THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE Dr. JUSTICE SHAMEEM AKTHER

WRIT PETITION NOS.39544 OF 2015 AND 22852 OF 2016

COMMON ORDER
(*Per Sri Justice Sanjay Kumar)*

The petitioners in these two cases are wife and husband. They availed housing loans and other credit facilities from the State Bank of India to construct a three storied building on the residential property admeasuring about 212.33 square yards, bearing House No.6-4-339, Gali Street, Tirupathi, belonging to the wife, the first petitioner. This property was offered as security interest for the said loans. Owing to the default committed by them in repayment of these loans, the State Bank of India initiated proceedings under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity, 'the SARFAESI Act'). When the bank attempted to bring the secured asset to sale under auction notice dated 31.10.2015, published in newspapers on 01.11.2015, the petitioners filed S.A.No.512 of 2015 before the Debts Recovery Tribunal, Hyderabad, under Section 17 of the SARFAESI Act. They sought stay of the proposed auction sale by way of I.A.No.3547 of 2015 in S.A.No.512 of 2015. By order dated 02.12.2015, the Tribunal dismissed the said I.A. Aggrieved thereby, they filed W.P.No.39544 of 2015 before this Court.

By order dated 08.12.2015 passed therein, this Court directed the State Bank of India not to issue a sale certificate to the purchaser of the secured asset, if any, on condition of the petitioners depositing a sum of Rs.40,00,000/- within ten days. Time was thereafter extended up to 31.12.2015 to make this deposit, *vide* order dated 23.12.2015. The auction sale took place on 03.12.2015 and

S.R.Mohammad Bhasha and his wife, S.Mobin Taj, emerged as the highest bidder. As this auction sale was held by the bank after the dismissal of I.A.No.3547 of 2015 in S.A.No.512 of 2015 by the Debts Recovery Tribunal, Hyderabad, the challenge laid by the petitioners to the said order of dismissal is rendered purely academic and no longer warrants consideration on merits. W.P.No.39544 of 2015 is therefore rendered infructuous.

W.P.No.22852 of 2016 was then filed by the petitioners assailing the action of the State Bank of India in conducting the auction sale on 03.12.2015 and identifying S.R.Mohammad Bhasha and his wife, S.Mobin Taj, impleaded as respondents 3 and 4 therein, as the auction purchasers and in issuing a sale certificate to them on 21.01.2016 in respect of the secured asset. The petitioners claimed that the sale was held in gross violation of the mandatory rules and applicable law and sought a consequential direction to set aside the sale certificate dated 21.01.2016 issued by the bank in favour of respondents 3 and 4 and to direct the bank to return the title deeds of the secured asset along with its possession to the petitioners after allowing them to pay the total outstanding loan amounts.

In the affidavit filed in support of this writ petition, the petitioners stated that the State Bank of India had issued demand notice dated 23.06.2015 under Section 13(2) of the SARFAESI Act, after classifying their loan accounts as non-performing assets. Symbolic possession of the secured asset was taken over by the bank by issuing possession notice dated 07.09.2015 under Section 13(4) of the SARFAESI Act read with Rule 8(1) of the Security Interest (Enforcement) Rules, 2002 (for brevity, ‘the Rules of 2002’). This possession notice was published in newspapers, as statutorily required, on 13.09.2015. Sale notice dated 16.10.2015 was thereafter issued by the bank under Rules 8(5) and 8(6) of the Rules of 2002 followed by e-auction sale notice dated 31.10.2015 under Rule 9(1) of the Rules of 2002, proposing to hold the auction sale of the secured asset on 03.12.2015. The petitioners admitted that they failed to comply with the conditional order passed by this Court in W.P.No.39544 of 2015 despite time being extended up to 31.12.2015 to enable them to do so. They stated that W.P.M.P.No.726 of 2016 was filed by them in the said writ petition praying for further extension of time and that the same was pending as on date.

According to the petitioners, in the auction sale held on 03.12.2015, there was only a sole bidder, respondents 3 and 4. The reserve price of the secured asset was shown as Rs.1,13,00,000/- and the sale was knocked down in their favour for Rs.1,13,20,000/-. The petitioners claimed that this process of bidding, without there being any competition whatsoever, is violative of the Competition Act, 2003. They further asserted that the auction could not have proceeded with a single bidder. The main contention urged by them however was that the auction purchasers were obligated to deposit 25% of the bid amount immediately after the auction, which means the same day, but they deposited 25% of the bid amount only on 05.12.2015 and the balance 75% of the sale consideration was deposited by them on 21.01.2016. The delay on their part in making these deposits, *per* the petitioners, is a serious legal infirmity which would invalidate the auction sale itself. It is on this ground that they seek relief in W.P.No.22852 of 2016, despite the admitted fact that the sale certificate was already issued by the bank and was also registered in favour of respondents 3 and 4 on 21.01.2016.

Reliance is placed by the petitioners on case law in support of their contention that the sale is liable to be invalidated for non-compliance with the prescribed statutory procedure.

The State Bank of India filed its counter through the Chief Manager-cum-Authorized Officer at its Settipalli Branch. Therein, it pointed out that S.A.No.512 of 2015 filed by the petitioners before the Debts Recovery Tribunal, Hyderabad, was still pending and contended that it was not open to the petitioners to directly approach this Court by way of W.P.No.22852 of 2016 to assail the concluded sale. The bank pointed out that the petitioners had failed to comply with the conditional order passed by this Court in W.P.No.39544 of 2015 and had filed another extension petition seeking time to do so, which was still pending. As to the merits of the contentions urged by the petitioners, the bank stated that respondents 3 and 4 stood as the successful bidders in the auction sale held on 03.12.2015 with a bid of Rs.1,13,20,000/-. It denied the claim that the sale could not be knocked down in favour of a single bidder. The bank admitted that respondents 3 and 4 had deposited 25% of the bid amount on 05.12.2015 and the remaining 75% of the sale price on 21.01.2016. It however denied that there was serious infirmity in making these deposits which would invalidate the sale itself. According to the bank, the petitioners had failed to file a reply to its counter in W.P.No.39544 of 2015 raising this issue, which amounted to the petitioners waiving their right to do so and they were estopped from raising the issue at this stage. The bank further stated that as the petitioners had failed to comply with the conditional order passed by this Court despite extension of time and had caused delay in completion of the sale process, they were not entitled to take advantage of their own conduct. It pointed out that, but for the fact that the petitioners obtained a conditional order in their favour restraining the bank from issuing a sale certificate, the auction purchasers would have deposited 75% of the bid amount within the prescribed period of 15 days. The bank denied that the sale was uncompetitive as there was only one bidder and that it had acted unfairly in allowing the sole bidder to become the successful bidder on a paltry increase of Rs.20,000/- over and above the upset price. The bank further stated that the auction sale was not vitiated, be it on facts or in law, and that the sale certificate issued by it to respondents 3 and 4 was not liable to be set aside as the Competition Act, 2003 had no applicability to the present case.

Respondent 3 filed a counter stating that pursuant to the e-auction sale notice published by the bank in the news papers, he and his wife participated in the auction and were declared the successful bidder. He pointed out that the petitioners themselves had secured stay of issuance of a sale certificate in their favour in W.P.No.39544 of 2015 *vide* order dated 08.12.2015 and despite failure to comply with the condition imposed therein, they had successfully delayed the sale process. He stated that 25% of the bid amount was deposited on 05.12.2015 and the balance amount on 21.01.2016, whereupon the sale certificate was issued. He asserted that they had spent a lot of money for renovating the building thereafter. He pointed out that the writ petition was filed on 12.07.2016 in relation to the sale certificate issued on 21.01.2016. He further pointed out that the petitioners had filed I.A.No.2387 of 2016 in S.A.No.512 of 2015 seeking to implead them and by order dated 05.10.2016, the Tribunal had made them parties to the said

S.A. The Tribunal further directed them not to create third party interests over the secured asset *vide* order dated 05.10.2016 in I.A.No.2388 of 2016 in S.A.No.512 of 2015. As the petitioners were praying for setting aside the sale certificate in the pending S.A., he stated that they could not seek the same relief before this Court. He reiterated the pleas put forth by the bank as regards the conduct of the sale being valid and above board. He also asserted that the petitioners had waived their right to raise any issue in relation to the deposit of the sale consideration and could not now impugn the sale, six months after the issuance of the sale certificate.

Heard Sri Vedula Venkataramana, learned senior counsel appearing for Sri P.Sri Harsha Reddy, learned counsel for the petitioners, Sri Maruthi Jadhav, learned counsel representing Sri B.S.Prasad, learned counsel for the State Bank of India, and Sri O.Manohar Reddy, learned counsel for the auction purchasers.

Sri Vedula Venkataramana, learned senior counsel, would assert that in terms of the statutory scheme of the SARFAESI Act and the Rules framed thereunder, the State Bank of India was bound to follow the prescribed procedure as set out therein and failure to do so would invariably set at naught the entire sale transaction. He would submit that the question of the petitioners waiving their right to object to the violations of such procedure cannot be inferred lightly when their valuable property rights were at stake. He would place reliance on case law in support of his plea.

Per contra, Sri Maruthi Jadhav, learned counsel, would point out that the petitioners were well aware of the fact that the auction purchasers had not deposited 25% of the bid amount on the date of the auction sale, as long back as on 04.12.2015, when they filed

W.P.No.39544 of 2015. He would assert that despite having knowledge of the same, the silence of the petitioners in raising this issue amounted to their having waived their right to do so and that it was not open to them to belatedly raise this issue six months after issuance and registration of the sale certificate. He would further point out that the petitioners lack of *bonafides* was patent as they failed to comply with the conditional order passed in W.P.No.39544 of 2015 despite time being extended to enable them to do so. He would point out that W.P.M.P.No.726 of 2015 was filed on 05.01.2016 in the said writ petition seeking further extension of time by another eight weeks and in its counter filed on 07.01.2016, the bank specifically stated that 25% of the bid amount was paid by the successful bidder on 05.12.2015. Despite the same, the petitioners failed to file their reply or take effective measures to challenge the sale on the ground of violation as to the time for making such deposit.

Sri O.Manohar Reddy, learned counsel, would point out that though the sale certificate was issued and registered as long back as on 21.01.2016, the petitioners did not choose to protest for over six months and filed W.P.No.22852 of 2016 only on 12.07.2016 and no reasons were put forth by them to explain the delay on their part. He reiterated the contention urged in the counter that it was not open to the petitioners to simultaneously pursue two remedies at the same time. Learned counsel would further point out that the interim order staying issuance of the sale certificate was granted by this Court on 08.12.2015 in W.P.No.39544 of 2015 and the same stood extended up to 31.12.2015. Even thereafter, W.P.M.P.No.726 of 2016 was filed by the petitioners seeking further extension of time. However, as no action was taken thereupon despite expiry of the stipulated period on

31.12.2015, the auction purchasers paid the balance 75% of the sale consideration on 21.01.2016 and the bank took further steps by issuing and registering a sale certificate in their favour. Learned counsel would state that in the light of these circumstances, the petitioners must be deemed to have waived their right to raise any objection as regards any procedural violation in making the deposit. He would state that the auction purchasers spent Rs.52,00,000/- to renovate the property and that no valid grounds are made out at this stage to nullify the sale in their favour.

In reply, Sri Vedula Venkataramana, learned senior counsel, would state that there is no scope for waiver in so far as Rule 9(3) of the Rules of 2002 is concerned, relating to deposit of 25% of the bid amount on the same day and that failure to comply with this mandatory norm vitiated the sale. He would point out that, in any event, lapse of a mere six months would not be sufficient to infer waiver by the petitioners and that the writ petition is maintainable. He would assert that failure on the part of the petitioners to comply with the conditional order granted by this Court in W.P.No.39544 of 2015 is of no relevance when deviation from the prescribed procedure by the bank, in conducting the sale, is manifest.

At the outset, it may be noted that the SARFAESI Act overrides other laws. The Competition Act, 2003 therefore has no role to play in the present case. Further, in the light of the scheme framed under the SARFAESI Act, there is no absolute bar to a sale being knocked down at the reserve price or in favour of a sole bidder at just over the reserve price. Arguments in this regard are therefore rejected.

That being said, the procedure prescribed under Rule 9 of the Rules of 2002 for conducting the sale is mandatory. However, in

GENERAL MANAGER, SRI SIDDESHWARA COOPERATIVE BANK LIMITED V/s. IKBAL[1], the Supreme Court, having affirmed the mandatory nature of this Rule, went on to observe that even if a provision is mandatory, it can always be waived by the party for whose benefit it has been made. It was further observed that Rule 9(1) of the Rules of 2002 was for the benefit of the borrower, while Rules 9(3) and 9(4) thereof were for the benefit of the secured creditor or for the benefit of the borrower and therefore, the secured creditor and the borrower can lawfully waive their rights. The Supreme Court held that these provisions neither expressly nor contextually indicate otherwise. It was however cautioned that the question as to whether there was 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.

In ***MATHEW VARGHESE V/s. M.AMRITHA KUMAR***[2], the Supreme Court again upheld the mandatory nature of Rules 8 and 9 of the Rules of 2002 but did not have occasion to go into the issue as to whether the same could be waived by the party for whose benefit they were made. This aspect of the matter was made clear in ***VASU P. SHETTY V/s. HOTEL VANDANA PALACE***[3], wherein the Supreme Court observed that there is no conflict between the aforestated two judgments as ***MATHEW VARGHESE***[2] on the one hand, and ***IKBAL***[1] on the other, held that Rules 8 and 9 of the Rules of 2002 were mandatory but ***IKBAL***[1] proceeded further to lay down the principle that these provisions were for the benefit of the borrower/secured creditor and the borrower/secured creditor can always waive those procedural requirements.

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[1] (2013) 10 SCC 83
[2] (2014) 5 SCC 610
[3] (2014) 5 SCC 660

The legal position is therefore clear that though the procedure prescribed under Rule 9 of the Rules of 2002 is mandatory, it is not sacrosanct and in a given case, the facts may demonstrate that the borrower, for whose ultimate benefit the said procedure has been formulated, can waive such procedural requirements.

Rule 9(3) of the Rules of 2002 postulates that on every sale of immovable property, the purchaser shall immediately pay a deposit of 25% of the amount of the sale price to the authorized officer and in default of such deposit, the property shall forthwith be sold again. Rule 9(4) of the Rules of 2002 goes on to state that the balance amount of purchase price shall be paid by the purchaser to the authorized officer on or before the fifteenth day of confirmation of the sale of the immovable property or such extended period, as may be agreed upon in writing between the parties.

In the present case, it is an admitted fact that the auction purchasers did not deposit 25% of the bid amount immediately, i.e., on the date of the sale, 03.12.2015. However, the petitioners seem to have been well aware of this fact as they specifically stated in their writ affidavit in W.P.No.39544 of 2015, which was filed on 04.12.2015, as under:

> '13. It is submitted that though the sale was proposed on 03.12.2015, the 25% of the sale consideration is to be deposited within 48 hours from the date of confirmation of sale. The petitioners have information that no such amount was deposited and therefore no prejudice would be caused to anybody. It is further submitted that the petitioners are ready to deposit the entire overdue amounts as directed by this Hon'ble Court.'

Significantly, the petitioners secured an order on 08.12.2015 restraining the bank from issuing a sale certificate to the auction purchaser, though this order was subject to the condition that they should deposit a sum of Rs.40,00,000/- within ten days from that day. The time to do so was extended, *vide* order dated 23.12.2015, up to 31.12.2015. In effect, the petitioners themselves were responsible for the sale process being stalled from 08.12.2015 to 31.12.2015. There is no indication as to when the sale was confirmed in favour of the auction purchasers, requiring them to deposit the balance 75% of the sale consideration within fifteen days thereafter. In any event, it is an admitted fact that the said amount was deposited on 21.01.2016 and the bank issued and registered the sale certificate in their favour. Therefore, there appears to be no delay on their part in making the balance payment of 75% of the sale consideration. The demonstrable violation is as regards the deposit of 25% of the bid amount on the date of the sale. However, as already stated *supra*, the petitioners seem to have been well aware of the same as is clear from their affidavit dated 04.12.2015 filed in W.P.No.39544 of 2015. That apart, the bank filed its counter on 07.01.2016 stating that the auction purchasers had deposited 25% of the bid amount only on 05.12.2015. The petitioners' knowledge of this procedural violation therefore dates back to the date of the auction sale, 03.12.2015 itself, or at least to 07.01.2016. However, they did not choose to raise this aspect and it was only on 12.07.2016 that W.P.No.22852 of 2016 was filed raising this aspect. In the interregnum, nearly six months elapsed since the issuance of the registered sale certificate to the auction purchasers.

The facts therefore speak for themselves and clinchingly establish that the petitioners did not choose to protest against the statutory violation of the procedure prescribed under Rule 9(3) of the Rules of 2002 at the earliest point of time available to them or at least after filing of the counter affidavit by the bank in W.P.No.39544 of

2015, on 07.01.2016. Their continued inaction despite having knowledge of this fact for over six months from that date must be understood to mean that they waived their right to protest against such statutory violation thereafter. In this regard, six months delay, in our opinion, would be fatal.

In that view of the matter, it is too late in the day for the petitioners to now raise the issue of violation of Rule 9(3) of the Rules of 2002 having allowed matters to crystallize to the extent of a registered sale certificate being issued to the auction purchasers on 21.01.2016 and thereby, enabling them to invest their monies in renovation of the property purchased by them.

As the petitioners, in their own wisdom, chose to prosecute this writ petition instead of raising these issues in their pending securitization application, we have adjudicated the matter on merits. W.P.No.22852 of 2016 is therefore devoid of merit and is accordingly dismissed. W.P.No.39544 of 2015, as already stated *supra*, has become infructuous and is also dismissed on that ground.

Pending Miscellaneous Petitions, if any, shall also stand dismissed in both cases. No order as to costs.

SANJAY KUMAR,J

Dr.SHAMEEM AKTHER,J

4th AUGUST, 2017
PGS