

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

WRIT PETITION No.5273 OF 2018

ORDER
(Per Sri Justice Sanjay Kumar)

On 02.02.2018, the Indian Overseas Bank (*hereinafter*, 'the bank') conducted an auction sale of the property mortgaged with it by the fourth respondent company, under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (*for short*, 'the SARFAESI Act'), for recovery of its dues. The petitioner company emerged the highest bidder in the said sale with a bid of Rs.9,01,04,000/- and paid 25% of the bid amount. However, by letter dated 09.02.2018, the Authorized Officer of the bank stated that his controlling office had advised cancellation of the auction and informed the petitioner company that the auction sale stood cancelled. The amount deposited by the petitioner company was refunded online on the very same day. Aggrieved by the cancellation of the sale, the petitioner company is before this Court alleging that the same was contrary to the provisions of the SARFAESI Act. Apart from a direction to set aside the letter dated 09.02.2018, the petitioner company also seeks a direction to the bank to confirm the sale upon receiving the balance sale consideration and to issue it a sale certificate.

The property brought to sale on 02.02.2018 is an extent of Ac.0.35 guntas of land in Sy.Nos.40, 54 and 55/1 of Raidurg Nav Khalsa Village, Serilingampally Mandal, Ranga Reddy District. This land was mortgaged with the bank by the fourth respondent company to secure the loan facility availed by it. The said loan account was classified as a non-performing asset, leading to initiation of proceedings under the SARFAESI Act culminating in the e-auction notice dated 27.12.2017 under Rule 9(1) of the Security

Interest (Enforcement) Rules, 2002 (*for brevity*, 'the Rules of 2002'), whereunder the e-auction sale was scheduled to be held on 02.02.2018. The reserve price fixed for the property was Rs.8,12,04,000/-. The petitioner company emerged the highest bidder in the said sale with a bid of Rs.9,01,04,000/-. However, a week later, the Authorized Officer of the bank addressed the letter dated 09.02.2018 informing the petitioner company that the said auction sale stood cancelled. This letter reads as under:

'M/s Sri Vaishnaoi Automobiles India Pvt Ltd
Plot No.11 & 12, Amar society
Begumpet, Kavuri Hills
Hyderabad

Dear Sir/Madam,

Sub: Sale of immovable property in an extent of 35.958 guntas at S.No.40, 54, 055/1, Raidurg New Khalsa, Serilingampally village in the name of Ms.Neha Agarwal w/o Arun Kumar Agarwal.

Ref: Your bid for the captioned property dated 29.01.2018

We refer to the bid form submitted by you for participating in the E-auction to be conducted for the captioned property (fully described above) and pleased to inform you that your company has emerged as successful bidder. As per our internal guidelines the sale is to be confirmed by our controlling office. Today our controlling office advised us to cancel the auction. Hence under the authorities derived from SARFAESI Act, it is hereby informed that the auction conducted for the captioned property stands cancelled. The amount deposited by you shall be remitted back into your account details of which mentioned in the bid form. However as we are intending to reauction the property you may participate in the same.

Thanking you,

Yours faithfully,

Sd/-

AUTHORISED OFFICER'

Sri Vedula Venkataramana, learned senior counsel appearing for Sri S.Ashok Anand Kumar, learned counsel for the petitioner company, would contend that once the property was brought to sale and the highest bid offered in the said sale was above the reserve price fixed therefor by the secured creditor and its Authorized Officer, no discretion was left in them to cancel the sale in the context of the statutory scheme obtaining under the

SARFAESI Act and the Rules of 2002, on the premise that the property may perhaps fetch a higher price. Learned senior counsel would point out that the letter dated 09.02.2018 did not even disclose the reason for cancellation of the sale but the same was revealed in the counter-affidavit filed by the bank, i.e., the hope of the bank to secure a better price. He would state that though the bank proceeded to put the property to sale afresh on 03.03.2018, resulting in a highest bid of Rs.14,98,00,000/-, that was only a fortuitous happenstance and cannot be taken into consideration to justify cancellation of the earlier sale. He would assert that acceptance of 25% of the bid amount from the petitioner company by the bank amounted to confirmation of the sale and the sale could not have been cancelled thereafter, as rights stood crystallized in the petitioner company. He would argue that there is no controlling office over and above the Authorized Officer in the statutory scheme and, therefore, intervention of such controlling office, as borne out by the impugned letter, has no legal basis. Learned senior counsel would place reliance on case law in support of his contention that unless glaring illegality, irregularity or fraud is patent, an auction sale would not be liable to be cancelled. He would contend that expectation of a better sale price is not a ground for resorting to cancellation of a sale, as the same would be purely within the realm of hope and providence. Learned senior counsel would fairly point out that one of the conditions of the auction was that the Authorized Officer had the absolute right to cancel the sale without assigning any reason whatsoever, but would argue that mere existence of such power would not validate exercise thereof without just cause. He would assert that exercise of such power in the circumstances obtaining is vitiated by arbitrariness and seek invalidation of the letter dated 09.02.2018 along with consequential confirmation of the sale held on 02.02.2018.

Sri E.Madan Mohan Rao, learned counsel for the bank, would reiterate the contents of the counter-affidavit filed by the Authorized Officer of the bank. Therein, while confirming the factual aspects set out *supra*, the Authorized Officer pointed out that the outstanding dues of the fourth respondent company stood at Rs.31,88,00,411-50 as on 19.12.2017, apart from future interest and costs. He stated that the competent authority of the bank felt that the bid offered by the petitioner company was not appropriate to the market value of the property sold and that it would fetch more. It was on this basis that the bank was stated to have taken a decision to cancel the sale held on 02.02.2018 and a fresh sale notice was issued on 09.02.2018, fixing the next auction sale on 03.03.2018. He justified cancellation of the auction held on 02.02.2018 as the property was capable of fetching a better price, as was duly proved in the subsequent auction sale held on 03.03.2018. The reserve price for the property in the subsequent sale was enhanced to 12,63,00,000/- and the highest bid for it went up to 14,98,00,000/-. He stated that the sale amount was deposited by the highest bidder on 30.04.2018 and a sale certificate was also issued in its favour on the same day. He pointed out that though the letter dated 09.02.2018 invited the petitioner company to participate in the fresh auction, it failed to do so. He concluded by stating that mere deposit of 25% of the bid amount did not amount to confirmation of the sale by the bank, the secured creditor, and therefore, cancellation thereof was not in violation of the statutory scheme.

No reply-affidavit was filed rebutting the averments in the bank's counter-affidavit.

The fourth respondent company did not choose to file a counter-affidavit. Sri Sharad Sanghi, its learned counsel, did not venture to advance arguments, one way or the other, on the issue arising for consideration. He

however stated that a securitization application was filed by his client, under Section 17 of the SARFAESI Act, against the auction sale held on 02.02.2018.

In reply, Sri Vedula Venkataramana, learned senior counsel, would assert that in terms of Rule 8(5) of the Rules of 2002, once a reserve price was fixed by the Authorized Officer after due consultation with it, the bank could not find fault with the petitioner company's highest bid, which was over and above such reserve price. He would contend that enhancement of the reserve price in the auction held just a month later was no basis for invalidating the earlier auction sale, when the bank, in its own wisdom, decided to peg the reserve price earlier at Rs.8,12,04,000/-. Learned senior counsel would argue that allowing the bank and its Authorized Officer such discretion to revise the reserve price as per their whims and fancies would be arming them with unbridled power and there would be no finality attaching to any auction sale. He would further contend that the Rules of 2002 do not lay down any particular procedure to be followed for confirmation of a sale and as the bank accepted 25% of the petitioner company's bid amount, it would amount to confirmation of the sale. He would reiterate his prayer for relief and to allow the writ petition.

The short point that falls for consideration is whether cancellation of the auction sale held by the bank on 02.02.2018 is lawful and valid. In this regard, it would be necessary to examine the statutory scheme and structure of the Rules of 2002. Rule 9 of the Rules of 2002, captioned 'Time of sale, issues of sale certificate and delivery of possession, etc.', lays down the step-by-step procedure to be followed by the Authorized Officer while bringing an immovable secured asset to sale. It may also be noted that Rule 8(5) of the Rules of 2002 speaks of the Authorized Officer obtaining valuation of such property from an approved valuer and thereafter fixing the

reserve price for such property in consultation with the secured creditor. Rule 9(2) provides that the sale shall be confirmed in favour of the purchaser who offers the highest sale price to the Authorized Officer but the same shall be subject to confirmation by the secured creditor. Rule 9(3) postulates that on the sale of the immovable secured asset, the purchaser shall deposit 25% of the sale price either on the same day or not later than the next working day. In default of such deposit, the property shall be sold again.

Rule 9(4) is of relevance and it reads as under:

‘9(4) The balance amount of purchase price payable shall be paid by the purchaser to the authorized officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the purchaser and the secured creditor, in any case not exceeding three months.’

The aforestated statutory scheme indicates that it is only upon actual confirmation of the sale of the immovable secured asset by the secured creditor that the liability of the auction purchaser to pay the balance amount of the purchase price arises. Rule 9(2) makes this clear as it stipulates that even if the sale is confirmed by the Authorized Officer in favour of the purchaser who offered the highest sale price in his bid, the same shall be subject to confirmation by the secured creditor. Mere deposit of 25% of the sale consideration in terms of Rule 9(3) therefore does not have the effect of confirmation of such auction sale. Had the petitioner company failed to make the said deposit, the property had to be sold again as per Rule 9(3).

No doubt, when the Authorized Officer fixed the reserve price for the property at Rs.8,12,04,000/-, he must have done so after due consultation with the bank, the secured creditor. It is unfortunate that sufficient application of mind was missing as to this aspect at that point of time, resulting in the auction sale being knocked down in favour of the petitioner company at a bid of Rs.9,01,04,000/- on 02.02.2018. However, better sense

seems to have prevailed when the bank examined the issue after the said sale and it realized that the subject property was capable of fetching a better price. Though the impugned letter dated 09.02.2018 mentions a 'controlling office' of the Authorized Officer, the reference was obviously to the secured creditor, i.e., the management of the bank. As it was ultimately the bank, being the secured creditor, which had to confirm the said sale, intervention by the bank, be it called a 'controlling office' or otherwise, is not illegal or unjustified. It is only upon such intervention that the bank could have confirmed the sale under Rule 9(2). Only then, a letter of confirmation would be issued to the auction purchaser calling upon it to pay the balance 75% of the sale consideration. Admittedly, in the case on hand, this did not come to pass.

Sri Vedula Venkataramana, learned senior counsel, placed reliance on M/ s. KAYJAY INDUSTRIES (P) LTD. V/ s. M/ s. ASNEW DRUMS (P) LTD.¹. This decision pertained to cancellation of a Court sale on the ground that the best price was not secured. In this context, the Supreme Court observed that a Court should not go on adjourning the sale till a good price is got, as it is a notorious fact that Court sales and market prices are distant neighbours. It was further observed that decree holders may never be able to get the property of the debtor sold and it would not be right to judge the unfairness of the price by hindsight wisdom. Though these observations are relied upon by Sri Vedula Venkataramana, learned senior counsel, we find that the Supreme Court also referred to its earlier observations in NEYALKHA AND SONS V/ s. RAMANYA DAS², which are worthy of extraction.

¹ (1974) 2 SCC 213

² (1969) 3 SCC 537

'The principles which should govern confirmation of sales are well established. Where the acceptance of the offer by the Commissioners is subject to confirmation of the Court the offerer does not by mere acceptance get any vested right in the property so that he may demand automatic confirmation of his offer. The condition of confirmation by the Court operates as a safeguard against the property being sold at inadequate price whether or not it is a consequence of any irregularity or fraud in the conduct of the sale. In every case it is the duty of the Court to satisfy itself that having regard to the market value of the property the price offered is reasonable. Unless the Court is satisfied about the adequacy of the price the act of confirmation of the sale would not be a proper exercise of judicial discretion.'

The above principle would squarely apply to the case on hand. The condition precedent of confirmation of the sale operates as a safeguard against the property being sold at an inadequate price or with some irregularity. This principle has been incorporated into Rules 9(2) and 9(4) of the Rules of 2002, which categorically require confirmation of the auction sale by the secured creditor. Therefore, the power vesting in the secured creditor to examine all aspects of the auction sale prior to bestowing such confirmation upon it cannot be whittled down. In the absence of such confirmation by the secured creditor, an auction purchaser cannot claim a concluded sale or any vested rights, even if he deposits 25% of the sale consideration. The observations of the Supreme Court in Para 24 in MEERUT DEVELOPMENT AUTHORITY V/ s. ASSN. OF MANAGEMENT STUDIES³ to the effect that the authority would have the right not to accept even the highest bid if there exist good and sufficient reasons, such as, the highest bid not representing the market price, may also be taken note of in this regard.

³ (2009) 6 SCC 171

Learned senior counsel also placed reliance on UNION OF INDIA V/ s. DINESH ENGINEERING CORPORATION⁴. This decision pertained to rejection of a tender pursuant to a clause in the guidelines, which entitled the Railways to reject any tender without assigning reasons, and is pressed into service in connection with the auction condition that the Authorized Officer could cancel the auction sale without any reason. The Supreme Court observed therein that notwithstanding existence of such power, the same should be exercised within the realm of the object for which the clause was incorporated and would not give arbitrary power to the Railways to reject the bid offered by a party merely because it had the power to do so.

We are however of the opinion that the above decision has no bearing in the case on hand. The auction sale in the instant case was never confirmed by the bank and its cancellation was attributable to the bank, the secured creditor, and not it's Authorized Officer, who merely communicated its decision to the petitioner company. It was not in exercise of the Authorized Officer's power under the auction conditions that the sale was cancelled.

On the above analysis, we find that there was no concluded contract of sale on 02.02.2018, even after deposit of 25% of the sale consideration by the petitioner company. The statutory scheme of the Rules of 2002, as is evident from Rules 9(2) and 9(4) thereof, postulates that confirmation of the sale by the secured creditor is a condition precedent and only thereafter, the duty would be cast upon the auction purchaser to deposit the balance 75% of the sale consideration. Admittedly, that situation did not materialize in the present case. Though the bank ought to have been more careful in accepting the reserve price fixed for the earlier auction, its failure in that regard is not

⁴ AIR 2001 SC 3887

sufficient in itself to validate the claim of the petitioner company that its bid must be accepted notwithstanding the subsequent cancellation of the sale by the bank. The events that came to pass thereafter, *viz.*, the auction sale held on 03.03.2018 validated the surmise of the bank that the property in question would fetch a higher price. In effect, the opinion of the bank cannot be said to be without realistic basis. Viewed from any angle, we find no grounds to interfere with the cancellation of the auction sale held on 02.02.2018 by the bank. The impugned letter dated 09.02.2018 informing the petitioner company of this decision therefore does not warrant interference.

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.



SANJAY KUMAR,J

T.AMARNATH GOUD,J

12th JULY, 2018

PGS