

**THE HON'BLE SRI JUSTICE SANJAY KUMAR  
AND  
THE HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD**

**WRIT PETITION NO.17704 OF 2017**

**O R D E R**

*(Per Sri Justice Sanjay Kumar)*

Order dated 11.06.2009 passed by the Debts Recovery Tribunal, Visakhapatnam, in S.A.No.82 of 2008 was confirmed by the Debts Recovery Appellate Tribunal, Kolkata, in Appeal No.262 of 2013/43. Both the orders are subjected to challenge presently.

The State Bank of Hyderabad, Chirala Road, Chilakaluripeta, Guntur District, initiated proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI Act'), in relation to the secured asset offered by Bhavanasi Subba Rao, the fourth respondent, for the loan facilities availed by him. After following the due procedure, the bank issued auction notice dated 15.10.2004, published in the newspaper on 17.10.2004, proposing to hold the auction sale on 15.11.2004. However, this sale did not materialize. The bank thereupon issued notice dated 02.07.2005, published in the newspaper on 04.07.2005, proposing to hold the auction on 15.07.2005. In the auction held on 15.07.2005, K.Nageswara Rao and his son, K.V.Pulla Rao, the writ petitioners, were declared the highest bidders. A sale certificate was issued to them on 22.07.2005. On 25.08.2005, Bhavanasi Subba Rao filed SA IR No.169 of 2005 under Section 17 of the SARFAESI Act, which came to be numbered as S.A.No.82 of 2008 on the file of the Debts Recovery Tribunal, Visakhapatnam. By order dated 11.06.2009, the Tribunal allowed the application, taking into consideration the fact that 30 days notice had not been given prior to

conduct of the auction sale on 15.07.2005. The Tribunal also took note of the fact that Bhavanasi Subba Rao forwarded photocopies of demand drafts available with him to the bank in proof of his sincere efforts to redeem the secured asset. The Tribunal therefore granted 10 days time to Bhavanasi Subba Rao to deposit the money due to the bank and in the event he did so, the bank was directed to receive the same and restore possession of the secured asset to him.

Aggrieved thereby, K.Nageswara Rao and K.V.Pulla Rao, the auction purchasers, filed Appeal No.262 of 2013/43 before the Debts Recovery Appellate Tribunal, Kolkata. By order dated 17.04.2017, the Appellate Tribunal upheld the order of the Debts Recovery Tribunal, Visakhapatnam, but granted liberty to the appellants to invoke appropriate remedies in accordance with law for the loss and harassment they were subjected to by the bank as they had paid the entire sale consideration and had secured a registered sale certificate as long back as on 22.07.2005. Aggrieved by the dismissal of their appeal, the auction purchasers are before this Court.

Bhavanasi Subba Rao filed a counter justifying the orders under challenge. As regards the factual aspects, he stated that the bank initially published auction notice dated 07.11.2003 proposing to conduct the auction sale on 21.02.2004. However, the same did not materialize and was postponed to 15.11.2004. Again, on the said day, the sale was dropped. A fresh publication was made on 04.07.2005 fixing the date of the sale as 15.07.2005. The sale was conducted on that day and the writ petitioners were declared the highest bidders. Consequently, sale certificate dated 22.07.2005 was issued to them. He contended that there was a clear violation of the procedure prescribed under Rules 8 and 9 of the Security Interest

(Enforcement) Rules, 2002 (for brevity, 'the Rules of 2002'), as the sale was held before expiry of 30 days from the date of publication of the notice. He pointed out that even before confirmation of the sale, he had obtained four demand drafts dated 08.07.2005 for a sum of Rs.4,54,660/- to satisfy the mortgage debt of the bank and that attested copies of these drafts were sent to the bank. In spite of the same, the sale was confirmed on 22.07.2005 and the sale certificate was issued on the very same date. He pointed out that under Section 13(8) of the SARFAESI Act, his right to redeem the secured asset stood protected up to the transfer of such secured asset. He therefore justified the action of the Debts Recovery Tribunal, Visakhapatnam, in giving him 10 days time to redeem the property. He stated that pursuant to the said order, four fresh demand drafts for a sum of Rs.6,30,000/- were taken on 17.06.2009 and tendered to the bank. The bid amount of Rs.13,00,000/- paid by the auction purchasers was sought to be returned by the bank by way of a bankers cheque dated 02.07.2009. However, as they refused to receive the same, it was kept in an interest bearing account by the bank. He pointed out that the bank had returned the excess amount paid by him to settle the mortgage debt and Rs.98,420/- was refunded on 10.08.2016. He concluded by stating that the auction purchasers, who were originally tenants in occupation of the premises, had purchased it for a sum of Rs.13,00,000/- though the value of the property, a two storied building, would be about Rs.1.00 crore.

Heard Sri C.Raghu, learned counsel for the petitioners/auction purchasers, and Sri G.L.V.Ramana Murthy, learned counsel on caveat for Bhavanasi Subba Rao, the fourth respondent.

In the light of the stand taken by the State Bank of Hyderabad before the Debts Recovery Appellate Tribunal, Kolkata, it is not necessary to put it on notice or give it an opportunity of hearing for deciding this case. Perusal of the orders under challenge reflects that the factual aspects and the dates are not in dispute. The initial auction sale notices dated 13.11.2003 and 11.02.2004 did not fructify and the postponed auction, scheduled to be held on 15.11.2004, pursuant to the auction notice published in the newspapers on 16.10.2004 and 17.10.2004 also failed. According to the bank, the said auction was again postponed and was conducted on 15.07.2005 pursuant to the paper publication made on 04.07.2005 in two newspapers. It was this auction sale that materialized in the bid being knocked down in favour of the petitioners/auction purchasers for a sum of Rs.13,00,000/-.

The Debts Recovery Tribunal, Visakhapatnam, concentrated on the fact that Bhavanasi Subba Rao had tendered photocopies of the demand drafts already secured by him in proof of his sincerity in seeking to discharge his debt even prior to the confirmation of the sale in favour of the auction purchasers. Holding that an opportunity could be given to him to discharge the loan amount, as the bank did not wait for submission of the original demand drafts despite receiving photocopies thereof, the Tribunal granted him 10 days time to do the needful. The order also contained a default clause to the effect that if he failed to deposit the money within the time stipulated, the application would stand dismissed.

In appeal by the auction purchasers, the Appellate Tribunal at Kolkata looked into the more vital aspect of the validity of the sale in favour of the auction purchasers. Significantly, the bank conceded



before the Appellate Tribunal that the sale conducted by it on 05.07.2005 was in violation of the procedure prescribed under Rule 9(1) of the Rules of 2002, as notice of 30 days was not given. The Appellate Tribunal agreed with this and held that the bank had acted in clear violation of the mandatory procedural requirement as spelt out in **MATHEW VARGHESE V/s. M.AMRITHA KUMAR**<sup>1</sup>. Taking note of the fact that the sale itself was invalid, the Appellate Tribunal opined that there was no error on the part of the Debts Recovery Tribunal, Visakhapatnam, in allowing an opportunity to the borrower to redeem his property. The Appellate Tribunal noted that Bhavanasi Subba Rao had already complied with the said order by tendering payment and the bank had also attempted to refund the sale consideration of Rs.13,00,000/- paid by the auction purchasers but they had refused to receive the same whereupon the said amount was lying with the bank in an interest bearing account. The Appellate Tribunal therefore directed the bank to return the said amount to the auction purchasers along with accrued interest within a time frame. However, as they, being *bonafide* auction purchasers, were subjected to harassment and irreparable loss for no fault on their part, the Appellate Tribunal held that they would be entitled to be compensated and left it open to them to make a claim to the bank and seek appropriate remedies in accordance with law. Subject to this observation, the appeal was dismissed.

In so far as the legal position is concerned, **MATHEW VARGHESE**<sup>1</sup> puts it beyond doubt that the procedure prescribed under Rule 8(6) read with Rule 9(1) of the Rules of 2002 necessarily has to be followed.

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<sup>1</sup> (2014) 5 SCC 610

However, earlier, in **G.M., SRI SIDDESHWARA CO-OPERATIVE BANK LTD. V/s. IKBAL<sup>2</sup>**, the Supreme Court while observing that Rule 9(1) of the Rules of 2002 is mandatory, held that even though a provision is mandatory it can always be waived by the party for whose benefit it has been made. It was further held that Rule 9(1), being for the benefit of the borrower, and Rules 9(3) and 9(4), being for the benefit of the secured creditor and the borrower, could be lawfully waived by them. The Supreme Court however cautioned that whether there is a waiver or not would depend on the facts of each case and no hard and fast rule could be laid down in that regard.

Later, in **VASU P.SHETTY V/s. M/s.HOTEL VANDANA PALACE<sup>3</sup>**, the Supreme Court observed that there was no conflict between **MATHEW VARGHESE<sup>1</sup>** and **IKBAL<sup>2</sup>** as, in **MATHEW VARGHESE<sup>1</sup>** it was held that Rules 8 and 9 of the Rules of 2002 were mandatory, and while holding so even in **IKBAL<sup>2</sup>**, the Supreme Court held that as these provisions were for the benefit of the borrower or the secured creditor, they could be waived by them. As this aspect never fell for consideration in **MATHEW VARGHESE<sup>1</sup>**, the Supreme Court held that the contention that there was contradiction between the two judgments did not hold water.

In the case on hand, the auction sale was held on 15.07.2005 pursuant to the notice published in the newspapers on 04.07.2005 in clear violation of the statutory mandate. Bhavanasi Subba Rao filed an application under Section 17 of the SARFAESI Act on 23.08.2005 before the Debts Recovery Tribunal, Hyderabad, in SA IR No.169 of 2005. This application, upon transfer to the Debts Recovery Tribunal, Visakhapatnam, was renumbered as S.A.No.82 of 2008. Therein, he

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<sup>2</sup> (2013) 10 SCC 83

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

specifically took the ground that the State Bank of Hyderabad had failed to follow Rule 9 by maintaining a minimum 30 days before the date fixed for sale and that it ought not to have given a mere 11 day notice for the sale of the property. It is therefore clear that Bhavanasi Subba Rao did not condone the lapse on the part of the bank in not adhering to the procedure prescribed under Rules 8(6) and 9(1) of the Rules of 2002.

Though Sri C.Raghu, learned counsel, would argue that the earlier attempts by the bank to conduct an auction sale also violated the aforestated rules and that Bhavanasi Subba Rao silently suffered the same without protesting, we are of the opinion that such inaction on his part would not, in any event, preclude him from raising the ground of statutory procedural violations in the context of the sale which took shape on 15.07.2005. No waiver can be attributed to Bhavanasi Subba Rao in relation to the procedural violation in this sale as he raised this aspect immediately after the event. The sale would therefore have to be tested in the context of the alleged violation of procedure and given the settled legal position in this regard, as stated *supra*, the sale was clearly liable to be set aside.

That apart, as rightly pointed out by the Debts Recovery Tribunal, Visakhapatnam, once Bhavanasi Subba Rao produced photocopies of the demand drafts prior to confirmation of the sale in favour of the auction purchasers, the bank ought to have given him an opportunity to produce the originals thereof so as to discharge his mortgage debt and redeem the secured asset. Without allowing him an opportunity to do so, the bank proceeded with confirmation of the sale and issued the sale certificate dated 22.07.2005. This action on its part violated the statutory right of Bhavanasi Subba Rao to

redeem his secured asset prior to its transfer, under Section 13(8) of the SARFAESI Act. Admittedly, the transfer in favour of the auction purchasers on 22.07.2005 was after Bhavanasi Subba Rao proffered sufficient material in proof of his being in a position to redeem the secured asset, but despite the same, the bank ignored his right. Allowing him an opportunity to redeem the property within 10 days was therefore a lawful exercise of power and discretion by the Debts Recovery Tribunal, Visakhapatnam.

Be it viewed from any angle, this Court finds no error in either of the orders under challenge warranting interference under Article 226 of the Constitution. The writ petition is 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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**GUDISEVA SHYAM PRASAD,J**

**19<sup>th</sup> JULY, 2017**  
**PGS**