 01.08.2011. The OCC limit was secured by way of mortgage of immovable property admeasuring 88.75 square yards situated at Kanjarguda, Old Bhoiguda, Secunderabad, along with the building thereon. Both the principal borrowers have approached the bank for sanction of home loan of Rs.6,00,000/- for effecting repairs etc. They have deposited original registered partition deed dated 16.01.2004 pertaining to property bearing House No.3-2-97 of Peddapalli Village, Karimnagar District, and created an equitable mortgage as security for the said home loan. Later, principal borrower No.1 has approached the bank for sanction of one SOD limit of Rs.20,00,000/- and thereafter, for sanction of one medium term loan of Rs.1,50,000/- for his business requirements. The bank has sanctioned the said loans by extension of mortgage. Both the principal borrowers have executed a memorandum of extension of equitable mortgage on 02.12.2008 and same was duly registered with Sub Registrar's Office, Peddapalli, under document No.4603 of 2008. The said two properties along with joint passage covered by 'A' to 'C' schedules of the registered partition deed were accordingly mortgaged as security to the over all loan facilities of Rs.27,50,000/-. When the bank has taken securitisation measures leading to issue of sale notice dated 22.07.2015 through e-auction mode fixing 02.09.2015 for the sale of the mortgaged properties, the third party purchaser, who purchased 'B' schedule property from principal borrower No.1, filed W.P.No.27707 of 2015.

On 01.09.2015, this Court while issuing notice before admission in W.P.No.27707 of 2015, permitted the bank to proceed further in pursuance of the impugned sale notice with the direction that the sale shall not be confirmed in favour of the third party/purchaser and the petitioner therein shall not be dispossessed from the subject property pending further orders. On 14.09.2015, this Court took note of the fact from the counter affidavit filed by the bank that the auction was held on 02.09.2015 and the successful bidder has offered a sum of Rs.45,95,000/-. The Court also took note of the submission made by the learned counsel for the petitioner-third party purchaser that her client is prepared to deposit the amount offered by the auction purchaser within one week. The case was accordingly adjourned to 21.09.2015. On the said date, the learned counsel for the third party purchaser represented that since her client is claiming only half share in the property notified for auction, she may be permitted to deposit Rs.22,97,500/-. This Court has accepted the said submission and directed the bank to receive the said amount and keep the same in 'No Lien Account'. At the instance of the third party purchaser, the auction purchaser and principal borrower No.1 have been impleaded by orders dated 21.09.2015 and 05.10.2015 respectively.

On 09.10.2015, principal borrower No.1 has filed W.P.No.33761 of 2015 pleading that he had no knowledge of the initiation of auction proceedings till he has received notice in W.P.No.27707 of 2015. Principal borrower No.2 has filed W.P.No.30994 of 2016 during September, 2016.

When the cases were taken up on 15.09.2016, Mr.P.Hemachandra, learned counsel representing principal borrower No.2 submitted that his client is prepared to pay the entire balance due to the bank within 10 days. Mr.Ambadipudi Satyanarayana, learned Standing Counsel for the Bank submitted that he will furnish the details of the dues by 17.09.2016 to the learned counsel for principal borrower No.2 to facilitate the latter to pay the entire dues. Based on these representations, we have posted the cases 'for orders' today.

Today, at the hearing, Sri P. Hemachandra, learned counsel for principal borrower No.2 submitted that as against the sum of Rs.45,95,000/- deposited by the auction purchaser, the bank is demanding more than Rs.53,00,000/- and that his client is not prepared to pay the said amount.

Learned counsel for the third party purchaser submitted that her client is a *bona fide* purchaser having purchased 'B' schedule property for a valuable consideration; that since the properties were ancestral properties and based on the encumbrance certificate obtained by her client, she purchased the property and got the sale deed executed and registered on 31.01.2013. She further submitted that on the application made by her client to the Commissioner, Nagara Panchayat, Peddapalli, the property was mutated in her name and that for the first time, her client came to know about the mortgage of the said property by principal borrower No.1 through publication of auction notice on 22.07.2015. She has further submitted that her client has lamented that because of the fraud played by principal borrower No.1 and the encumbrance certificate, which has not shown any encumbrance, she was deceived and made to part with the substantial money for the purchase of the property and therefore, being *bona fide* purchaser, it would lead to grave injustice, if the sale in respect of 'B' Schedule property is confirmed.

Mr. Arun Kumar Doddla, learned counsel for principal borrower No.1 has assailed the sale and its confirmation on the following grounds:

(a) His client was not served with the notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the Act");

(b) In the possession notice, 'B' schedule property was described as open place belonging to dismantled house bearing No.3-2-97, while in the tender form the said property was described as residential and commercial building bearing House No.3-2-97; and

(c) The valuation certificate for 'A' schedule property obtained in the year 2004 has shown the value of the property as Rs.42,50,000/- while the valuation certificate for 'B' schedule property has shown as Rs.35,00,000/- as against which the bank has fixed only the reserve price of Rs.32,50,000/- for both the properties and sold the same for Rs.45,95,000/-.

He has accordingly submitted that the sale is vitiated by procedural illegalities.

Mr. P. Hemachandra, learned counsel representing principal borrower No.2 has not advanced separate submissions while adopting the submissions of the learned counsel for principal borrower No.1.

Mr. Ambadipudi Satyanarayana, learned Standing Counsel for the bank submitted that the writ petitions are liable to be dismissed in *limine* for the reasoning that the principal borrowers have bypassed the limit under the Act. On merits, he has denied the plea of principal borrower No.1 that Section 13(2) notice was not served on him. He has invited the Court's attention to the averments in the counter affidavit supported by a copy of the notice dated 16.01.2014 issued under Section 13(2) of the Act to M/s. Kiran Enterprises, the proprietary concern of both the principal borrowers and to the two guarantors. He has placed reliance on the acknowledgment containing the purported signature of principal borrower No.1. He has also produced the letter addressed to principal borrower No.1, which was returned by the postal department with the endorsement "refused". He also submitted that in the notice sent to the principal borrowers and the guarantors, the reserve price of the three properties was clearly mentioned as Rs.32,50,000/- and that neither the borrowers nor the guarantors submitted any objections to the said notice. He also submitted that the valuation certificates relied upon by principal borrower No.1 pertain only to the estimation of the cost of the building, submitted at the time of obtaining the loan; that they do not reflect the true market value; that as per Rule 8(5) of the Security Interest (Enforcement)

Rules, 2002 (for short 'the Rules'), the Bank has obtained the valuation certificate from the competent authority and that notice of the same was issued to the principal borrowers as well as the guarantors under Section 8(6) of the Rules.

We have considered the respective submissions of the learned counsel for the parties. As regards W.P.No.27707 of 2015, the petitioner therein has not disputed the fact that she has purchased the property mortgaged to the bank. The legal position is well settled that the right of a subsequent purchaser of a mortgaged property is subservient to the mortgage and that the mortgagee has an unfettered right to enforce the mortgaged property. The petitioner-third party purchaser has also not disputed the fact of registered partition deed between the principal borrowers. She has, however, entered into the sale transaction with principal borrower No.1 without insisting on production of registered partition deed by her vendor. The only explanation offered in this regard by her is that she was misled into believing by her vendor that there was only oral family partition. If that be so, she was expected to request principal borrower No.2 also to join execution of the sale deed. A person, who acted on the mere representation of the vendor, without being supported by any material, cannot be termed as a *bona fide* purchaser. A person can be treated as a *bona fide* purchaser when he has taken all possible precautions before purchasing property. The petitioner has failed to take such precautions and claimed to have simply believed the version of principal borrower No.1, and was allegedly guided by encumbrance certificate showing encumbrance as 'Nil'.

Assuming that the third party purchaser is a *bona fide* purchaser, the alleged sale by principal borrower No.1 in her favour was behind the back of the mortgagee bank. The mortgageee being a nationalized bank cannot be prevented from recovering its money due under a mortgage in order to save the sale transaction between principal borrower No.1 and the third party purchaser. If the third party purchaser is deceived by principal borrower No.1, she is entitled to sue the latter for damages. We are informed at the hearing, that the principal borrower No.1 himself filed a suit for cancellation of the registered sale deed in favour of the third party purchaser. Learned counsel for the third party purchaser has not disputed this position. Therefore, we give liberty to the third party purchaser to avail appropriate legal remedy against her vendor-principal borrower No.1.

Coming to principal borrower No.1, a careful perusal of the record shows that in support of the plea that it has issued notice under Section 13(2) of the Act, the bank has filed a copy of notice dated 16.01.2014. This fact is also pleaded by the bank in the counter affidavit. As noted above, it has also filed a copy of the acknowledgment containing purported signature of principal borrower No.1.

Learned counsel for principal borrower No.1 submitted that the signature on the acknowledgment does not tally with the admitted signature of his client on record. We are afraid, we cannot embark upon comparison of signatures. Though the counter affidavit was filed as far back as 08.12.2015, no reply affidavit has been filed disputing the authenticity of the copy of the acknowledgment filed by the bank. The bank being a public authority unless contrary is proved, all its actions are presumed to be legal. Therefore, on mere allegation made by principal borrower No.1 that the signature on the acknowledgment does not belong to his client, we are not prepared to doubt its authenticity and we also see no reason for the bank to fabricate an acknowledgment. In the face of the material discussed above, the plea of principal borrower No.1 that he has not received Section 13(2) notice is proved as false.

As regards the variation in description of the properties between the possession notice and tender form, no doubt, we found such variation with regard to 'B' schedule property because, while in the possession notice, the property was described as vacant site, in the tender notice, it was correctly described. The possession notice was only served on the owner of the property while the tender form was published in newspapers meant for intending purchasers. As the property was correctly described in the tender form, there is no scope for the intending purchasers to offer less than the actual price of the property. Therefore, we are unable to see any prejudice having been caused to principal borrower No.1. Hence, we do not find any merit in this submission.

With regard to the valuation, interestingly, principal borrower No.1, who claims that the value of 'B' schedule property is Rs.35,00,000/-, has sold the same for Rs.8,42,000/- under registered sale deed to the third party purchaser as late as 2013. As against this, the valuation obtained by the bank has shown a lumpsum amount of Rs.32,50,000/- as reserve price for 'A' and 'B' schedule properties with right of way. At any rate, if principal borrower No.1 has any objection, he should have submitted his objections on receipt of notice under Rule 8(6) of the Rules. The conduct of principal borrower No.1 shows that he has even refused to receive Rule 8(6) notice as evident from the postal endorsement referred to above. Indeed, this

Court has shown the original postal endorsement cover to the learned counsel for principal borrower No.1. He has fairly not denied the authenticity of this endorsement. Having failed to avail the opportunity of submitting his objections to the valuation of the property, it does not lie in the mouth of principal borrower No.1 to raise objections to the valuation in the present writ petitions.

As noted herein before, as this Court has permitted the bank to proceed with the sale, the sale was held and the auction purchaser has purchased the property for Rs.45,95,000/- as against the reserve price of Rs.32,50,000/-. The amount offered by the auction purchaser, in our opinion, represents the fair price as the same is in excess of the reserve price by more than Rs.13,00,000/-.

In the light of the above facts and circumstances of the case, we are of the opinion that all these three writ petitions are wholly vexatious in nature and meritless. Since the third party purchaser has deposited 50% of the bid amount, the bank is directed to refund the same to her immediately on her approaching it. Needless to observe that the bank is entitled to take further steps in pursuance of the sale made in favour of the auction purchaser.

For the above-mentioned reasons, W.P.No.27707 of 2015 and W.P.No.33994 of 2016 are dismissed without costs. W.P.No.33761 of 2015 is dismissed with costs of Rs.25,000/- (Rupees Twenty Five Thousand only) payable to the bank.

As a sequel to disposal of the Writ Petitions, miscellaneous petitions, pending if any, stand disposed of as infructuous.

(C.V.NAGARJUNA REDDY, J)

(G. SHYAM PRASAD, J)

Date: 26.09.2016
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