THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE DR. JUSTICE B.SIVA SANKARA RAO

WRIT PETITION NO.15370 OF 2015

O R D E R

(per Hon'ble Sri Justice Sanjay Kumar)

Challenge in this writ petition is to the action of the State Bank of Hyderabad (*hereinafter*, 'the bank') in proceeding to complete the process under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (*hereinafter*, 'the SARFAESI Act'), pursuant to the sale conducted by it on 25.06.2014, despite the pendency of S.A.No.140 of 2014 before the Debts Recovery Tribunal, Visakhapatnam. The petitioner rice mill also sought a consequential direction to the bank not to take any further action pending disposal of the said S.A.

By order dated 03.06.2015, this Court directed the bank not to create any third party interest or alter the nature of the rice mill property which was put to sale. Thereafter, by order dated 17.06.2015, this Court directed the bank not to take further steps under the SARFAESI Act pursuant to the sale held on 25.06.2014.

W.V.M.P.No.655 of 2016 was filed by the bank to vacate the interim order dated 17.06.2015.

Heard Sri V.Ravinder Rao, learned counsel for the petitioner rice mill, Sri Unnam Muralidhar Rao, learned counsel for the bank, and Sri Raja Sripathi Rao, learned counsel for the 3rd respondent/ auction purchaser.

Comprehensive arguments were advanced by the learned counsel covering the core issues arising in the writ petition. The case is therefore taken up for final disposal.

At the outset, it may be noted that the petitioner rice mill already approached the Tribunal at Visakhapatnam by way of S.A.No.140 of 2014, under Section 17 of the SARFAESI Act, aggrieved by the sale held on 25.06.2014. Normally, this Court would not entertain a writ petition during the pendency of such proceedings before the Tribunal. However, a significant fact that needs to be taken note of is that the Tribunal at Visakhapatnam has no regular Presiding Officer and owing to this, cases pending before it are not being taken up for hearing. It is because of this peculiar circumstance, rendering the remedy provided under the statute wholly ineffective, that this Court is inclined to entertain this case.

Relevant facts need elucidation. The bank classified the loan account of the petitioner rice mill as a non-performing asset and issued demand notice dated 07.06.2013, under Section 13(2) of the SARFAESI Act read with Rule 3 of the Security Interest (Enforcement) Rules, 2002 (*hereinafter*, 'the Rules of 2002'), calling upon the petitioner rice mill to clear the outstanding dues, aggregating to Rs.3,60,43,265/- as on 31.05.2013, within sixty days. Consequent to the failure of the petitioner rice mill to do so, the bank initiated proceedings under Section 13(4) of the SARFAESI Act read with Rule 8(1) of the Rules of 2002, by issuing possession notice dated 16.08.2013. The same was also published in local English and Telugu newspapers in due compliance with Rule 8(2) of the Rules of 2002. Thereafter, upon obtaining valuation of the secured assets from an approved panel valuer, the bank addressed sale notice dated 26.08.2013 to the petitioner under Rule 8(6) of the Rules of 2002, stipulating the required thirty days time. This sale notice was published in local English and Telugu newspapers on 07.09.2013, fixing the date of sale as 09.10.2013. On the said day, out of the secured assets put to sale, only four house plots situated at Gorantla and Namburu Villages, Guntur District, were sold. Aggrieved by the sale of these plots, the petitioner rice mill filed S.A.No.236 of 2013 before the Tribunal but the same was ultimately dismissed.

Thereafter, the bank published a sale notice on 18.12.2013 but the sale proposed thereunder did not fructify. The bank then published the sale notice dated 24.05.2014 in Eenadu Telugu and Indian Express English newspapers on 25.05.2014 proposing to put the secured rice mill property and residential property of the petitioner rice mill to sale on 25.06.2014.

Assailing the sale notice dated 24.05.2014 and seeking stay of all further proceedings pursuant thereto, the petitioner rice mill filed S.A.No.140 of 2014 before the Tribunal. This S.A. came up before the Tribunal on 25.06.2014 and notice was ordered to the bank. The matter was then taken up on 09.07.2014 and the Tribunal directed the bank not to go ahead with further process under the SARFAESI Act, subject to the condition that the petitioner rice mill deposits 10% of the amount mentioned in the sale notice dated 24.05.2014 by 11.07.2014 and another 10% on or before 22.07.2014. The bank was given liberty to proceed further in the matter in accordance with law in case of default. Again on 11.08.2014, the Tribunal directed the bank not to confirm the sale till the next date of hearing so as to give an opportunity to the petitioner rice mill to exercise its right of redemption. The matter was adjourned to 02.09.2014 and thereafter, from time to time, the last such date being 15.12.2014.

The material placed before this Court demonstrates that the sale certificate in favour of the 3rd respondent/auction purchaser, in relation to the rice mill property, was issued under Rule 9(6) of the Rules of 2002 on 30.09.2014. Registration of the sale certificate was effected on 03.03.2015. There appears to be no sale certificate issued in relation to the residential property though the bank stated before the Tribunal in its reply in S.A.No.140 of 2014 that the same was also sold for Rs.52,00,000/-.

Significantly, one of the main grounds raised by the petitioner rice mill, in S.A.No.140 of 2014 before the Tribunal, was that no sale notice had been served upon it as mandated by Rule 8(6) of the Rules of 2002 prior to publication of the sale notice dated 24.05.2014.

Sri V.Ravinder Rao, learned counsel, would state that the conditional interim order passed in S.A.No.140 of 2014 was complied with, albeit beyond the time stipulated. He would point out that in this writ petition also, the very same ground as to non-compliance with Rule 8(6) of the Rules of 2002 in relation to the sale notice dated 24.05.2014 has been raised but the bank has no answer.

Perusal of the counter-affidavit filed by the bank confirms this, as the bank does not claim that it issued a separate notice under Rule 8(6) of the Rules of 2002 after the first sale was conducted on 09.10.2013. The first sale was held pursuant to the sale notice dated 26.08.2013 issued under Rule 8(6) which was published in the newspapers on 07.09.2013 in compliance with Rule 9(1) of the Rules of 2002. The bank admitted that after issuance of the initial sale notice under Rule 8(6) on 26.08.2013 which resulted in the sale held on 09.10.2013, it only resorted to publication of the subsequent sale notices in newspapers under Rule 9(1) of the Rules of 2002. A sale notice was published on 18.12.2013, but did not materialize in a sale and then, the impugned sale notice was published on 25.05.2014.

The issue as to whether the aforestated procedure followed by the bank is in compliance with the statutory mandate of Rules 8 and 9 of the Rules of 2002 is no longer *res integra.*

In ***MATHEW VARGHESE V/s. M.AMRITHA KUMAR***[1], this very issue fell for consideration before the Supreme Court. That was a case where after issuance of the sale notice dated 14.08.2007 under Rule 8(6) of the Rules of 2002 and the newspaper publication on 23.08.2007 under Rule 9(1) of the Rules of 2002, the sale proposed to be held thereunder on 25.09.2007 did not materialize owing to the Debts Recovery Tribunal's order and stood postponed. After dismissal of the case by the Tribunal on 27.12.2007, the bank straightaway accepted the tender of the bidder on 28.12.2007 and confirmed the sale in his favour. The property was also transferred to him. Dealing with this fact situation, the Supreme Court observed that a secured creditor must ensure that the borrower is put on notice of the date and time by which the sale would be effected in order to provide him the required opportunity to take all possible steps for retrieving his property or at least ensure that in the process of sale, the secured asset derives the maximum benefit and the secured creditor, or any one on its behalf, is not allowed to exploit the situation. *Apropos* the statutory procedural prescriptions in Rules 8 and 9 of the Rules of 2002, the Supreme Court opined that the requirement under Rule 8(6) and Rule 9(1) contemplates a clear 30 days individual notice to the borrower and also a public notice by way of publication in the newspapers. In other words, *per* the Supreme Court, while the publication in a newspaper should provide 30 days clear notice, as Rule 9(1) also states that such notice of sale is to be in accordance with the proviso to sub-rule (6) of Rule 8, 30 days clear notice to the borrower should be ensured as stipulated under Rule 8(6) as well. It was therefore held that the use of the expression 'or' in Rule 9(1) should be read as 'and' as that alone

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[1] (2014) 5 SCC 610

would be in consonance with Section 13(8) of the SARFAESI Act. This, according to the Supreme Court, was intended to provide an opportunity to the borrower to redeem his property in terms of Section 13(8) of the SARFAESI Act.

In paragraph 53 of the judgment, the Supreme Court pointed out that in the event any sale, properly notified after giving 30 days clear notice to the borrower, does not take place as scheduled for reasons which cannot be solely attributed to the borrower, the secured creditor cannot effect the sale of the secured asset on any subsequent date by relying upon the notification issued earlier and once such sale does not take place pursuant to a notice issued under Rules 8 and 9, read along with Section 13(8), for which the entire blame cannot be thrown on the borrower, it is imperative that for effecting the sale, the procedure prescribed will have to be followed afresh as the notice issued earlier would lapse.

In effect, once the sale proposed to be held on a particular date does not materialize, for reasons not solely attributable to the borrower, the secured creditor would have to start afresh from the stage of issuing a sale notice under Rule 8(6) of the Rules of 2002. This aspect stands further crystallized by the observations in paragraph 55 of the judgment wherein, while referring to the facts of that case in terms of the sale having been held at a later date than that notified in the sale notice issued and published, the Supreme Court observed that there should have been a fresh notice issued in accordance with Rules 8(6) and 9(1) of the Rules of 2002. As in that case the bank had effected the sale on 28.12.2007 by accepting the tender of the bidder straight away and went about confirming the sale thereafter, the Supreme Court condemned the whole procedure followed by the bank and the ultimate confirmation of the sale was also held to be vitiated as it was not in conformity with the provisions of the SARFAESI Act and the Rules framed thereunder. This was the result, notwithstanding the fact that the bank had already confirmed the sale and had transferred the asset to the bidder.

It is relevant to note that the judgment in ***MATHEW VARGHESE***[1] was delivered on 10.02.2014. The bank, in the present case, resorted to publication of the sale notice on 25.05.2014, well after three months thereafter. The bank therefore ought to have been more mindful of the legal position enunciated by the Supreme Court even if it entertained any doubt as regards the statutory mandate of Rules 8(6) and 9(1). Admittedly, there was no separate notice issued by the bank under Rule 8(6) of the Rules of 2002 to the petitioner rice mill after the auction sale held on 09.10.2013 and before publication of the sale notice on 25.05.2014. This procedure was therefore in utter violation of the statutory mandate of Rules 8 and 9 of the Rules of 2002 as spelt out and affirmed in ***MATHEW VARGHESE***[1].

Sri Raja Sripathi Rao, learned counsel, would however contend that the petitioner rice mill must be deemed to have waived the statutory mandate of Rule 8(6) of the Rules of 2002, as it failed to challenge the dismissal of S.A.No.236 of 2013 filed by it in relation of the auction sale held on 09.10.2013.

This argument loses sight of the fact that the auction sale dated 09.10.2013 was not tainted by this procedural irregularity. The sale held on 09.10.2013 was preceded by the sale notice dated 26.08.2013 under Rule 8(6) of the Rules of 2002, followed by publication of the sale notice in newspapers on 07.09.2013 in compliance with Rule 9(1) of the Rules of 2002, and a clear 30 day period was maintained *vis-à-vis* both the notices. The issue of the petitioner rice mill waiving the statutory procedural mandate under

Rules 8 and 9 of the Rules of 2002 therefore did not arise at all in the context of the sale held on 09.10.2013.

It is no doubt true that in terms of the law laid down in ***VASU P.SHETTY V/s. HOTEL VANDANA PALACE***[2], waiver of the statutory mandate of Rules 8 and 9 is possible but no hard and fast rule was laid down in that regard. Each case would have to be examined on the individual facts thereof to identify whether the conduct of the borrower amounted to a waiver. However, in the present case, though Sri Raja Sripathi Rao, learned counsel, would contend that there is a waiver, it is noticed that the petitioner rice mill specifically raised the ground of violation of Rule 8(6) of the Rules of 2002 in S.A.No.140 of 2014 filed by it challenging the auction sale notice dated 24.05.2014. As the petitioner rice mill raised an objection in this regard at the very threshold, there is no discernible conduct on its part which can be construed to amount to a deemed waiver of the statutory mandate under the aforestated rules.

Sri Raja Sripathi Rao, learned counsel, would also place reliance on the observations of the Supreme Court in ***SADASHIV PRASAD SINGH V/s. HARENDAR SINGH***[3] to the effect that the rights of an auction purchaser in the property purchased by him cannot be extinguished except in cases where the said purchase can be assailed on the ground of fraud or collusion. It is however relevant to note that the aforestated case arose in the context of a sale effected during recovery proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. The said judgment has no application to the present case arising under the SARFAESI Act and in the light of the law laid down in ***MATHEW VARGHESE***[1].

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[2] (2014) 5 SCC 660
[3] (2015) 5 SCC 574

On the above analysis, we find that the sale conducted by the bank on 25.06.2014 stood vitiated as there was demonstrable non-compliance with the statutory mandate of Rules 8(6) and 9(1) of the Rules of 2002. There was no waiver of this mandate by the petitioner rice mill going by its conduct and, therefore, all steps taken by the bank, including delivery of possession, pursuant to the tainted sale held by it on 25.06.2014 must fail and are accordingly quashed. We therefore set aside the said sale and the consequent sale confirmation by the bank leading to issuance and registration of a sale certificate.

A copy of this order shall be marked to the Joint Sub-Registrar, Pedakakani, Guntur District, for effecting necessary cancellation and changes in his records in terms of Section 31(2) of the Specific Relief Act, 1963.

Consequently, the petitioner rice mill shall withdraw S.A.No.140 of 2014 pending before the Debts Recovery Tribunal, Visakhapatnam.

Before parting with the case, we must note that the 3rd respondent/auction purchaser is now put to loss owing to a lapse solely attributable to the bank. In his counter-affidavit, the 3rd respondent/auction purchaser stated that he had bought the rice mill property out of his hard earned money and that it was the only asset ever purchased by him. This Court cannot therefore be unmindful of the loss caused to the 3rd respondent/auction purchaser owing to what was, primarily, a mistake on the part of the bank in following the statutory mandate, notwithstanding the clear enunciation thereof by the Supreme Court in ***MATHEW VARGHESE***[1] long before it committed the same. In terms of the relief granted therein to the bidder who had also parted with his monies, we hold that the 3rd respondent/auction purchaser is entitled to refund of the amounts deposited by him with the bank along with interest thereon at 18% per annum from the date of each such deposit. The determined amount in this regard shall be refunded to him by the bank by way of a pay order/banker's cheque within two weeks from the date of receipt of a copy of this order.

The writ petition is therefore allowed. This order shall however not preclude the bank from initiating action afresh under the provisions of the SARFAESI Act and the Rules of 2002, if warranted, to recover its outstanding dues. Pending miscellaneous petitions, if any, shall stand closed. No order as to costs.

SANJAY KUMAR, J

DR. B.SIVA SANKARA RAO, J

12th JULY, 2016

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