

THE HON'BLE SRI JUSTICE SANJAY KUMAR  
AND  
THE HON'BLE MS JUSTICE J.UMADEVI

WRIT PETITION NO.13793 OF 2016

ORDER

*(per Hon'ble Sri Justice Sanjay Kumar)*

Challenge in this writ petition is to the order dated 20.01.2016 passed by the Debts Recovery Tribunal, Hyderabad (for brevity, 'the Tribunal'), in S.A.No.364 of 2012. This S.A. was filed by the petitioner herein under Section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity, 'the SARFAESI Act'), assailing the tender/auction notice dated 30.06.2012 issued by the Canara Bank, Asset Recovery Management Branch, Hyderabad, fixing the date of the auction sale of the secured asset on 10.08.2012 and to set aside all the measures taken by the bank under the SARFAESI Act. By the order under challenge, the Tribunal dismissed the S.A.

By order dated 22.04.2016, this Court granted interim suspension of the order under challenge for a period of eight weeks. The last extension of the said interim order was on 14.06.2016 upto the next hearing. The matter was thereafter listed in July, 2016, but there was no further extension. Thus, as on date, there is no interim order subsisting in the writ petition.

The petitioner is a proprietary concern which was originally founded by one Konda Veeresh Murthy. He availed financial assistance from the respondent bank but owing to the default committed in repayment, his account was declared a non-performing asset. Demand notice dated 29.10.2004 was issued by the bank under Section 13(2) of the SARFAESI Act and the same was served upon Konda Veeresh Murthy and others on 01.12.2004. Possession notice under Section 13(4) read with Rule 8(1) of the Security Interest (Enforcement) Rules, 2002 (for brevity, 'the Rules of 2002'),

was served upon him on 30.03.2005. As the borrower failed to deliver possession of the secured asset, the bank approached the learned Chief Metropolitan Magistrate, Hyderabad, under Section 14 of the SARFAESI Act. Aggrieved thereby, Konda Veeresh Murthy filed S.A.No.77 of 2005 before the Tribunal. Therein, he secured stay of all further proceedings by the bank *vide* order dated 07.04.2005. However, the said S.A. was dismissed for default on 29.09.2005. Konda Veeresh Murthy died on 29.10.2005. On 18.01.2006, the present proprietrix of the petitioner concern, Konda Anuradha, the widow of Konda Veeresh Murthy, addressed a letter informing the bank that Konda Veeresh Murthy had expired and seeking time to repay the debt under a one time settlement. She expressed willingness to deposit 25% of the amount due within 12 weeks of approval and the balance within one year.

The legal heirs of Konda Veeresh Murthy, being his widow, Konda Anuradha, and his sons, Konda Raj Kumar and Konda Ritesh Kumar, along with his daughter, B.Rajya Lakshmi, then filed W.P.No.2007 of 2006 before this Court assailing the action of the bank in trying to dispossess them from the secured asset under the SARFAESI Act without accepting their representation dated 16.01.2006 (*sic* 18.01.2006) and to consequently direct the bank to forbear for a reasonable period from causing their dispossession so as to give them a chance to repay the outstanding dues.

This writ petition was dismissed by order dated 02.02.2006.

Perusal of the said order reflects that this Court found that the petitioners therein had not approached the Court with clean hands in as much as they deliberately omitted to place on record copies of the notices issued by the bank under Section 13(2) and (4) of the SARFAESI Act along with the order of the Tribunal dismissing S.A.No.77 of 2005. The order passed by the learned Chief Metropolitan Magistrate, Hyderabad, under Section 14 of the SARFAESI Act was also not placed before the Court. This

Court observed that it was not the case of the petitioners therein that they did not have knowledge of these proceedings and, therefore, they must be presumed to have deliberately omitted to place such documents before the Court. As the petitioners therein had tried to mislead the Court for securing a direction to the bank to entertain their representation, this Court dismissed the case.

Surprisingly, Konda Ritesh Kumar and Konda Anuradha, the son and widow of late Konda Veeresh Murthy, then filed W.P.No.2547 of 2006 again assailing the failure of the bank in considering their one time settlement proposal and to declare the proceedings initiated by the bank against the secured asset as illegal.

This writ petition was dismissed as withdrawn on 24.02.2006.

As the earlier endeavour to take possession had not fructified, the bank again issued possession notice dated 25.02.2006 taking over symbolic possession of the secured asset. Aggrieved thereby, the petitioner proprietary concern represented by the widow Konda Anuradha filed S.A.No.10 of 2006 before the Tribunal under Section 17 of the SARFAESI Act. Stay was granted upon the application filed by the proprietary concern therein on 03.03.2006. This S.A. was dismissed for default on 02.02.2012. Thereafter, the bank issued tender/auction notice on 01.07.2012 and Rule 8(6) notice under the Rules of 2002 on 03.07.2012. Aggrieved thereby, the proprietary concern represented by Konda Anuradha filed S.A.No.364 of 2012 before the Tribunal. The main contention urged therein was that the impugned notices were issued in the name of the deceased borrower, late Konda Veeresh Murthy, and were therefore bad in law. However, taking note of the fact that the legal heirs of late Konda Veeresh Murthy were well aware of the SARFAESI proceedings initiated by the bank and had made attempts several times to stall the same, the Tribunal opined that they could not claim

ignorance of all that had happened after the death of Konda Veeresh Murthy. While acknowledging that issuance of a notice in the name of a dead person would be normally bad in law, the Tribunal opined that the notice in the present case was not issued to the dead person as the legal heirs of the original borrower were well aware of all the proceedings. The Tribunal accordingly held that there was no merit in the Securitization Application and dismissed it by the order under challenge.

Heard Sri G.K.Deshpande, learned counsel for the petitioner, and Sri Deepak Bhattacharjee, learned senior counsel appearing for Sri Dishit Bhattacharjee, learned counsel for the respondent bank.

At the outset, it may be noted that the impugned notice under Rule 8(6) of the Rules of 2002 was not addressed to late Konda Veeresh Murthy but was issued in the name of the proprietary concern, M/s.Hotel Pearl City, Hyderabad. Copies of this notice were served upon not only the addressee but also upon the widow, sons and daughter of late Konda Veeresh Murthy. The tender/auction notice which was published in the newspaper also did not mention the name of late Konda Veeresh Murthy but indicated the name of the proprietary concern, M/s.Hotel Pearl City, as the borrower. It is however apparent from the record that the original demand notice under Section 13(2) of the SARFAESI Act, which was issued on 29.10.2004, was addressed to late Konda Veeresh Murthy and was received by him during his life time.

The only point that arises for consideration is whether initiation of proceedings under the SARFAESI Act by the respondent bank stood vitiated by the intervening circumstance of the death of late Konda Veeresh Murthy after issuance of the demand notice under Section 13(2) thereof.

Sri G.K.Deshpande, learned counsel, would place reliance on the judgment of the Madras High Court in S.SUHAINA BANU V/ s. INDIAN

BANK<sup>1</sup>. That was also a case where, after the demand notice under Section 13(2) of the SARFAESI Act was issued, the addressee expired but proceedings were continued by the secured creditor on the basis thereof. In that context, a Division Bench of the Madras High Court observed that proceedings initiated against a person while he was alive would automatically stand abated immediately after his death and the only course open to the bank was to initiate proceedings by issuance of a fresh notice to the legal heirs of the borrower/guarantor, as the case may be, as such legal heirs would then have an opportunity to discharge the liability in sixty days.

Learned counsel would point out that this Court accepted the dictum of the Madras High Court in SMT. NEELAM V/ s. STATE BANK OF INDIA<sup>2</sup>. Learned counsel would also place reliance on the observations of the Supreme Court in VASU P. SHETTY V/ s. HOTEL VANDANA PALACE<sup>3</sup>. This was however not a case turning on similar facts. The issue before the Supreme Court therein was as to whether the borrower had waived the mandatory provisions of Rules 8 and 9 of the Rules of 2002. On facts, it was found that there was not even an iota of material suggesting any waiver on the part of the borrower. In that context, it was observed that the moment it was found that the mandatory requirement of the Rules had not been waived by the borrower, consequences in law would have to follow and breach of the mandatory requirement would render the sale null and void.

The Supreme Court had occasion to consider the effect of the death of a party upon the proceedings in N.JAYARAM REDDY V/ s. REVENUE DIVISIONAL OFFICER ANED LAND ACQUISITION OFFICER, KURNOOL<sup>4</sup>. That was a case where a decree had been passed against a dead person. The Supreme Court dealing with this aspect observed that a

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<sup>1</sup> W.P.No.27230 of 2009 decided on 01.12.2010

<sup>2</sup> W.P.No.24298 of 2014 decided on 26.08.2014

<sup>3</sup> (2014) 5 SCC 660

<sup>4</sup> (1979) 3 SCC 578

decree against a dead person is not necessarily a nullity for all purposes and it would be sufficient to say that such a decree has been held to be a nullity because it cannot be executed against the legal representatives for the simple reason that they did not have an opportunity of being heard and they could not be condemned unheard. In this regard, the Supreme Court made the following observations which are apposite of extraction:

“6. The basic fact remains that a decree against a dead person is treated as a nullity because it cannot be allowed to operate against his legal representative when he was never brought on the record to defend the case. Any other view would not be possible or permissible for it would fasten on him a liability for which he did not have any hearing. So while the law treats such a decree as a nullity qua the legal representative of the deceased defendant or respondent, there is nothing to prevent him from deciding that he will not treat the decree as a nullity, but will abide by it as it stands, or as it may be mollified thereafter on appeal. If a legal representative adopts that alternative or course of action, it cannot possibly be said that his option to be governed by the decree is against the law or any concept of public policy or purpose, or the public morality. It is thus a matter entirely at the discretion of the legal representative of a deceased respondent against whom a decree has been passed after his death to decide whether he will raise the question that the decree has become a nullity, at the appropriate time, namely, during the course of the hearing of any appeal that may be filed by the other party, or to abandon that obvious technical objection and fight the appeal on the merits. He may do so either because of his faith in the strength of his case on the merits, or because of incorrect legal advice, or for the reason that he may not like to rely on a mere technical plea, or because in the case of cross-appeals, he may have the impression that bringing the legal representative of the deceased respondent on record in an appeal by a co-appellant will enure for the benefit of or be sufficient for purposes of the cross-appeal. An abandonment of a technical plea of abatement and the consequential dismissal of the appeal, is therefore a matter at the discretion of the legal representative of the deceased respondent and there is no justification for the argument to the contrary. It is equally futile to argue that an appellate court is denuded of its jurisdiction to hear an appeal in which one of the respondents has died and the right to sue does not survive against the surviving defendant or defendants alone merely because no application has been made to bring his legal representative on the record when no objection to that effect is raised by anyone.

7. But, as is equally obvious, it will not be fair to draw an inference as to the abandonment of such a plea of abatement unless there is clear, sufficient and satisfactory evidence to prove that the legal representative of the deceased respondent was aware of it and abandoned it wilfully. The following facts have been well established in this respect in the present case.”

The Supreme Court further observed therein that a point of defence which has been willfully or deliberately abandoned by a party in a civil case at a crucial stage, when it was most relevant or material, cannot be allowed to be taken up later at the sweet will of the party which had abandoned the point, as a last resort or as an afterthought.

We are of the opinion that reliance placed by Sri G.K.Deshpande, learned counsel, on the case law cited by him is of no avail in the light of the authoritative edict in N.JAYARAM REDDY<sup>4</sup>.

The facts of the case on hand put it beyond the pale of doubt that the legal heirs of late Konda Veeresh Murthy were not only well aware of the proceedings initiated by the bank under the SARFAESI Act but took active interest in contesting the same at every stage. It is not clear from the record as to whether the legal heirs raised the issue of the effect of death of the addressee of the Section 13(2) notice in W.P.No.2007 of 2006. If they did raise it, the fact that this Court did not accept the same and dismissed the writ petition by order dated 02.02.2006 and the said order attained finality would preclude them from raising the very same issue at this late stage. If they did not raise it, it is too late in the day for them to do so now. Be it noted, after the dismissal of W.P.No.2007 of 2006, the legal heirs filed W.P.No.2547 of 2006, S.A.No.10 of 2006 and then S.A.No.364 of 2012.

Even going by the observation of the Madras High Court, the purpose of starting the proceedings afresh by issuing a fresh demand notice under Section 13(2) of the SARFAESI Act is only to enable the legal heirs of the deceased borrower/guarantor, as the case may be, to clear the outstanding dues within the stipulated sixty days. In the present case, after the death of late Konda Veeresh Murthy, his widow, the present proprietrix of the petitioner concern, addressed letter dated 08.02.2006 to the bank informing it of the death of late Konda Veeresh Murthy and requesting the bank to

accept their proposal for a one time settlement whereby they would pay 25% of the outstanding amount within 12 weeks from the date of approval and the balance amount within one year. This offer on their part clearly demonstrates that there was no necessity to put them on notice afresh of the impending demands of the bank.

Significantly, the finding of this Court rendered as long back as on 02.02.2006 in W.P.No.2007 of 2006 to the effect that the legal heirs of late Konda Veeresh Murthy were lacking in *bonafides* and had come to Court with unclean hands has attained finality and cannot be brushed aside now. Further, having dragged on the matter since 2006, it is too late in the day for the petitioner proprietary agency or the legal heirs of late Konda Veeresh Murthy to set at naught all such proceedings by resorting to the plea that the proceedings were initiated against a dead person. They cannot be permitted to turn back the clock to suit their own convenience.

Be it viewed from any angle, the petitioners have not made out any grounds warranting interference with the order under challenge.

The writ petition is therefore devoid of merit and is accordingly dismissed.

Pending miscellaneous petitions, if any, shall also stand dismissed. No order as to costs.

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SANJAY KUMAR,J

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J.UMA DEVI ,J

21<sup>st</sup> NOVEMBER, 2017  
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