**IN THE HIGH COURT OF JUDICATURE AT HYDERBAD FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADERSH**

**W.P.No.12879 of 2016**

Between:

1. Metta Chandra Sekhar Rao, and another

.....Petitioners

And:

1. The State Bank of India, Rep. by its Chairman, Head Office, Nariman Point, Mumbai, Maharashtra State, and others.

...... Respondents

**JUDGMENT PRONOUNCED ON :**

**HON'BLE SRI JUSTICE : V. RAMASUBRAMANIAN**
**AND**
**HON'BLE SMT. JUSTICE : ANIS**

1. Whether Reporters of local Newspapers may be allowed to see the Judgments? : Yes/No.

2. Whether the copies of judgment may be marked to Law Reporters/ Journals? : Yes/No

3. Whether their Ladyship/Lordship wish to see the fair copy of the judgment? : Yes/No

**HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN**
**AND**
**HON'BLE SMT JUSTICE ANIS**

**W.P.No.12879 of 2016**

**ORDER:** (per V. Ramasubramanian, J.)

The petitioners have come up with the above writ petition challenging the action of the Authorised Officer of the State Bank of India in seizing their property pursuant to the sale certificate dated 15.03.2016 and to set aside the same, with a consequential direction to the Authorised Officer not to dispossess the petitioners from the secured assets, till the disposal of an appeal filed by the 1st petitioner before the Debts Recovery Tribunal.

2. The 2nd petitioner herein is a Private Limited Company, of which the 1st petitioner is a Director. The 2nd petitioner borrowed a term loan of Rs.2.60 crores from the State Bank of India on 27.05.2011. A further sum of Rs.10,00,000/- was sanctioned on 29.08.2011. On the dates on which the loans were sanctioned, the 2nd petitioner as well as its Directors including the 1st petitioner herein are said to have signed letters of arrangement, letters of guarantee as well as Memorandum of Deposit of Title Deeds.

3. It appears that the account of the 2nd petitioner became a non-performing asset on 28.06.2012. Therefore a demand notice under Section 13(2) of the SARFAESI Act, 2002 was issued on 04.07.2012 and possession notice followed on 03.10.2012.

4. It appears that the physical possession of the house belonging to the 1st petitioner was taken on 24.04.2013. However, the parties agreed upon a One Time Settlement on 22.06.2013, by which the bank agreed to take a total amount of Rs.2.90 crores in full and final settlement.

5. Since payments were not made as per the One Time Settlement agreed upon, the bank issued an auction notice on 02.09.2013, proposing to hold the auction on 04.10.2013.

6. Immediately the petitioners filed a writ petition in W.P. No.28336 of 2013. This writ petition was disposed of on 03.10.2013, on certain conditions. However, the conditional order was not complied with. forcing the bank to issue a fresh auction notice on 01.11.2013.

7. Challenging the fresh auction notice, dated 01.11.2013, the petitioners filed an appeal in S.A.No.678 of 2013 before the Debts Recovery Tribunal under Section 17 of the SARFAESI Act. In this Appeal, a conditional order of stay was granted by the Tribunal. But this conditional order was not complied with.

8. Therefore, the properties were put to e-auction, by a notice dated 08.01.2014. Though the petitioners moved a fresh application for stay before the Debts Recovery Tribunal, the petitioners' application for stay was dismissed. Therefore the bank appears to have sold two out of five properties mortgaged to it, in the
e-auction.

9. Challenging the sale, a fresh writ petition in W.P.No.1481 of 2014 was filed, in which a stay of confirmation of sale was sought. In the meantime, the bank initiated proceedings under Section 14. The same was challenged in W.P.No.14018 of 2014. It appears that both the writ petitions were dismissed.

10. Thereafter, a fresh proposal for a One Time Settlement was mooted on 31.03.2015. A sum of Rs.10,00,000/- pursuant to the same was also paid but the proposal did not go through, forcing the bank to resort to a fresh e-auction for two more properties on 18.12.2015.

11. Immediately after the issue of the e-auction notice proposing to hold the auction on 18.12.2015, the petitioners filed a fresh writ petition in W.P.No.39776 of 2015. On 08.12.2015, this

Court granted a conditional order of stay in the said writ petition, directing the petitioners to deposit Rs.50,00,000/- on or before 17.12.2015. The said order reads as follows:

> "Notice before admission.
> There shall be interim stay of auction on condition of petitioners depositing Rs.50,00,000/- (Rupees fifty lakhs ) on or before 17.12.2015. It is made clear that if the petitioners fail to deposit the aforesaid amount within the stipulated time, it is open to the respondent – Bank to proceed with the auction scheduled to be held on 18.12.2015. Further, it is open to the petitioners to make a representation to the respondent – Bank for settling the account."

12. However, the petitioners moved an application for modification of the said condition. The said petition W.P. M.P. No.52906 of 2015 came up for hearing on 17.12.2015, which was one day prior to the date fixed for e-auction, viz., 18.12.2015. Taking a lenient view, this Court passed an order on 17.12.2015, modifying its earlier order dated 08.12.2015. This order dated 17.12.2015 reads as follows:

> "This petition is filed seeking to modify the order, dated 08.12.2015.
>
> Having regard to the reasons stated in the affidavit filed in support of the petition and as it is represented that the petitioners are prepared to pay Rs.10,00,000/- today, we permit the petitioners to pay Rs.50,00,000/-, as ordered by this Court in the order, dated 08.12.2015, in the following manner.
>
> The petitioners shall pay Rs.10,00,000/- today i.e., 17.12.2015, Rs.15,00,000/- by the end of December, 2015, and the balance amount of Rs.25,00,000/- by 15.01.2016. It is made clear that the stay granted by this Court is confined to the house property covered by property No.14 in the notification. It is also made clear that with regard to the factory property, the respondent may proceed with the auction.
>
> Accordingly, the order, dated 08.12.2015, is modified."

13. It appears that the petitioners paid Rs.5,70,000/- on 17.12.2015 and Rs.4,30,000/- on 18.12.2015. Therefore,

technically it can be said that though the modified order dated 17.12.2015 was complied with, in spirit, it was not done within the time stipulated. But the petitioners have a different story to say. In any case, the amount of Rs.10,00,000/- directed to be paid by this Court by its modified order dated 17.12.2015 was actually paid, partly on 17.12.2015 and partly on the forenoon of 18.12.2015.

14. It appears that on the ground that the petitioners failed to comply with the modified interim order dated 17.12.2015 in letter and spirit, the bank proceeded with the auction on 18.12.2015. In the said auction, the 3rd respondent herein appears to have become the successful bidder of the house property belonging to the first petitioner herein.

15. Therefore, when the writ petition W.P.No.39776 of 2015 came up for hearing on 22.12.2015, this Court took note of the compliance or part compliance of the modified conditional order and the conduct of the auction on 18.12.2015. Thereafter, this Court passed an order directing the bank not to issue the sale certificate to the third party auction purchaser, until further orders.

16. Thereafter, the writ petition again came up for hearing on 29.02.2016 when this Court directed the petitioners to deposit a further amount of Rs.25,00,000/- on or before 08.03.2016. Since the same was not done, this Court passed an order dated 09.03.2016, permitting the bank to act in accordance with law. Therefore, the bank appears to have issued a sale certificate dated 15.03.2016 to the 3rd respondent herein, in respect of the house property belonging to the 1st petitioner herein. It is claimed by the bank that the sale certificate was also registered on 18.03.2016 and possession was handed over to the 3rd respondent on the same day.

17. It is only thereafter that the petitioners herein came up with the present writ petition W.P.No.12879 of 2016. The prayer with which the petitioners came up with this writ petition originally, was only to declare the seizure of the house property pursuant to the sale certificate dated 15.03.2016 as illegal and null and void. But subsequently, the prayer was amended so as to include the words “set aside the same”.

18. In the light of the prayer originally made in the present writ petition and in the light of the limited amendment secured by the petitioners to the prayer, a preliminary objection was raised by Mr. Ambatipudi Satyanarana, learned counsel for the bank that the sale certificate is not under challenge and that only the seizure of the property (possession) is under challenge.

19. But we reject the said preliminary objection as being hyper technical. The words “set aside the same” have a direct correlation to the sale certificate dated 15.03.2016. Therefore, it is not correct to say that the sale certificate is not under challenge.

20. The main contentions of the petitioners, as projected by the 1st petitioner appearing in person, are two-fold. The first is that the memorandum of deposit of title deeds on the basis of which the bank initiated action under the SARFAESI Act, 2002, did not merely record any past transaction, but contained several recitals which made the memorandum incapable of being acted upon, on account of not being duly stamped and not being registered. The second contention is that the sale held on 18.12.2015 was completely contrary to law and in violation of the interim orders passed by this Court.

**CONTENTION - 1**

21. Contention-1 revolves around the question as to whether the bank was entitled to act on the basis of the Memorandum of

Deposit of Title Deeds, creating a mortgage, in the absence of adequate stamping as well as registration.

22. The learned counsel appearing for the bank has filed a paper book containing the material papers. The same contains a document titled as "Memorandum for Recording Creation of Mortgage by Deposit of Title Deeds". Column No.7 of the said document indicates the date of deposit of title deeds as 27.05.2011. Column No.10 contains a full description of the mortgaged properties. Column No.11 contains the details of title deeds deposited.

23. Though the said memorandum is signed on the very same day, viz., 27.05.2011, it contains only the rubber stamp and the signature of the Manager of the Branch, who granted the facility to the petitioners. Though the date of deposit of title deeds as well as the date of preparation of this memorandum are one and the same, there is no bar in law, for a post facto recording of the creation of mortgage by deposit of title deeds, on the same day, provided it was done after the event had taken place.

24. However, the bank has also filed in their paper book, another document titled as "**Letter of Confirmation for Creation of Mortgage by Deposit of Title Deeds**". This letter is in a printed format, filled up, signed and delivered by the mortgagor to the bank. This letter, which is dated 28.05.2011 (the day after the grant of loan and the deposit of title deeds) indicates the name of the borrower, the nature and extent of facilities granted, the date of deposit of title deeds, place of deposit of title deeds, the list of title deeds and the description of the mortgaged properties. This letter requires to be extracted, in full, as the first contention of the petitioners turn on this letter. Therefore, it is extracted as follows:

"From
Surabhi Mohan Rao,

( Name/s & Addresses of the Mortgagor/s)

To
The Branch Manager,
State Bank of India,
Edi Bazaar Branch,
(Address)

Dear Sir,

**LETTER OF CONFIRMATION FOR CREATION OF MORTGAGE BY DEPOSIT OF TITLE DEEDS.**

| | |
|---|---|
| Name/s of the Borrower Address/s (Father's /Husband's name to be mentioned) | Standard Milk Products India Pvt. Ltd. |
| Facilities & Limits and the total amount secured by the Mortgage | Cash Credit Rs.150.00 lacs<br>TL I Rs. 70.00 lacs<br>II Rs. 10.00 lacs<br>III Rs. 15.00 lacs<br>New TL Rs. 15.00 lacs<br>Rs.260.00 lacs<br>----------------------- |
| Date of deposit of title-deeds | 27-05-2011 |
| Place of Deposit of title deeds | SBI, Edi Bazaar Branch |

1. We are writing this to confirm that we had already deposited with the Bank on the aforesaid date the title-deeds relating to our property described hereunder with intent to create equitable mortgage as security for the mortgaged debt together with interest, costs, charges and expenses thereon due and payable to the Bank.

2. We confirm that the said security shall also be for all other liabilities and indebtedness past, present and future to the bank and shall subsist and continue notwithstanding the granting of totally new limits and facilities and / or account/s coming into credit and / or inter-changeability of limits and / or cancellation of limits, etc.

3. We confirm that we have good and marketable title and that save the charge/s created in favour of the Bank, the mortgaged properties are free from all encumbrances. The mortgaged properties are in our physical possession (a portion of the property is under tenancy occupation on monthly rent).

4. We have not entered into any agreement for transfer or alienation in respect of the mortgaged properties of whatsoever nature. **We waive the application of Sections 61, 65A and 67A of the Transfer of Property Act, 1882**.

5. We confirm that no proceedings for recovery of any statutory dues, taxes, etc., was initiated in the past nor any proceeding or levy or tax is pending against us under the Income Tax Act, 1961 or the Sales Tax Laws, and that no

notice has been issued / or served on us under Rules 2, 16 or 51 or any other Rules of the Second Schedule to the Income Tax Act, 1961, or under any other law for the time being in force.

(List of the Title Deeds)

Registered Gift Settlement Deed 5421/2007 dated 6.09.2007 (2) RSD 1204/1996 dated 4.10.1995 at SRO, Nagar Kurnool.

(3) Registered Gift Settlement Deed 5783/2007 dated 24.9.2007 (4) RRO 6550/2007 dated 01.12.2007 (5) RSD 1203/96 dated 04.10.1995.

(Description of the mortgaged properties)

(Note: In addition to Land & Buildings, if fixed Plant & Machinery is also given, then, full description of the said plant & Machinery, including identification marks should be recorded)

Industrial land and structures thereon in Plot No.15 and 18 Sy.No.327 admeasuring (968 + 179488) Sq. yds., situated at BA Palem, Bijnepalli Village, Mahabubnagar District, A.P.

Yours faithfully,

Signature of the Mortgagor/s

Strike out if not applicable.

25. Obviously, the above Letter of Confirmation dated 28.05.2011, is one of the basic documents which actually confer power upon the bank to invoke the provisions of the SARFAESI Act, 2002. Therefore, a careful look at the conditions incorporated in the said Letter, is necessary for the purpose of appreciating the first contention of the petitioners.

26. While Clause-1 of the said letter merely confirms a past event, Clauses-2, 3 and 5 contain certain covenants expressly agreed to by and between the parties. But these clauses are also in the nature of confirmation and hence we shall take them as referring only to a past transaction.

27. The second part of Clause-4 of the aforesaid Letter of Confirmation contains a specific covenant to the effect that the

petitioners waived the application of Sections 61, 65A and 67A of the Transfer of Property Act, 1882. It is interesting to note that all other Clauses in the Letter of Confirmation merely contain a confirmation of something that had happened earlier. **But the second part of Clause-4 contains a waiver agreed to by the mortgagor *in presenti.***

28. Keeping the above in mind, let us now have a look at the statutory prescriptions.

29. Chapter IV of the Transfer of Property Act, 1882 deals with mortgages of immovable properties. Clause (f) of Section 58 of the Transfer of Property Act, 1882 specifically recognises a mortgage by deposit of title deeds.

30. Section 61 confers a right upon the mortgagor to redeem the mortgaged properties separately, if two or more mortgages had been created in favour of the same mortgagee and there was no contract between the parties to the contrary. Similarly, Section 65A recognises the mortgagor's power to lease the mortgaged property, subject to the prescription contained in sub-section (2). Section 67A obliges the mortgagee, who holds two or more mortgages executed by the same mortgagor, to sue on all mortgages together, in the absence of a contract to the contrary. In other words, the mutual rights and obligations of the mortgagor and the mortgagee, recognised by sections 61, 65-A and 67-A are made subject to any contract to the contrary.

31. Therefore, it is clear that by the Letter of Confirmation, dated 28.05.2011, which we have extracted in entirety, the writ petitioners have given up their valuable rights under three independent provisions of the Transfer of Property Act, 1882.

32. In **Veeramachineni Gangadhara Rao v. The Andhra Bank Ltd., and ors**.[1], the Supreme Court traced the history of

the law relating to the nature of a memorandum filed along with the deposit of title deeds, both in this country and in England. After referring to two decisions of the Judicial Committee of the Privy Council, one in **Pranjivandas Mehta v. Chan Ma Phee**[2], and the other in **Subramonian v. Lutchman**[3], and after referring to its earlier decision in **Rachpal Maharaj v. Bhagwandas Daruka**[4], the Supreme Court pointed out in ***Veeramachineni,*** that if the parties intended to reduce their bargain regarding the deposit of title deeds to the form of a document, the same requires registration and that if the parties did not intend to reduce their bargain into writing, there is no requirement of registration. The fundamental premise as pointed out by the Supreme Court in **Veeramachineni** is that a contract to create the mortgage arises by implication of the law from the very deposit of title deeds itself, with the requisite intention. In such a case, the document merely evidences the creation and the intention and nothing more.

33. In cases where a deposit and the document evidencing the deposit, both form integral parts of the transaction and happen to be essential ingredients in the creation of the mortgage, then the document becomes the sole evidence of the terms, making it compulsorily registerable.

34. The rationale for the above proposition was explained by Couch, CJ, in **Kedarnath Dutt v. Shamllal Khettry**[5], which was also extracted by the Supreme Court in **United Bank of India Ltc., v. M/s. Lekharam Sonaram and Co.**[6] in the following words.

> "The rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository and

> the appropriate evidence of their agreement. If this memorandum was of such a nature that it could be treated as the contract for the mortgage and what the parties considered to be the only repository and appropriate evidence of their agreement, it would be the instrument by which the equitable mortgage was created, and would come within Section 17 of the Registration Act."

35. In **State of Haryana v. Narvir Singh**[7], the Supreme Court pointed out that the essence of a mortgage by deposit of title deeds is the handing over, by the borrower to the creditor, of the title deeds of immovable property, with the intention that those documents shall constitute security, enabling the creditor to recover the money lent. So long as the memorandum written down by the parties merely refers to such a transaction of deposit of title deeds with the intent to create security, the document would not be treated as a mortgage deed, under Section 2(17) of the Indian Stamp Act, 1899, attracting Article 35 under Schedule I-A thereto. But ***if a memorandum reduces into writing, the other terms and conditions of such a mortgage, the same would require registration under Section 17(1) (c) of the Registration Act***. The relevant portion of the judgment of the Supreme Court in **State of Haryana v. Narvir Singh**, reads as follows:

> "The essence of a mortgage by deposit of title deeds is the handing over, by a borrower to the creditor, the title deeds of immovable property with the intention that those documents shall constitute security, enabling the creditor to recover the money lent. After the deposit of the title deeds the creditor and borrower may record the transaction in a memorandum but such a memorandum would not be an instrument of mortgage. A memorandum reducing other terms and conditions with regard to the deposit in the form of a document, however, shall require registration under Section 17(1) (c) of the Registration Act, but in a case in which such a document does not incorporate any term and condition, it is merely evidential and does not require registration."

36. In paragraph-14.2 of the judgment in **State of Haryana v. Narvir Singh**, the Supreme Court crystallized the principle as follows:

> "But the question is whether a mortgage by deposit of title deeds is required to be done by an instrument at all. In our opinion, it may be effected in a specified town by the debtor delivering to his creditor documents of title to immovable property with the intent to create a security thereon. No instrument is required to be drawn for this purpose. However, the parties may choose to have a memorandum prepared only showing deposit of the title deeds. In such a case also registration is not required. But in a case in which the memorandum recorded in writing creates rights, liabilities or extinguishes those, the same requires registration."

37. keeping the above principles in mind, if we have a look at the Letter of Confirmation dated 28.05.2011 that we have extracted above, it is clear that the Letter of Confirmation did not stop merely with (1) the recording of the act of handing over of title deeds and (2) the recording of the intent on the part of the borrower to create security. Unfortunately, the Letter of Confirmation dated 28.05.2011 also records other terms and conditions such as the waiver of three valuable rights conferred under Sections 61, 65A and 67A of the Transfer of Property Act, 1882. What is worse is the fact that the second part of Clause-4 of the Letter of Confirmation dated 28.05.2011 does not even seek to record a past act of waiver on the part of the borrowers. It incorporates a covenant *in praesenti* by using the expression "we waive".

38. Therefore, the first contention of the first petitioner appearing in person, raised on the basis of the prohibition contained in Section 35 of the Indian Stamp Act, 1899 and Section 49 read with section 17(1) (c) of the Registration Act, 1908, cannot be rejected very easily.

39. However, Mr. Ambatipudi Satyanarayana, learned counsel for the bank, contended that (i) the creation of the mortgage, (ii) the deposit of title deeds and (iii) the intention with which the title deeds were deposited, were all never disputed by the petitioners in the previous rounds of litigation. Even in the present writ petition, no specific pleading is made to this effect by the petitioners. On the basis of the very same documents including the Letter of Confirmation for recording the deposit of title deeds, the bank had already sold two out of five mortgaged properties and that therefore at this stage it is not open to the petitioners to question the very validity of the mortgage.

40. But the above contention loses sight of one important fact. The question as to whether the Authorised Officer of a bank could invoke the power conferred upon him under the SARFAESI Act, 2002 on the basis of a document, which is not duly stamped and registered, is a pure and simple question of law. As a matter of fact, the writ petitioners have not filed the copies of the memorandum of deposit of title deeds or the letter of confirmation. These two documents are filed only by the bank in the paper book filed before us. Therefore, on the basis of documents filed by the bank itself, if we could come to the conclusion that there was a bar under
Section 35 of the Stamp Act, 1899 and Section 49 of the Registration Act, 1908, the question of holding the petitioners as having been estopped from raising a legal issue, does not arise. It is needless to point out that there can be no estoppel against a statute.

41. More over, two out of five mortgaged properties appear to have been sold in January, 2014 itself and the challenge of the petitioners to the e-auction notice dated 8.01.2014 failed with the

dismissal of two writ petitions W.P.Nos.1481 and 14018 of 2014. After the dismissal of those two writ petitions, the sale through e-auction of two out of five properties under the e-auction notice dated 8.01.2014 has attained finality. Therefore, the petitioners have actually lost the right of redemption of those two properties sold under the e-auction notice dated 08.01.2014. The loss of the right of redemption and the right to question the sale of two out of five properties in the auction held in January, 2014, has also become final in view of one more subsequent development, viz., the agreement reached by the petitioners on 31.03.2014 to have a One Time Settlement with the bank for the balance amount. Therefore, the bank need not worry about the sale of two out of five mortgaged properties already concluded in January, 2014, as the petitioners have now lost the right to challenge the same.

42. But when a challenge is made to the sale or attempted sale of the remaining three properties, in W.P.No.39776 of 2015 and in the present writ petition W.P.No.12879 of 2016, on the ground that the Letter of Confirmation of Creation of Mortgage, which is not duly stamped and not registered, could not have been acted upon, the Court cannot shut its eyes by putting the plea of estoppel against the petitioners.

43. Unfortunately for the bank, the bar under Section 35 of the Indian Stamp Act, 1899 as well as the bar under Section 49 of the Registration Act, 1908, do not merely stop with the admissibility in evidence of the documents. ***Section 35 of the Stamp Act contains two restrictions. The first is that an instrument chargeable with duty, but which is not duly stamped, cannot be admitted in evidence for any purposes by any person having by law or consent of parties, the authority to receive evidence. The second part is that such an***

***instrument cannot also be acted upon, registered or authenticated by any such person or by any public officer***. It is this second restriction contained in Section 35 of the Indian Stamp Act, 1899, which will bar the Authorised Officer from acting upon the Letter of Confirmation in question.

44. ***Similarly Section 49 of the Registration Act, 1908 contains three types of restrictions. The first is that a document required to be registered by Section 17, but not registered, shall not affect any immoveable property relating to which the document was executed. The second is that such a document shall not confer any power to adopt. The third restriction is that it shall not be received as evidence of any transaction affecting such property or conferring such power.*** Therefore, even an Authorised Officer under the SARFAESI Act, 2002, who does not act like a Civil Court or a quasi judicial authority empowered to receive documents in evidence, is barred by Section 35 of the Indian Stamp Act and Section 49 of the Registration Act.

45. Therefore, in fine the first contention of the petitioners is to be upheld, but with a rider that the same cannot be take advantage of by the petitioners to upset the sale of two out of five properties already made in January, 2014 and the challenge to which has already been dismissed in W.P.Nos.1481 and 14018 of 2014.

**CONTENTION – 2**

46. The second contention of the petitioners is that the sale that took place on 18.12.2015 is completely vitiated and in violation of the orders passed by this Court. This contention is based upon two interim orders passed by this Court, on 8.12.2015 and 17.12.2015 in W.P.No.39776 of 2015 and the events that

happened thereafter.

47. As we have pointed out earlier, the One Time Settlement proposal entered into on 31.03.2015 failed. Therefore, the bank proposed to put the properties to e-auction on 18.12.2015. At this stage the petitioners moved W.P.No.39776 of 2015. The prayer in this writ petition was to direct the bank to grant one year time to repay the outstanding loan amount as per the Master Circular dated September, 2012 issued by the Reserve Bank of India.

48. On 8.12.2015 this Court granted an interim stay of the auction proposed to be held on 18.12.2015, subject to the condition that the petitioners deposited Rs.50,00,000/- on or before 17.12.2015. This interim order dated 8.12.2015 contained a default clause, to the effect that if the petitioners failed to deposit the amount on or before 17.12.2015, it is open to the bank to proceed with the auction.

49. The aforesaid order dated 8.12.2015, which we have extracted in para-11 above, was modified later in a miscellaneous petition taken out by the petitioners in W.P.M.P.No.52906 of 2015. The modified order passed on 17.12.2015 has been extracted by us in para-12.

50. It will be interesting to note that the modified order dated 17.12.2015 did not contain a default clause. The omission to incorporate a default clause was not accidental but after an application of mind. This can be seen from a comparative reading of the original order dated 08.12.2015 and the modified order dated 17.12.2015.

51. The original order dated 08.12.2015 granted a conditional stay of auction of two properties proposed to be held on 18.12.2015 subject to the payment of Rs.50,00,000/- on or before 17.12.2015. By their petition for modification the petitioners

expressed inability to pay Rs.50,00,000/- and offered to pay only Rs.10,00,000/-. Accepting it, this Court passed the modified order dated 17.12.2015 confining the interim stay only to the house property belonging to the 1st petitioner. The auction relating to the second property was allowed to be proceeded with on 18.12.2015.

52. In other words, by the modified order dated 17.12.2015, this Court permitted the auction to go on 18.12.2015, in respect of the second property, but continued the stay in respect of the house property. As a consequence, the default clause originally incorporated in the first order dated 8.12.2015 was not incorporated in the modified order dated 17.12.2015.

53. Therefore, the petitioners are right in contending that in the absence of a default clause, the respondents could not have sold the house property of the 1st petitioner on 18.12.2015. The law is well settled that unless a default clause is incorporated, in a conditional order, all the consequences of non-compliance of the conditional order would not automatically follow.

54. But unfortunately, the petitioners failed to raise this issue on the earlier occasions, resulting in this Court passing three more interim orders, one on 22.12.2015 directing the bank not to issue a sale certificate, the second on 29.02.2016 directing the petitioners to pay a sum of Rs.25,00,000/- on or before 8.03.3016 and the third on 09.03.2016 permitting the bank to act in accordance with law. Therefore, the second contention of the petitioners, though validly taken, cannot now be allowed to be raised by the petitioners.

55. in any event, the writ petition W.P.No.39776 of 2015, in which the aforesaid interim orders were passed, itself came to be dismissed as withdrawn, reserving liberty to the petitioners to urge all the contentions before the Debts Recovery Tribunal. Therefore,

the second contention raised by the petitioners, cannot now be allowed to be raised by them.

56. As a matter of fact, Mr. Ambatipudi Satyanarayana, learned counsel for the bank raised an objection that the present writ petition cannot at all be entertained in view of the withdrawal of the previous writ petition W.P.No.39776 of 2015, with a liberty to raise all the objections before the Debts Recovery Tribunal.

57. But we do not think that the above objection can be sustained. As we have stated elsewhere the prayer in W.P.No.39776 of 2015 was only for a Mandamus to direct the bank to grant four months time to the petitioners to clear the outstanding amount under the One Time Settlement scheme, agreed as per the proceedings dated 31.03.2015. Therefore, the withdrawal of the said writ petition on 30.03.2016, with liberty to raise all the contentions raised in that writ petition, cannot stand in the way of the petitioners raising objections to the sale certificate issued on 15.03.2016 and registered on 18.03.2016. The cause of action for the present writ petition was subsequent to the cause of action for the writ petition that was dismissed as withdrawn. Therefore we do not agree with the contention of the learned counsel for the bank that the withdrawal of the previous writ petition W.P.No.39776 of 2015 was a bar to the maintainability of the present writ petition.

58. In fine, we are of the considered view that the writ petition deserves to be allowed on the basis of our finding on the first contention raised by the petitioners. Accordingly, the writ petition is allowed, declaring the action of the authorised officer in taking possession of the house property of the 1st petitioner and issuing the sale certificate dated 15.03.2016. As a consequence, the sale certificate dated 15.03.2016 issued in favour of the 3rd

respondent and registered on 18.03.2016, is set aside and the bank is directed to put the petitioners back in possession of the property, after retuning the money paid by the 3rd respondent. However, as we have made it clear in paragraph 45 above, the sale of two mortgaged properties that had taken place in January, 2014 shall not stand disturbed, in view of the fact that the challenge to the sale was already rejected in two earlier writ petitions and the rejection orders have also attained finality. There shall be no order as to costs.

59. As a sequel, pending miscellaneous petitions, if any, shall stand closed.

**V. RAMASUBRAMANIAN, J**

**ANIS, J**

Date:24-08-2016
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[1] (1971) 1 SCC 874

[2] LR 43 IA 123

[3] AIR 1923 PC 50

[4] AIR 1950 SC 272

[5] 11 Beng LR (OC) 405,

[6] AIR 1965 SC 1591

[7] (2014) 1 SCC 105