**HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN**
**AND**
**HON'BLE SRI JUSTICE G. SHYAM PRASAD**

**Writ Petition No.35841 of 2016**

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

The petitioner has come up with the above writ petition challenging an order of the Debts Recovery Tribunal, dismissing his appeal under Section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. (SARFAESI Act).

2. Heard Mr. Vedula Venkataramana, learned senior counsel appearing for the petitioner, Sri B.S. Prasad, learned counsel appearing for the 1st respondent-Bank and Sri S. Niranjan Reddy, learned senior counsel appearing for the auction purchaser, who has filed an application to implead himself as party to the writ petition.

3. The 2nd respondent in the writ petition availed credit facility from the 1st respondent-Bank by creating a security interest over the property measuring Ac.3.09 guntas in Survey No.142 and 142/1 of B.B. Gudem village, Chibemala Mandal, Nalgonda District. When they committed default in repayment of the loan, proceedings for recovery were initiated and a notification for the auction of the property was published on 26-06-2016. The sale notice indicated that the loan outstanding from the 2nd respondent was Rs.1,52,88,675/- as on 25-06-2016.

4. Upon seeing the auction notice, the writ petitioner herein went before the Debts Recovery Tribunal and filed an application in S.A.No.306 of 2016 under Section 17 of the SARFAESI Act

contending, *inter alia*, that he was holding an agreement dated 11-03-2011 for the purchase of the aforesaid property from the 2nd respondent and that he was prepared to liquidate the entire loan amount of the 2nd respondent. Since the petitioner contended in his application that he was prepared to discharge the entire loan amount of the 2nd respondent, the Tribunal passed an interim order on 27.07.2016 to the following effect:

> "Ld. Advocate Mr. Abhay Singh appears for the Applicant.
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> Ld. Advocate Mr. P.K. Mukherjee appears for the Respondent Bank.
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> Ld. Advocate for the applicant submitted various arguable issues however submitted that they have interest on the property and the Applicant wants to redeem the loan and got the possession of the property. Since the Applicant is having interest in the property they may redeem the loan by paying the entire amount. In the above circumstances, the applicant is directed to pay 25% before 29/7/2016 and the balance amount within ten days thereafter. Upon receipt of the 25% of the amount, the Respondent Bank shall not proceed with the sale and communicate to the Applicant the balance amount as on the date of sale within three days and the Applicant is directed to pay the said amount within ten days thereafter. On receipt of the entire

amount, the Respondent Bank shall hand over the title document to the Applicant.

List the matter for hearing on 6/10/2016."

It appears that on 28-07-2016, the petitioner filed a memo before the Tribunal contending that he attempted to tender a Demand Draft for Rs.40,00,000/- representing 25% of the dues at the Bank and that it was turned down. The petitioner also filed the Demand Draft for the said amount of Rs.40,00,000/- along with the memo filed before the Tribunal.

5. It appears that the aforesaid memo was also followed by an e-mail dated 29-07-2016 sent by the petitioner to the Bank, informing the bank that the first part of the conditional order passed on 27-07-2016 had been complied with. In response to the said e-mail, the Bank wrote a reply dated 30-07-2016. The relevant portion of the reply dated 30-07-2016 sent by the Bank to the petitioner reads as follows:

"…….In view of the so called deposit of the amount with the DRT, Hyderabad on 29.07.2016, we have to advise, without prejudice to our contention in this regard, that the balance amount payable with interest for closing the loan account of M/s. Shabarinath Dall Mill calculated up to 7th August, 2016 is Rs.1,18,14,513/- (excluding the amount deposited with the DRT). We have no objection to receive the said amount and for issuing 'No Dues Certificate' towards the loan account of M/s. Shabarinath Dall Mill. However, please note that the same property is also extended as security for the advance sanctioned to M/s. Vasavi Agro Oil Products Pvt. Ltd., against which a Demand Notice and Possession Notice were already issued under SARFAESI Act for recovery of our dues. As on date an amount of Rs.8,25,92,599/- plus charges/ expenses is due from M/s. Vasavi Agro Oil Products Pvt. Ltd.

As the property is encumbered for the advance sanctioned to M/s. Vasavi Agro Oil Products Pvt. Ltd., the property cannot be released until and unless the total dues on account of M/s. Vasavi Agro Oil Products Pvt. Ltd., are also paid to the Bank."

6. It appears that the reply of the Bank dated 30-07-2016 was not served on the writ petitioner. Therefore, the bank sent a letter dated 10-08-2016 to the learned counsel for the petitioner contending that the letter dated 30-07-2016 sent to the petitioner returned with the postal endorsement "insufficient address". In the mean time, the petitioner had paid the balance amount of Rs.1,15,50,000/- by way of Demand Draft dated 06-08-2016 deposited with the Bank on 08-08-2016, admittedly within the time limit prescribed by the Tribunal. However, in view of the stand taken by the bank in their letter dated 30-07-2016, which we have extracted above, the bank reiterated in their letter dated 10-08-2016 to the learned counsel for the writ petitioner that the dues of the other company should also be discharged.

7. But the petitioner did not discharge the dues of Vasavi Agro Oil Products Pvt. Ltd., since the petitioner claimed to hold an agreement only in respect of the property belonging to the 2nd respondent-borrower. As a consequence, the bank did not release the title deeds.

8. Eventually, the appeal filed by the petitioner came up for hearing before the Debts Recovery Tribunal on 05-10-2016. After hearing the parties, the Tribunal dismissed the main appeal in S.A.No.306 of 2016, holding that an agreement of sale is only an executory contract and that a person, who also participated in the auction, cannot maintain the application. Aggrieved by the said order, the petitioner is before this Court.

9. Before proceeding further, it must be noted that the bank proceeded with the auction on 29-07-2016. The impleading applicant herein participated in the auction and became the successful bidder by offering a total amount of Rs.3,74,00,000/- as against the upset price of Rs.2,20,00,000/-. But in view of the order of the Tribunal dated 27-07-2016, the Bank did not confirm the sale. But after S.A.No.306 of 2016 was dismissed on 05-10-2015, the Bank issued a sale confirmation on 19-10-2016. Immediately, the impleading petitioner paid the balance of sale consideration on 24-10-2016 and obtained a certificate of sale also.

10. The above dates assume significance in view of the fact that the above writ petition challenging the order of the Tribunal dated 05-10-2016 was actually presented on 21-10-2016 before this Court and it came up for orders as to admission only on 27-10-2016.

By this time, the auction purchaser has paid the balance of sale consideration and also obtained a sale certificate. Keeping the above developments in mind, let us now take up for consideration the rival contentions.

11. The main contentions of Mr. Vedula Venkataramana, learned senior counsel for the writ petitioner are three fold:

(1) When admittedly the writ petitioner had complied with the first condition imposed under the order dated 27-07-2016, the Bank ought not to have proceeded with the sale on 29-07-2016. Since the Bank proceeded with the sale on 29-07-2016 in utter violation of the order of stay granted by the Tribunal, the sale is not valid and liable to be set aside;

(2) So long as the mortgagor has a right of redemption, it is available up to the date of registration of sale, as pointed out by the Supreme Court in **Mathew Varghese v. M. Amritha Kumar and others**[1] and hence the Bank cannot defeat such a valuable right to property, which is a human right and a constitutional right; and

(3) The very auction sale notice dated 26-06-2016 indicated the property in question as the property over which the security interest was created by the 2nd respondent. Therefore, the theory of extended mortgage cannot be applied to the dues of another company, when the primary security of that company was also included as one of the items for sale.

12. In response to the above contentions, it is submitted by Mr. B.S. Prasad, learned counsel for the bank that at the outset an

[1] (2014) 5 SCC 610

agreement holder has no right to go before the Tribunal; that the very agreement of sale relied upon by him is obviously a fabricated document; and that in any case the writ petitioner suppressed the material facts, of having participated in an auction conducted earlier and offering an amount of Rs.2,70,00,000/- and not even disclosing the same in his application S.A.No.306 of 2016.

13. We have heard the learned counsel for the petitioner.

14. The first preliminary objection of the learned counsel appearing for the bank is fairly well taken. An appeal under section 17 of the Securitization Act cannot be filed by a person who holds an agreement for the purchase of the property mortgaged to the bank. But in the facts and circumstances of the case, the bank is not entitled to take such an objection anymore. In the appeal S.A.No. 306/2016 filed by the petitioner before the DRT, the tribunal passed an interim order in the presence of the counsel for the bank. Pursuant to the interim order, the petitioner first deposited Rs.40,00,000/- with the tribunal and also paid a sum of Rs.1,15,50,000/- to the bank on 8-8-2016. In the correspondence that the bank made with the petitioner, they never objected to his locus standi. Even till date neither the tribunal ordered nor the bank itself refunded the amount of Rs. 1,55,50,000 paid by the petitioner to the bank pursuant to the interim order passed by the tribunal. Therefore it is not open to the bank to raise this objection, especially when the tribunal did not dismiss the appeal on the ground of maintainability.

15. The second contention of the learned counsel for the bank that the agreement of sale relied upon by the petitioner is a fabricated document, cannot be adjudicated in the writ petition. The tribunal also did not adjudicate the same. Therefore we will not go into the question whether the agreement of sale on the basis of which the petitioner has lodged a claim is a fabricated document or not.

16. But the third contention of the learned counsel for the bank about the non-disclosure of a material fact cannot be rejected as wholly without merit. It appears that the petitioner participated in the first auction conducted by the bank and offered a bid amount Rs.2,70,00,000. But the auction failed when some other bidder wrongly clicked Rs.26,15,00,000 and later withdrew the same as a clerical mistake. The petitioner herein has not disclosed the factum of his participation in the first auction held on 11-03-2016. Therefore the petitioner is guilty of suppression of facts.

17. But the contention of Mr. Vedula Venkataramana, learned senior counsel for the petitioner is that every non-disclosure need not amount to suppression and that every fact not disclosed need not be a material fact. The non-disclosure of the petitioner's participation in the first auction had no bearing upon the course of events before the tribunal and hence it is contended by him that his claim should not be defeated on this ground.

18. But the above contention of the learned senior counsel for the petitioner cannot be accepted. Admittedly he was prepared to

offer Rs.2,70,00,000 in the auction held on 11-03-2016, despite his claim that he held a valid agreement of sale dated 11-03-2011. Under the alleged agreement of sale dated 11-03-2011, the total sale consideration was fixed only as Rs. 2,00,00,000 and out of the said amount, he had already paid a sum of Rs. 50,00,000 before the date of the first auction.

19. Therefore it was highly improbable that a person who was due to pay only a balance of sale consideration of Rs.1,50,00,000 under an agreement of sale dated 11-03-2011 would have ignored the agreement and participated in an auction held on 11-03-2016 and offered a sum of Rs.2,70,00,000. If this probability had been taken note of by the tribunal when it passed the first interim order on 27-07-2016, it might not have passed the same kind of order as it did. Today the whole case of the petitioner rests on the contention that the auction sale as well as its confirmation had taken place contrary to the interim order of the tribunal dated 27-07-2016. If what was not disclosed to the tribunal on 27-07-2016 could have led to a different order, if disclosed, the same would tantamount to a material fact and the suppression of the same could certainly be held against the petitioner.

20. It is a fundamental principle that a person who secured an interim order by suppressing a material fact is not entitled to succeed on the sole ground that the respondents did something in violation of the very same interim order. Since the entire case of the petitioner rests on the sale made by the bank allegedly in violation of an interim order of the tribunal and since the said interim order might

not have been passed if full facts had been disclosed, the ultimate dismissal of the appeal by the tribunal cannot be found fault with. Therefore the order of the tribunal is liable to be confirmed.

21. However one mistake that the tribunal committed was it did not even order the refund of the money paid by the petitioner pursuant to the interim orders. Just as the petitioner cannot now take advantage of the interim order, he cannot also be prejudiced by the interim order.

22. Therefore the writ petition is allowed in part and the order of the tribunal is modified directing the bank to refund the amount of Rs.1,55,50,000, to the petitioner together with interest @ 6% p.a. from 08-08-2016 till the date of actual payment.

23. In the light of the view taken by us, we do not think it necessary to implead the auction purchaser as a party to the writ petition. Hence the implead petition is dismissed. No order as to costs.

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

**V. RAMASUBRAMANIAN, J**

**G. SHYAM PRASAD, J**

Date: 13-12-2016

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