

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH

* * * *

WRIT PETITION No.1320 OF 2018

Between:

M/s. Solithro Private Limited

... Petitioner

and

The Debt Recovery Tribunal-I rep. by its
Registrar at Hyderabad and others

... Respondents

DATE OF JUDGMENT PRONOUNCEMENT: 27th JULY, 2018

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE T.AMARNATH GOUD

- 
1. Whether Reporters of Local newspapers may be allowed to see the judgment? Yes/No
 2. Whether copies of the judgment may be marked to Law Reporters/Journals Yes/No
 3. Whether His Lordship wishes to see the fair copy of the judgment? Yes/No

SANJAY KUMAR, J

T.AMARNATH GOUD, J

* THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE T.AMARNATH GOUD

+ WRIT PETITION No.1320 OF 2018

% DATED 27th JULY, 2018

Between:

M/s. Solithro Private Limited

... Petitioner

and

\$ The Debt Recovery Tribunal-I rep. by its
Registrar at Hyderabad and others

... Respondents

< Gist:

> Head Note:

! Counsel for petitioner : Sri Vedula Venkataramana and
M/s. Bharadwaj Associates

^ Counsel for respondent No.1 : --

^ Counsel for respondent No.2 : Sri Ch.Siva Reddy

^ Counsel for respondent No.3 : Sri Rahul Sarella

? CASES REFERRED:

1. (2010) 8 SCC 110
2. (2014) 5 SCC 610
3. (2013) 10 SCC 83
4. (2014) 5 SCC 660

THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE T.AMARNATH GOUD

WRIT PETITION NO.1320 OF 2018

ORDER

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

M/s. Axis Structures Private Limited, Hyderabad (*hereinafter*, 'the borrower company'), availed financial assistance from ING Vysya Bank Limited, Hyderabad, in the form of cash credit facility to the tune of Rs.10.00 Crore and non-fund based limit for issuance of guarantees/letters of credit to the tune of Rs.10.00 Crore. These facilities were availed in August, 2010. The borrower company created a security interest in relation to certain immovable property at Vivekananda Nagar Colony, Bagamerry Village, Balanagar Mandal, Ranga Reddy District. Thereafter, ING Vysya Bank Limited modified the terms of the loan sanction, *vide* letter dated 09.09.2010, requiring the borrower company to create a charge over the land admeasuring Ac.12.27 gts. in various sub-divisions of Sy.Nos.227 and 137 and an extent of Ac.3.15 gts. in Sy.No.228 of Shabhaspally Village, Shivvampet Mandal, Medak District. The borrower company accordingly mortgaged the said properties also as security for repayment of its loans to ING Vysya Bank Limited.

In course of time, the borrower company's loan account was classified as a non-performing asset and demand notice dated 09.06.2012 was issued by ING Vysya Bank Limited under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (*for brevity*, 'the SARFAESI Act'), quantifying the dues as on 31.05.2012 at Rs.10,70,12,208.20 ps. Possession notice dated 14.08.2012 was thereafter issued by ING Vysya Bank Limited 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'). Two attempts to sell the secured assets having failed, the third auction sale notice dated 21.11.2013 was published by ING Vysya Bank Limited under Rule 9(1) of the Rules of 2002 fixing the date of auction sale as 27.12.2013. M/s. Solithro Private Limited, Hyderabad, emerged the highest bidder for the land admeasuring Ac.16.02 gts., along with plant & machinery and buildings, in Sy.Nos.227, 137 and 228 of Shabhaspally Village, Shivvampet Mandal, Medak District, with a bid of Rs.2,60,99,658/-. Sale certificate dated 20.01.2014 was issued by ING Vysya Bank Limited to the auction purchaser upon payment of the total sale consideration. The said sale certificate was registered by the Sub-Registrar, Narsapur, Medak District, as Document No.650 of 2014, on 07.02.2014.

Prior thereto, Securitization Application No.120 of 2013 was filed by the borrower company before the Debts Recovery Tribunal-I, Hyderabad, under Section 17(1) of the SARFAESI Act, with the following prayer:

'In the circumstances stated above, it is prayed that this Hon'ble Tribunal, may be pleased to declare that the measures taken by the Respondent Bank u/s 13(4) of The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, including the Auction Notice of Sale through the process of Tender cum Bidding dated 21-1-2013 fixing the sale on 26-2-2013 in respect of the S.A schedule property, is illegal, arbitrary and against the rules and principles of natural justice and consequently set aside the measures taken under section 13(4) of the SARFAESI Act, 2002, including the Auction Notice of Sale through the process of Tender cum Bidding dated 21-1-2013 proposing to conduct the auction sale on 26-2-2013 and pass such other order or orders as this Hon'ble Tribunal may deem fit and proper in the circumstances of the case.'

Be it noted that the Auction Sale Notice dated 21.01.2013 represented the first attempt by ING Vysya Bank Limited to sell the property. The second attempt was through the Auction Sale Notice dated 07.05.2013 fixing the

date of auction sale as 18.06.2013. I.A.No.1906 of 2013 was filed by the borrower company in S.A.No.120 of 2013 seeking to challenge the same. Stay of the auction was granted subject to the condition that the borrower company deposit certain monies within a time frame. The borrower company did not abide by this condition but in the meanwhile, as the auction sale failed, ING Vysya Bank Limited issued the third auction sale notice dated 21.11.2013 fixing the date of auction sale as 27.12.2013. The borrower company filed I.A.No.4542 of 2013 in S.A.No.120 of 2013 seeking stay of the auction sale proposed to be held on 27.12.2013. However, by order dated 27.12.2013, the Tribunal declined to grant stay of the sale but directed ING Vysya Bank Limited not to confirm the sale till 10.01.2014, subject to the condition that the borrower company discharge its entire loan liability with ING Vysya Bank Limited on or before the said date. In the event it failed to do so, the Tribunal permitted ING Vysya Bank Limited to confirm the auction sale in favour of the highest bidder.

Aggrieved by this order, the borrower company filed W.P.No.1112 of 2014 before this Court. Its grievance therein was that the Tribunal ought not to have imposed the condition that it should discharge its entire loan liability to ING Vysya Bank Limited on or before 10.01.2014, when S.A.No.120 of 2013 was still pending. By order dated 21.01.2014, this Court dismissed the said writ petition taking note of the submission made on behalf of ING Vysya Bank Limited that as the borrower company had failed to make the payment before the stipulated date, the sale was confirmed in favour of the auction purchaser and the sale certificate was also issued to it on 20.01.2014 after receiving the entire sale consideration.

While so, by way of I.A.No.5231 of 2014 in S.A.No.120 of 2013 filed on 22.12.2014, the borrower company sought to introduce certain additional

paragraphs in the securitization application and also amend its main prayer.

Its main prayer, as per the amendment sought, reads as under:

'a) declare that the measures taken by the Respondent Bank u/s 13(4) of The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, including the Auction Notice of Sale through the process of Tender cum Bidding dated 21-1-2013 fixing the sale on 26-2-2013 in respect of the S.A schedule property, is illegal, arbitrary and against the rules and principles of natural justice and consequently set aside the measures taken under section 13(4) of the SARFAESI Act, 2002, including the Auction Notice of Sale through the process of Tender cum Bidding dated 21-1-2013 proposing to conduct the auction sale on 26-2-2013,

b) declare that the measures taken by the Respondent Bank u/s 13(4) of The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, including the Auction Notice of Sale through the process of Tender cum Bidding dated 21-11-2013 fixing the sale on 27-12-2013 in respect of the S.A schedule property and sale held on 27.12.2013 and also delivery of property on 07.02.2014 to the auction purchaser is illegal, arbitrary and against the rules and principles of natural justice and consequently set aside the measures taken under section 13(4) of the SARFAESI Act, 2002,

bb) declare that the measures taken by the Respondent Bank u/s 13(4) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, including the Auction Notice of Movables through the process of Tender cum Bidding dated 16.11.2014 fixing the auction on 22-12-2014 in respect of the Movables mentioned in the SA Schedule is illegal, arbitrary and against the rules and principles of natural justice and consequently set aside the measures taken under section 13(4) of the SARFAESI Act, 2002,

c) declare that the Applicant is entitled to Rs. 15.00 crores being damages for not allowing the credit facility as per sanction and for selling the SA schedule property far below price as if it is a private sale between the Bank and the auction purchaser without following the procedure laid down in law more particularly under SARFAESI Act.

d) to award the costs and pass such other order or orders as this Hon'ble Tribunal may deem fit and proper in the circumstances of the case.'

There is no indication of the aforestated amendment petition having been ordered by the Tribunal. However, by order dated 21.12.2017, the

Tribunal allowed S.A.No.120 of 2013 on the ground that ING Vysya Bank Limited failed to meticulously follow the SARFAESI Act and the Rules of 2002. The Tribunal accordingly quashed the measures initiated by ING Vysya Bank Limited in relation to the secured assets and left it free to it to initiate fresh proceedings. Aggrieved by this order, M/s. Solithro Private Limited, Hyderabad, the auction purchaser, filed this writ petition.

By interim order dated 19.01.2018, this Court took note of the fact that the petitioner-auction purchaser was not even put on notice in the proceedings before the Tribunal, but an adverse order was passed against it, and granted interim suspension of the said order.

It may be noted that ING Vysya Bank Limited merged with Kotak Mahindra Bank Limited pursuant to a scheme of amalgamation sanctioned by the Reserve Bank of India, *vide* order dated 31.03.2015. Pursuant thereto, the account of the borrower company stood transferred to Kotak Mahindra Bank Limited.

Heard Sri Vedula Venkataramana, learned senior counsel representing M/s.Bharadwaj Associates, learned counsel for the petitioner-auction purchaser, Sri Rahul Sarella, learned counsel for Kotak Mahindra Bank Limited/ING Vysya Bank Limited, and Sri Ch.Siva Reddy, learned counsel for the borrower company.

Perusal of the order under challenge demonstrates that the Tribunal proceeded under the assumption that the securitization application was directed against the possession notice and the first auction sale notice dated 21.01.2013. No mention was made by the Tribunal of the last auction sale notice dated 21.11.2013 and the sale held pursuant thereto on 27.12.2013, which were the subject matter of the amendment petition filed by the borrower company. It is therefore clear that the Tribunal did not even note

the factual position obtaining as on the date of disposal of the case. Significantly, no mention was made by the Tribunal as to the entry of an auction purchaser into the picture pursuant to the auction sale held on 27.12.2013. Having extracted the respective contentions of the borrower company and ING Vysya Bank Limited in the first 5 paragraphs of the order, the Tribunal framed the point for consideration in paragraph 6 as under:

‘Whether the applicant has made out valid ground for quashing the SARFAESI proceedings and the measures initiated by the respondent bank against the schedule property under the provisions of SARFAESI Act.’

The actual consideration by the Tribunal thereafter, in 3 short paragraphs, requires extraction:

‘7. I have gone through the material placed on record meticulously. The applicant contended that the demand notice was not served on him. The respondent bank has produced the copy of demand notice dated 09.06.2012 and the same was served on the applicant and postal acknowledgements were filed. The objections under section 13(3A) of SARFAESI Act vide letter dated 26.02.2012 has been adequately replied by the respondent bank vide letter dated 28.06.2012. The possession notice dated 14.8.2012 are served and published in two newspapers on 28.08.2012. Notice prior to sale dated 21.01.2013 was sent by regd post and acknowledged on 23.01.2013. The Auction notice was served on 26.02.2013 and published in two newspapers. The Respondent bank failed to file any evidence to prove that the possession notice was served and affixed on the SA schedule properties. Similarly, the said prior notice to auction/ sale were not affixed on the SA schedule properties. It is clearly established that the respondent bank failed to meticulously follow the SARFAESI Act and Security Interest (Enforcement) Rules, 2002.

In view of the above discussions, I find that the applicant made a valid ground for quashing the measures initiated by the Respondent Bank against the SA schedule property under SARFAESI Act and as such the SA.No.120/2013 is allowed.

8. In the result, SA.No.120 of 2013 is allowed. However, the Bank is free to initiate fresh proceedings under the SARFAESI Act for SA schedule property duly following the rules.

9. In the result, SA.No.120 of 2013 is allowed.’

At the outset, it would be apposite to deal with the issue of maintainability of this writ petition. Sri Ch.Siva Reddy, learned counsel, and Sri Rahul Sarella, learned counsel, would both contend that it is not maintainable as the petitioner-auction purchaser has an effective alternative remedy in the form of an appeal before the jurisdictional Debts Recovery Appellate Tribunal under Section 18 of the SARFAESI Act, if it has any grievance with the order dated 21.12.2017 passed in S.A.No.120 of 2013.

It may however be noted that refusal by this Court to entertain a writ petition on the ground of availability of an alternative remedy is in exercise of self-imposed restraint and it would ultimately depend upon the individual facts of the case as to whether this Court would choose to do so or not. In UNITED BANK OF INDIA V/s. SATYAWATI TONDON¹, the Supreme Court observed that the High Court would ordinarily not entertain a petition under Article 226 of the Constitution if an alternative remedy is available. But having said so, the Supreme Court observed that the powers conferred upon the High Court under Article 226 of the Constitution are very wide and there is no express limitation on exercise of that power and the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion.

In the case on hand, the very fact that the Tribunal did not even take note of the factual aspects obtaining as on the date of disposal of the securitisation application resulting in it passing an order adverse to a party, who was not even before it, is sufficient to demonstrate patent violation of the principles of natural justice. It is well settled that this Court, in exercise of writ jurisdiction, would interfere in a given case where violation of the principles of natural justice is manifest and mere existence of an alternative

¹ (2010) 8 SCC 110

remedy would be inconsequential in such circumstances. We are therefore not inclined to agree with the learned counsel that the petitioner-auction purchaser should be relegated to the ordinary remedy of preferring an appeal before the Debts Recovery Appellate Tribunal at Kolkata. The case on hand beseeches interference by this Court on grounds more than one.

As regards the terse and cryptic reasoning of the Tribunal, recorded in paragraphs 7 and 8 of the order under challenge, it may be noted that the Tribunal began by recording that ING Vysya Bank Limited had taken various steps in accordance with the statutory procedure but thereafter found that it failed to file any evidence to prove that the possession notice was affixed on the SA schedule properties. It further found that the auction sale notice was not affixed on the SA schedule properties and on these grounds, the Tribunal concluded that ING Vysya Bank Limited had failed to meticulously follow the procedure and this was taken to be sufficient for quashing the measures initiated by ING Vysya Bank Limited.

In this regard, it may be noted that Rule 8(1) of the Rules of 2002 requires the authorised officer of the secured creditor to deliver a possession notice, prepared as nearly as possible in Appendix-IV to the Rules of 2002, to the borrower and by affixing it on the outer door or at a conspicuous place of the property. It is not in dispute that the borrower company received the possession notice dated 04.08.2012. The complaint was that it had not been affixed on the SA schedule property. Affixture of such possession notice on the outer door or at a conspicuous place of the property is notice to the public at large. This is clear from the contents of the statutory format of the possession notice in Appendix-IV to the Rules of 2002. Thereunder, the borrower in particular and the public in general are cautioned not to deal with the property. In such a situation, it is not open to

the borrower company, having already received the possession notice dated 04.08.2012, to complain of failure on the part of ING Vysya Bank Limited in affixing the notice on the premises of the secured assets. If at all, such a grievance could be projected by a member of the general public who dealt with the secured assets in ignorance of the possession notice. Such is not the case presently.

As regards affixture of the auction sale notice, it is significant to note that Rule 9(1) of the Rules of 2002 only requires publication of such a notice in newspapers. There is no necessity to deliver a copy of such auction sale notice upon the borrower under Rule 9(1) of the Rules of 2002. The reasoning adopted by the Tribunal to invalidate the measures taken by ING Vysya Bank Limited under Section 13(4) of the SARFAESI Act is without legal basis and is therefore patently unsustainable.

Further, as already stated *supra*, the petitioner-auction purchaser was not even made a party to the securitisation application and the aforesaid order was passed behind its back.

Sri Vedula Venkataramana, learned senior counsel, would contend that it was for the borrower company, the applicant in the S.A., to take steps to implead the petitioner-auction purchaser as a party to the pending proceedings before the Tribunal and all the more so, in the light of the amendment petition filed by it therein.

Sri Ch.Siva Reddy, learned counsel, would however advert to the fact that the sale certificate issued by ING Vysya Bank Limited specifically recorded that it was being issued subject to the outcome and result of S.A.No.120 of 2013 pending before the Debts Recovery Tribunal, Hyderabad, and assert that, being well aware of the pendency of the case, the fault lies with the petitioner-auction purchaser in not getting itself impleaded therein.

Sri Rahul Sarella, learned counsel, would rely upon the averments made in the counter-affidavit filed by the Vice-President of Kotak Mahindra Bank Limited to the effect that the said bank was not even aware of the pendency of the proceedings before the Tribunal in relation to the subject securitization application until it received the order dated 21.12.2017 passed by the Tribunal therein.

It may be noted that the securitisation application, as originally framed, was directed against the first auction sale notice dated 21.01.2013 proposing to hold the auction sale on 26.02.2013. As the said auction sale came to naught, be it for whatever reason, challenge to the said auction sale was rendered purely academic. However, the borrower company filed I.A.No.5231 of 2014 in the said securitisation application on 22.12.2014 and sought to amend its main prayer by including a challenge to the third auction sale notice dated 21.11.2013 fixing the auction sale on 27.12.2013. Significantly, the borrower company also included a challenge to the auction sale actually held on 27.12.2013 and prayed for a declaration that the delivery of the SA schedule property on 07.02.2014 to the auction purchaser was illegal. Once it included such a relief in its prayer as per the amendment petition, it was incumbent upon the borrower company to also seek impleadment of the auction purchaser as a party to the securitisation application. However, no such steps were taken by the borrower company. That apart, as already stated *supra*, there is no indication of I.A.No.5231 of 2014 in S.A.No.120 of 2013 having been ordered at all, as the Tribunal proceeded to finally dispose of the S.A. in terms of the original prayer only.

It is therefore clear from the factual narrative set out hereinabove that the borrower company was well aware of the existence of the auction purchaser but despite the same, it did not choose to take steps to implead it

as a party to the pending securitisation application. It also did not take steps to get its amendment petition ordered whereby the amended prayer, as put forth by it, would have fallen for consideration before the Tribunal. In effect, the order passed by the Tribunal invalidating all the measures taken by ING Vysya Bank Limited, without even taking note of the factual aspects obtaining as on the date of the disposal of the securitisation application, whereby the rights of the petitioner-auction purchaser stood nullified, cannot be sustained. The Tribunal could not have set aside the auction sale held in favour of the petitioner-auction purchaser when there was no challenge to it and without even affording the petitioner-auction purchaser an opportunity of hearing. However, as already pointed out *supra*, the Tribunal seems to have been completely unaware of the facts and proceeded only on the strength of the original prayer in the securitisation application, blissfully ignorant of all that had transpired thereafter.

Though the demonstrable violation of the principles of natural justice is sufficient in itself to allow the writ petition, we deem it appropriate to also deal with a new issue raised before us by the borrower company. Sri Ch.Siva Reddy, learned counsel, would contend that the auction sale notice dated 21.11.2013 was illegal as ING Vysya Bank Limited failed to issue a notice prior thereto under Rule 8(6) of the Rules of 2002. He would rely upon the judgment of the Supreme Court in MATHEW VARGHEE V/ s. AMRITHA KUMAR², wherein it was held that the procedure prescribed in Rules 8(6) and 9(1) of the Rules of 2002 is binding and mandatory.

It may however be noted that in SRI SIDDESHWARA COOPERATIVE BANK LTD. V/ s. IKBAL³ and VASU P. SHETTY V/ s.

² (2014) 5 SCC 610

³ (2013) 10 SCC 83

HOTEL VANDANA PALACE⁴, the Supreme Court made it clear that though the procedure under Rules 8(6) and 9(1) of the Rules of 2002 is mandatory, waiver of the same is possible as the said procedure is put in place for the benefit of the borrower, amongst others, and in the event the borrower chooses to ignore any lapse in adherence to the said procedure, it would not invalidate the sale, notwithstanding such irregularities therein.

In the case on hand, the auction sale was held on 27.12.2013 pursuant to the auction sale notice dated 21.11.2013. Though the borrower company filed I.A.No.4542 of 2013 in S.A.No.120 of 2013 seeking stay of the said auction sale and secured a conditional order therein, it filed W.P.No.1112 of 2014 before this Court assailing the condition imposed but suffered the dismissal of the writ petition on 21.01.2014. It did not choose to take the matter further and kept quiet till 22.12.2014, when it filed I.A.No.5231 of 2014 in S.A.No.120 of 2013 seeking to lay a challenge to the auction sale notice dated 21.11.2013 and the sale held pursuant thereto on 27.12.2013. Inaction and delay on the part of the borrower company in pursuing its challenge to the said auction sale notice, on the ground of non-compliance with the procedure laid down in Rule 8(6) of the Rules of 2002, is therefore writ large. It thereafter proceeded to argue the securitisation application before the Tribunal without even ensuring amendment of its prayer and without impleading the vitally affected party, the petitioner-auction purchaser. In these circumstances, the borrower company is deemed to have waived any right that it had to protest against violation of the procedure prescribed under Rule 8(6) of the Rules of 2002.

On the above analysis, this Court finds that the order dated 21.12.2017 passed by the Tribunal in S.A.No.120 of 2013 is unsustainable

⁴ (2014) 5 SCC 660

both on facts and in law. It is indeed distressing to note that the Tribunal proceeded to dispose of the said securitisation application in utter and complete ignorance of the full facts and without taking note of the pleadings that were available on file.

The writ petition is accordingly allowed setting aside the order dated 21.12.2017 passed by the Debts Recovery Tribunal-I, Hyderabad, in S.A.No.120 of 2013. Pending miscellaneous petitions, if any, shall stand closed in the light of this final order. No order as to costs.

SANJAY KUMAR, J

T.AMARNATH GOUD, J

27th JULY, 2018

Note : L.R.Copy to be marked.

(B/O) Svv

