HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

<u>WRIT PETITION No.6151 of 2007</u>

<u>ORDER</u>:

1) The petitioner, who is the proprietor of Tirumala Tyre Retreading Company, preferred the present Writ Petition, aggrieved by the action of the second respondent in conducting sale of 298 sq. yards of site with structures therein, situated within the limits of Satyanarayanapuram, Ongole Municipality, as illegal and improper.

2) The petitioner herein claims to be the absolute owner and possessor of the above mentioned site. He is said to have established a small-scale industry and with a view to expand the same, obtained financial aid from the second respondent. He applied for a loan in the year 2004 and an amount of Rs.7,27,021/- was sanctioned on 20.12.2004, which was to be repaid in 36 monthly instalments. The petitioner claims to have repaid a sum of Rs.2,10,000/- in various instalments and thereafter paid Rs.1,00,000/- on 22.02.2007 and another sum of Rs.1,00,000/- on 01.03.2007. In the second week of January, 2007, the petitioner learnt about a publication dated 11.12.2006 in Eenadu Telugu daily dated 19.12.2006, wherein the second respondent advertised to sell the unit of the petitioner. Immediately he is said to have approached the second respondent with a request to furnish a copy of the account and the outstanding balance, so as to raise funds and pay the same at once. It is the case of the petitioner that the second respondent granted three months

time for payment of entire balance and that the second respondent also instructed the petitioner to pay a sum of Rs.2,00,000/- within one month. With difficulty, the petitioner is alleged to have raised considerable amount of money and paid Rs.1,00,000/- on 22.02.2007 and another Rs.1,00,000/- on 01.03.2007. The averments in the affidavit show that the second respondent is said to have granted time till 04.04.2007 for clearing the balance amount. Though he was granted time to pay the entire amount by 04.04.2007, he noticed respondents 2 to 5 moving near his site and undertaking a survey work. When questioned, he was informed that the property was sold to the fifth respondent at Rs.16.50 lakhs. Challenging the action of the second respondent in selling the property at a meager amount and without following procedure contemplated under law, the present Writ Petition is filed.

3) On 26.03.2007, this Court, while issuing notice before admission granted interim stay all further proceedings including confirmation of sale on a condition that the petitioner shall deposit the due amount within three weeks from that day. Within the time stipulated the petitioner complied with the terms of the interim order.

4) Learned counsel for the petitioner mainly submits that the sale conducted without a notice under Section 30 of the State Financial Corporations Act, 1951 (for short "the Act") is illegal and improper.

According to him, the procedure of sale under Section 29 of the Act, which should be by way of tender and public auction, was not followed in the instant case. It is his case that there is no public auction, while affecting the sale. He further submits that though notice under Section 30 of the Act is mandatory, the same was not served. He further pleads that the entire transaction was an act of conspiracy and fraud played by respondents 2 to 5. It is pleaded that, but for the conspiracy between R-2 to R-5, the sale could not have taken place at such a low price, violating the circulars issued by the State Financial Corporation from time to time. He further submits that though the petitioner deposited an amount of Rs.2,00,000/- in the account of State Finance Corporation, Andhra Bank, Ongole Branch, the second respondent erred in conducting the auction. In view of the averments made in the counter and Clause 9 of the Circular dated 29.12.2001, he submits that the second respondent ought to have informed the promoter about the offer received from the highest bidder and give him an opportunity of redeeming the said amount as offered by the highest bidder, on the same terms, as per the norms. In the absence of such a procedure being followed, any action done by the second respondent is illegal and improper. According to him, the said clause is mandatory and is a pre-requisite before finalizing the sale. He further submits that the certificate dated 23.03.2007 issued by the Joint Sub-Registrar at Ongole, which shows the value of the property at Rs.44,34,240/-, would clearly reveal the collusion between the second respondent and fifth respondent, in selling away the property at a throw away price. He submits that had wide publicity been given with regard to the sale of the property, definitely it would have fetched far more than what has been obtained now. He submits that inspite of interim orders granted by this Court, the property was registered in favour of the fifth respondent, thereby finalizing the sale, which is illegal and improper.

5) A counter came to be filed by the second respondent disputing the averments made in the affidavit filed in support of the Writ Petition. According to him, the Corporation is totally unaware of the amounts said to have been remitted by the petitioner on 22.02.2007 and 01.03.2007 in the Bank account and that if these payments were made, definitely the Corporation, by no means, would have resorted to seizure of the unit and then put it to sale. It is said that as the loan amount was not paid within the time prescribed, the corporation had no other course, except to put the property to sale under Section 29 of the Act. It is said that had the petitioner really intended to pay the due amount, he should have deposited atleast 50% of the amount, on the demand made by the Corporation on 26.07.2016, which would have avoided this situation. It is stated that as per the procedure contemplated under the Act, the name of the highest bidder will be exhibited in the Notice Board of the Corporation and if any intending bidder wants to make a higher offer, over and above the existing

offer made before the expiry date, can deposit the stipulated EMD as specified and 15% of the offer amount by way of DD. It is urged that the petitioner was visiting the office of the State Finance Corporation every week and was aware about the price being displayed on the notice board and the procedure that was followed by the Corporation. Without raising any objection to the same, the present Writ Petition has been filed with a malafide intention. It is said that, the very issuance of notice on 26.07.2006, informing the petitioner about the outstanding due amount, itself is a notice under Section 30 of the Act. Insofar as the value of the property is concerned, it is said that the petitioner is under an illusion that the said property is worth about Rs.44,00,000/-. Lastly, it is contended that since the entire sale process is over and the property has been handed over to the fifth respondent under a panchanama, interference by this Court, at this stage, would be improper and incorrect.

6) The fifth respondent also filed counter disputing the averments made in the affidavit filed in support of the Writ Petition. The learned counsel for fifth respondent would submit that he is not aware about the procedure that is followed by the second respondent but denies any collusion between the second respondent and fifth respondent in the said transaction. According to him, on 09.04.2008 the Writ Petition was dismissed for non-prosecution and thereafter the same was restored on 30.04.2008 by setting aside the order

dated 09.04.2008. During the interregnum, the property was registered in the name of fifth respondent on 28.04.2008 vide document No.2954 of 2008. Relying upon the judgments of the Apex Court, he submits that even if a wrong decision was taken by the Corporation, the same cannot be challenged. It is his case that a bonafide purchaser, in an auction sale, is to be treated differently from a decree-holder purchasing such property. It is said that even if the decree is set-aside, the interest of the bonafide purchaser in the auction sale is saved.

7) An additional Counter came to be filed by the fifth respondent stating that the fifth respondent herein paid an amount of Rs.16,50,000/- much prior to the cut-off date, possession of the property was delivered to him under a panchanama and thereafter the sale deed came to be registered in his favour. It is stated that sale was confirmed even prior to the filing of the Writ Petition and as such the interim order granted by this Court, staying the confirmation of the sale, does not carry any weight. In view of the above, it is urged that there are no merits in the Writ Petition and the same is liable to be dismissed.

8) The issue that falls for consideration is whether the State Financial Corporation was justified in subjecting the property of the writ petitioner to auction?

9) As seen from the record, the petitioner herein obtained a loan of Rs.7,27,021/- from the second respondent on 20.12.2004, which was to be repaid in 36 monthly instalments. The petitioner is said to have paid an amount of Rs.2,10,000/- on various dates, towards instalments. On 11.12.2006 he came to know about a publication being made in local newspapers, with regard to sale of the petitioner's unit, for which he has taken the loan. It is his case that on an assurance given by the Manager of the second respondent Corporation, the petitioner paid an amount of Rs.1,00,000/- on 22.02.2007 and Rs.1,00,000/- on 01.03.2007. In the counter filed by the second respondent, it is stated that the Corporation was totally unaware of the amount said to have been remitted by the petitioner ie. Rs.1.00 lakh on 22.02.2007 and Rs.1.00 lakh on 01.03.2007 in the bank account and if these payments were made, the Corporation by no means would have resorted to seizure of the unit and put it to sale. It would be useful to extract the relevant portion of the counter, which is as under:

> "The corporation is totally unaware of the amounts said to have been remitted by the petitioner ie. an amount of Rs.1.00 lakh on 22.02.2007 and Rs.1.00 lakh on 01.03.2007 in the back account and the averment is totally false and the petitioner herein had neither submitted the proof of the said payment nor he had given us any information about the said payments being made. If these payments are made, the Corporation by no means would have resorted to seizing the unit and putting it to sale and if the petitioner had a genuine intention to repay

the amounts the illegal exercise of making false allegations against employees of the Corporation would not have been resorted to, and this would virtually reflect that the petitioner is trying to mislead the Court by making false averments."

10) It is the case of the Corporation that no amount was paid and that even if an amount was paid it was not to their knowledge. At the time of hearing of the matter, it was stated that the amount paid was kept in a suspense account, as the purpose for which it was paid was not disclosed. It would be useful to extract the contents of the deposit voucher dated 22.02.2007, which are as under:

"TRIPLICATE – APSFC'S COPY
CD A/c No.________L.F.______
CURRENT ACCOUNT – PAY IN SLIP
For cash only _______________
Andhra Bank
089 Ongole **Dt: 22.02.2007**
Paid into the credit of **ANDHRA PRADESH STATE FINANCIAL CORPORATION**
The sum of Rupees **One lakh only** towards **Arrears**
Name of the Unit : **TIRUMALA TYRE RETRADING COMPANY**
A/c Code No. **67246010**
Full Address of the Unit : **ONGOLE** **Rs.1,00,000/-**
Cashier/Clerk Entd. Manager/Officer Signature of Remitter"

11) A close perusal of the vouchers, the contents of which are not disputed, would show payments of Rs.1,00,000/- each were made in the month of February and March, 2007, to the credit of A.P.S.F.C. The purpose of which the payment was made was shown as 'towards arrears'. The loan account code number was mentioned as 67246010 and the name of the unit was shown as Tirumala Tyre Retreading Company.

12) The material papers filed by the Respondent Corporation, more particularly, the letter dated 08.12.2006 issued by the Branch Manager of the Corporation, to the petitioner informing about the non-payment of arrears in the loan account show the reference number as AFC/recovery/ 67246010/2006-07/3315 (Loan Account number). The reference number indicates the purpose for which the said notice was issued, namely, for recovery of the loan instalments. In the voucher, which has been filed along with the writ petition, the contents of which are not in dispute, there is a clear reference to the loan account number ie 67246010 and the purpose for which the amount was remitted. Therefore, the plea taken by the Corporation that they were not aware about the payment of the money; that the money paid was kept in suspense account and that they never asked the petitioner to pay the amount appears to be false, more so, when the payment voucher indicates loan account number, name of the company and the purpose of payment.

13) In view of the averments in the counter, which are extracted above, and as the material on record amply establish payment of money much prior to the date of auction, the plea of the petitioner that the said amount was paid pursuant to the demand made by the Corporation, cannot be brushed aside.

14) Section 29 of the Act deals with rights of Financial Corporations in case of default. Under the said Section the

Corporation is vested with an extraordinary power. It is relieved of the necessity to approach a civil Court either for a decree for the amount due or for the execution of the decree, if passed. It is not only assigned with the role of a trial Court and the Executing Court but is also relieved of the ordeal of trial and enquiry. With a stroke of pen, it can bring about sale of a property offered as security. **(Padmavathi Commercial Complex, Cuddapah and another v. A.P.State Financial Corporation, Hyderabad and others[1]).**

15) In ***Gajraj Jain v. State of Bihar*[2]** the Apex Court observed as under:

> "Under section 29(1), the corporation while enforcing the first charge was required to put the assets charged with the debt to sale and apply the sale proceeds in the manner stated in section 29(4). But before doing so, it is imperative to have the assets proposed to be sold, valued.
>
> In the case of M/s S.J.S. Business Enterprises (P) Ltd. v. State of Bihar & Ors. reported in [2004 (3) Scale 374], the Division Bench of this Court, it has been held that the Financial Corporation, in the matter of sale under Section 29, must act in accordance with the statute and must not act unreasonably. In this case, the Corporation fails on both the counts. It has neither complied with the provisions of sub-sections (1) and (4) of Section 29, nor has it acted fairly. The test of reasonableness has been laid down in the above judgment in which it is held that reasonableness is to be tested against the dominant consideration to secure the best price. Value or price is fixed by the market. In the case of a

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[1] (2009) 1 ALD 653
[2] (2004) 6 ALD 35 (SC)

going concern, one has to value the assets shown in the balance sheet. In our view, if the object of Section 29 of the Act is to obtain the best possible price then the Corporation ought to have called for the Valuation Report. This has not been done. There is no inventory of assets produced before us. The mortgaged assets of the Company could be sold on itemized basis or a whole, whichever is found on valuation to be more profitable. No particulars in that regard have been produced before us. If publicity and maximum participation is to be attained then the bidders should know the details of the assets (or itemized value). In the absence of the proper mechanism the auction-sale becomes only a pretence.....

16) In ***Karnataka State Industrial Investment and Development Corporation Limited v. Cavalet India Limited***[3] the Apex Court held as under:

"From the aforesaid, the legal principles that emerge are :

(i) The High Court while exercising its jurisdiction under Article 226of the Constitution does not sit as an appellate authority over the acts and deeds of the financial corporation and seek to correct them. The Doctrine of fairness does not convert the writ courts into appellate authorities over administrative authorities.

(ii) In a matter between the corporation and its debtor, a writ court has no say except in two situations;

(a) there is a statutory violation on the part of the corporation or

(b) where the corporation acts unfairly i.e., unreasonably.

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[3] (2005) 4 SCC 456

(iii) In commercial matters, the courts should not risk their judgments for the judgments of the bodies to which that task is assigned.

(iv) Unless the action of the financial corporation is mala fide, even a wrong decision taken by it is not open to challenge. It is not for the courts or a third party to substitute its decision, however more prudent, commercial or businesslike it may be, for the decision of the financial corporation. Hence, whatever the wisdom (or the lack of it) of the conduct of the corporation, the same cannot be assailed for making the corporation liable.

(v) In the matter of sale of public property, the dominant consideration is to secure the best price for the property to be sold and this could be achieved only when there is maximum public participation in the process of sale and everybody has an opportunity of making an offer.

(vi) Public auction is not the only mode to secure the best price by inviting maximum public participation, tender and negotiation could also be adapted.

(vii) The financial corporation is always expected to try and realize the maximum sale price by selling the assets by following a procedure which is transparent and acceptable, after due publicity, wherever possible and if any reason is indicated or cause shown for the default, the same has to be considered in its proper perspective and a conscious decision has to be taken as to whether action under Section 29 of the Act is called for. Thereafter, the modalities for disposal of seized unit have to be worked out.

(viii) Fairness cannot be a one-way street. The fairness required of the financial corporations cannot be carried to the extent of disabling them from recovering what is due to them.

While not insisting upon the borrower to honour the commitments undertaken by him, the financial corporation alone cannot be shackled hand and foot in the name of fairness.

(ix) Reasonableness is to be tested against the dominant consideration to secure the best price."

17) From the judgments referred to above, it is clear that it is the duty of the Corporation, which is holding the first charge, to obtain the best possible price, which means a fair market value, so as to protect its own interest as well as the interest of the subsequent charge holder and the mortgager.

18) The question now is whether the State Finance Corporation has sold the property at the best price.

19) Though the official respondent in the counter tried to contend that the market rate at the said place is only Rs.1500/- per square yard and the total value would be Rs.4,47,000/-, but the certificate issued by the Sub-Registrar Office, Ongole, shows that the market value of the property would be around Rs.44,34,240/-, as the said property is situated within the Ongole Municipality. The total fee payable towards registration was shown as Rs.4,21,275/-. Therefore, the plea of the respondents that the market value of the property is only Rs.4,47,000/- appears to be incorrect.

20) It may be true that tender of the un-official respondent, who quoted Rs.16,50,000/- as the value of the property was accepted, but

there is any amount of doubt whether the price quoted by the highest tenderer was put to auction, in accordance with the procedure established by law. Had it been put to auction, the Corporation would have definitely fetched more price. Therefore, the price quoted by the un-official respondent, which was accepted, appears to be far below the prevailing market value/price.

21) It is the case of the respondents that though the sale confirmation was done much prior to filing of the writ petition, this Court passed an interim order granting stay of all further proceedings including confirmation of sale. On 09.04.2008, the writ petition was dismissed for default and the same came to be restored on 30.04.2008 along with the interim order dated 26.03.2007. In the interregnum, the property came to be registered in the name of the fifth respondent on 28.04.2008. It would be useful to extract the order of this Court dated 30.04.2008 which is as under:

> "This is an application to set aside order dated 09.04.2007 and restore Writ Petition No.6151 of 2007 and WPMP No.7863 of 2007 to file.
>
> Having perused the averments contained in the affidavit filed in support of the application, I am satisfied that the petitioner made out sufficient cause for allowing the application.
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> The application is, accordingly, allowed and Writ Petition No.6151 of 2007 and WPMP No.7863 of 2007 are restored to

> file. This shall necessarily mean that the interim order dated 26.03.2007 granted in the Writ Petition stands restored."

22) From the above, it is clear that once the writ petition is restored, the same dates back to the date on which it was dismissed, meaning thereby that the interim order also gets restored to its file and will be in operation from the date on which the writ was dismissed for default. Therefore, any registration done during the said period will be in violation of law. Even assuming that the sale confirmation took place prior to the date of filing of the writ petition, but in view of the interim order passed, any registration done would be improper and incorrect.

23) One other factor which goes to the root of the matter is non-consideration of the circulars and office order dated 21.12.2001 issued by the Corporation. Clause (9) of the office order issued by the Corporation reads as under:

> "9. Once the sale proposal is accepted by the appropriate Committee, the original Promoters shall be intimated by the concerned BM/GM (O)/CGM (O)/Asst. General Manager of AMC about the offer received from the highest tenderer/bidder for giving an opportunity with 15 days notice by offering the assets at the price offered by the highest tenderer/bidder on the same terms of down payment within the stipulated period as per norms."

24) From a reading of the said clause, it is clear that before accepting the offer of the highest tenderer/bidder, a notice ought to

have been issued to the original promoter informing him the price offered by the highest bidder and also as to whether he is willing to comply with the same, on the same terms and conditions. The circular clearly states that the same is mandatory in nature. Admittedly, the condition stipulated therein was not followed by the Corporation. The counters filed by the parties do not anywhere indicate that such a procedure was followed. Even in the additional counter and the replies filed thereto, there is no answer to the said plea.

25) At this stage, the learned counsel for the fifth respondent would contend that since possession of the property was delivered to the fifth respondent and as the sale deed has been executed in his favour, the question of disturbing his possession and title is illegal and improper. In support of the same, he relied upon the judgment of the Apex Court in ***Sadashiv Prasad Singh v. Harendar Singh and others***[4]. In the said case, the Apex Court considered all the judgments of the Court on the said subject and held that the rights of an auction purchaser in the property purchased by him cannot be extinguished except in cases where the said purchase can be assailed on grounds of <u>fraud or collusion.</u>

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[4] Civil Appeal No.161 of 2014

26) In ***Velji Khimji and Company v. Official Liquidator of Hindustan Nitro Product (Gujarath) Limited and others***[5] the Apex Court held as under:

> "30. In the first case mentioned above ie. where the auction is not subject to confirmation by any authority, the auction is complete on the fall of the hammer, and certain rights accrue in favour of the auction-purchaser. However, where the auction is subject to subsequent confirmation by some authority (under a statute or terms of the auction) the auction is not complete and no rights accrue until the sale is confirmed by the said authority. Once, however, the sale is confirmed by that authority, certain rights accrue in favour of the auction-purchasers, and these rights cannot be extinguished except in exceptional cases such as fraud.
>
> 31. In the present case, the auction having been confirmed on 30.07.2003 by the Court it cannot be set aside unless some fraud or collusion has been proved. We are satisfied that no fraud or collusion has been established by anyone in this case."

27) In ***Janatha Textiles and Others v. Tax Recovery Officer and another***[6] the Apex Court, relying upon the judgments of the said Court in ***Zain-Ul-Abdin Khan v. Mohd. Asghar Ali Khan***[7] and **Ashwin S.Mehta and another v. Custodian and others**[8] observed that it is an established principle of law, that a third party auction purchaser's interest in the auctioned property continues to be protected, notwithstanding the underlying decree is subsequently

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[5] (2008) 9 SCC 299
[6] (2008) 12 SCC 582
[7] (1887-88) 15 IA 12
[8] (2006) 2 SCC 385

set aside or otherwise. In the former event even if the decree is *set aside* the interest of bonafide purchaser in auction sale is saved.

28) In the instant case, the lis with regard to a sale between the Corporation and the un-official respondent, where the property of the petitioner was sold without following the procedure prescribed and for a very low price.

29) It is the specific case of the petitioner that the manager of the Corporation colluded with un-official respondent in selling the property as one of the relatives of the un-official respondent was working in the Corporation. Though the relationship and the involvement of the said person in the said sale was not established but fact remains that the property was sold at a very low price compared to its market value. As held earlier, though the market value of the property was shown to be Rs.44.00 lakhs but the same was put to auction at a rate far below the value. Further, there was no justification from the Manager of the Corporation to accept the tender of the fifth respondent without conducting any bid. An attempt is sought to be made now, contending that though the bid amount was displayed in the notice board none came forward quoting morethan the offer price. The same is strongly refuted by the learned counsel for the petitioner. In fact no material is forthcoming to show that such a process was followed.

30) Further, a specific plea was taken by the Corporation that no amount was paid by the writ petitioner during the month of February and March, 2007 and if amount was paid they would not have conducted the auction. As stated earlier, the record discloses deposit of amount in the account of Corporation. The voucher shows the loan account number, the purpose for which the amount was paid and also the name of the firm, which clearly demonstrates that the plea taken by the Corporation, is false and the same was being done only with a view to get over the illegal and collusive act of the Corporation. It is also to be noted here that pursuant to the interim order passed, the petitioner deposited the entire due amount in the month of April, 2007 itself. That being the position, the Corporation ought not to have hastely registered the property in favour of the un-official respondent on 28.04.2008, when the writ petition was dismissed for default i.e., a day before it was restored. As stated earlier, the writ petition was restored along with the interim order on 30.04.2008. Everything appears to have been done in haste and in violation of the circulars issued by the State Finance Corporation. No reasonable explanation is forthcoming from the official respondents. In view of the subsequent order of the High Court in restoring the writ petition and the interim orders passed, the registration of sale deed during the interregnum also stands to cloud. From all the aforesaid circumstances, the plea of fraud and collusion leading to selling away

of the property to the fifth respondent at a very low price, violating all the circulars, stands to reason.

31) Having regard to the above, the writ petition is allowed setting aside the sale and the consequential registration in favour of the fifth respondent. There shall be no order as to costs. Consequently, miscellaneous petitions, if any, pending shall stand closed.

JUSTICE C. PRAVEEN **KUMAR**

Dt:06.06.2017
gm/gkv