THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE P.KESHAVA RAO

WRIT PETITION NO.35208 OF 2016

O R D E R
(*Per Hon'ble Sri Justice Sanjay Kumar*)

The petitioners, being auction purchasers, assail the final order dated 15.09.2016 passed by the Debts Recovery Tribunal, Visakhapatnam (*hereinafter*, 'the Tribunal at Visakhapatnam'), in S.A.No.11 of 2010, invalidating the sale in their favour. They seek a consequential direction to the Union Bank of India (*hereinafter*, 'the bank') to register their sale certificates dated 18.02.2010.

By order dated 20.10.2016, this Court granted interim stay of the operation of the order under challenge.

Comprehensive arguments having been advanced by Sri P.Rama Sharana Sharma, learned counsel for the petitioners/auction purchasers, Sri Maruthi Jadhav, learned counsel for the bank, and Sri S.Niranjan Reddy, learned senior counsel representing Sri J.Srinadh Reddy, learned counsel for the borrowers, the third and fourth respondents, the matter is amenable to final disposal at the stage of admission.

The petitioners are the auction purchasers of Plot No.126/3/3576, admeasuring Ac.0.81 cents, and Plot Nos.135/1 & 136/2, admeasuring Ac.0.87 cents, in Rayagadh Town in the State of Orissa, having emerged the highest bidders at Rs.1,90,98,099/-, in the auction sale held on 18.01.2010. This auction sale was held by the bank in relation to the aforestated properties mortgaged by the third and fourth respondents as security for the loan facilities availed by the third respondent company. The said loan account became a non-performing asset and the bank initiated recovery proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (*for brevity*, 'the RDDB Act'), by filing O.A.No.832 of 1999 on 28.01.1999, which was renumbered as O.A.No.823 of 2002 on the file of the Tribunal at Visakhapatnam. At this stage, it may be noted for the purpose of clarity and completeness that O.A.No.823 of 2002 was disposed of by the Tribunal at Visakhapatnam *vide* order dated 16.09.2016 holding that the borrowers were liable to pay to the bank, jointly and severally, a sum of Rs.37,66,874.74 ps. with interest at 6% per annum from the date of the O.A., i.e., 28.01.1999, till the date of payment. In the event they failed to pay the said dues within two months from the date of receipt of the said order, the bank was held entitled to proceed against them and recover its dues by sale of the mortgaged properties. Be that as it may.

Apart from initiating proceedings under the RDDB Act as aforestated, the bank also initiated proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (*for brevity*, 'the SARFAESI Act'), by issuing a demand notice under Section 13(2), followed by a possession notice under Section 13(4) thereof. Aggrieved by the possession notice, the borrowers filed S.A.No.101 of 2004 before the Tribunal at Visakhapatnam. This S.A. was renumbered as S.A.No.53 of 2006 on the file of the Debts Recovery Tribunal, Hyderabad (*hereinafter*, 'the Tribunal at Hyderabad'), upon transfer from Visakhapatnam. It was dismissed in the first instance on 17.09.2009. Thereafter, the bank issued sale notice dated 06.11.2009 fixing the auction sale of the secured assets on 10.12.2009.

While so, aggrieved by the dismissal of S.A.No.53 of 2006 (S.A.No.101 of 2004), the borrowers approached the Debts Recovery

Appellate Tribunal, Mumbai (*hereinafter*, 'the Appellate Tribunal at Mumbai'), by way of an appeal under Section 18 of the SARFAESI Act, which was then numbered as S.A.No.790 of 2009 on the file of the Debts Recovery Appellate Tribunal, Chennai (*hereinafter*, 'the Appellate Tribunal at Chennai'). They filed I.A.No.1399 of 2009 therein seeking waiver of the pre-deposit under the second *proviso* to Section 18 of the SARFAESI Act. By order dated 09.12.2009 passed therein, the Appellate Tribunal at Mumbai, while directing certain amounts to be deposited with the Registrar, DRAT, Chennai, as a condition precedent for entertaining the appeal, permitted the auction sale scheduled to be held on 10.12.2009 to go on but stayed the confirmation of the sale. The bank however chose not to proceed with the auction sale scheduled to be held on 10.12.2009. The borrowers failed to comply with the conditional order of the Appellate Tribunal at Mumbai as regards the deposits to be made and filed a memo seeking further time for paying the first instalment as directed. The same was however not considered. The borrowers then filed I.A.No.56 of 2010 in S.A.No.790 of 2009 seeking condonation of delay in payment. The Appellate Tribunal at Chennai considered and rejected the said application *vide* order dated 10.02.2010.

Meanwhile, the bank issued a fresh auction sale notice on 06.01.2010 proposing to hold the auction sale on 18.01.2010. The borrowers thereupon filed S.A.No.40 of 2010 before the Tribunal at Hyderabad, which was renumbered as S.A.No.11 of 2010, upon being transferred to the Tribunal at Visakhapatnam. Their challenge therein was to the auction notice issued on 06.01.2010. They also filed I.A.No.216 of 2010 in the said S.A. seeking stay of the auction. This I.A. was disposed of by the Tribunal at Visakhapatnam on

19.02.2010 directing *status quo* to be maintained. However, by that time the sale had already been held on 18.01.2010, wherein the writ petitioners became the auction purchasers and sale certificates were also issued to them on 18.02.2010. The registration of these sale certificates was put off by the bank owing to the *status quo* order.

While so, aggrieved by the rejection of their condone delay petition in I.A.No.56 of 2010 in S.A.No.790 of 2009 by the Appellate Tribunal at Chennai, the borrowers filed W.P.No.4170 of 2010 before this Court. By order dated 17.03.2010 passed therein, this Court condoned the delay on the part of the borrowers in depositing the first instalment as directed by the Appellate Tribunal at Mumbai and requested the Appellate Tribunal at Chennai to consider expeditious disposal of the appeal. Meanwhile, the appeal in S.A.No.790 of 2009 had been renumbered as R.A. (SA) No.89 of 2010. Pursuant to the order of this Court in W.P.No.4170 of 2010, the Appellate Tribunal at Chennai allowed the said appeal on 01.12.2011 and remanded S.A.No.53 of 2006 (S.A.No.101 of 2004) for consideration afresh along with S.A.No.40 of 2010 (S.A.No.11 of 2010) filed against the auction notice issued on 06.01.2010. The appellate Tribunal at Chennai directed that both S.As. should be disposed of within a time frame. The auction purchasers were also parties to the proceedings before the Appellate Tribunal at Chennai in R.A. (SA) No.89 of 2010.

Aggrieved by the delay in disposal of S.A.No.53 of 2006 (S.A.No.101 of 2004) by the Tribunal at Visakhapatnam, the auction purchasers filed W.P.No.20621 of 2015 before this Court. By order dated 07.07.2015, this Court disposed of the writ petition permitting them to make an application before the Tribunal at Visakhapatnam for expeditious disposal of the S.As.

Thereupon, by the impugned final order dated 15.09.2016, the Tribunal at Visakhapatnam held against the auction purchasers in both the SAs. S.A.No.101 of 2004 (S.A.No.53 of 2006) was dismissed holding that the properties in question were not agricultural lands, whereby Section 31 (i) of the SARFAESI Act would stand attracted, and moreover, as the properties had already been sold, the Tribunal at Visakhapatnam opined that the S.A., directed against the possession notice dated 29.09.2004 issued under Section 13(4) of the SARFAESI Act, would not survive as it had become infructuous. S.A.No.11 of 2010 (S.A.No.40 of 2010) was disposed of setting aside the sale, though the prayer therein was directed against the auction sale notice issued on 06.01.2010. The Tribunal at Visakhapatnam took note of the fact that upon issuance of the said sale notice issued on 06.01.2010, the borrowers immediately addressed letter dated 08.01.2010 to the bank informing them that the said sale notice was bad in law. Despite the same, the bank did not withdraw the said sale notice and went ahead with the sale on 18.01.2010. It was noted that there was no rule or provision in the Security Interest (Enforcement) Rules, 2002 (*for brevity*, 'the Rules of 2002') which permitted the bank to issue a subsequent sale notice after issuance of the first sale notice, without complying with the mandate of maintaining a clear gap of 30 days. It was also noted that despite receiving a letter from the borrowers pointing out the lapse on its part, the bank did not realize its mistake but chose to go ahead with the sale on 18.01.2010. Relying on **MATHEW VARGHESE V/s. M.AMRITHA KUMAR**[1], the Tribunal at Visakhapatnam held that the mandate of the Rules of 2002 necessarily has to be complied with

[1] (2014) 5 SCC 610

and as there was a clear violation with regard to maintaining the minimum period of 30 days between the auction sale notice and the date of the auction sale, the Tribunal at Visakhapatnam held the same to be vitiated and illegal. The Tribunal at Visakhapatnam concluded that the sale notice issued on 06.01.2010 was bad in law and hence, the sale held on 18.01.2010 pursuant thereto was also liable to be quashed. It was further noted that the confirmation of the said sale had been stayed by the interim order dated 19.02.2010 passed in the S.A. and the auction purchasers were well aware of the same. As the amount deposited by them would have been kept by the bank in a separate interest bearing account, the said amount was ordered to be refunded to the auction purchasers with interest payable on public fixed deposit accounts, being not less than 9% per annum with quarterly rests, from the date of deposit till the date of payment. The interest burden was held to be the bank's liability as it had utilized the said funds.

Sri P.Rama Sharana Sharma, learned counsel, would contend that the main ground on which the auction sale was set aside was that a clear 30 day gap was not maintained by the bank between the issuance of the auction notice on 06.01.2010 and the date of auction sale on 18.01.2010. Learned counsel would point out that the bank had earlier issued auction notice dated 06.11.2009, whereunder the auction was to be held on 10.12.2009, but the borrowers themselves stalled the said sale by securing an order on 09.12.2009 as to stay of confirmation of the sale. He would assert that it was owing to this order that the bank chose not to proceed with the sale scheduled to be held on the next day and it was only thereafter that the bank issued the fresh sale notice on 06.01.2010 proposing to hold the auction sale on 18.01.2010. Learned counsel would argue that as the earlier sale, as scheduled, did not take place owing to reasons attributable to the borrowers, they could not take advantage of their own actions and assail the subsequent auction sale notice issued on 06.01.2010. Learned counsel would further argue that as the sale took place prior to the decision in **MATHEW VARGHESE**[1], the same would have no role to play and the matter must be considered only in terms of the rules. In the alternative, he would contend that even if it is assumed that **MATHEW VARGHESE**[1] would apply retrospectively, as the sale did not take place on 10.12.2009 for reasons solely attributable to the borrowers, the benefit of the said decision could not be extended to them. He would further point out that the borrowers failed to amend the pending S.A. and allowed the prayer, which was directed only against the auction sale notice issued on 06.01.2010, to remain as it was, despite the later development of the auction sale being held on 18.01.2010, resulting in issuance of sale certificates to the auction purchasers, and the Tribunal at Visakhapatnam ought not to have gone to the extent of setting aside the said sale. He would fervently argue that the Tribunal at Visakhapatnam exceeded its jurisdiction in granting a relief which was not even prayed for and invalidation of the auction sale to the detriment of the auction purchasers therefore cannot be sustained.

Lastly, he would contend that the conduct of the borrowers disentitled them from seeking relief as they failed to mention that the sale had already materialized on 18.01.2010 when they secured an order on 17.03.2010 from this Court in W.P.No.4170 of 2010, due to which S.A.No.101 of 2004 (S.A.No.53 of 2006) ultimately revived for consideration afresh.

Per contra, Sri S.Niranjan Reddy, learned senior counsel, would contend that the requirements of Rules 8(6) and 9(1) of the Rules of 2002 are mandatory, as has been recognized by the Supreme Court time and again, and unless clear waiver of the benefit thereof is demonstrated on facts, the question of condoning any lapse on the part of the secured creditor in abiding by such a binding mandate would not arise. Learned senior counsel would further submit that once the borrowers approached the competent forum assailing the auction sale notice issued on 06.01.2010 well before the sale scheduled thereunder, to be held on 18.01.2010, notwithstanding the fact that there was no stay granted, the sale would invariably be subject to further orders in the said case and therefore, the doctrine of *lis pendens* would apply, whereby the Tribunal at Visakhapatnam was entitled to not only set aside the impugned sale notice issued on 06.01.2010 but also quash the illegal sale held pursuant thereto on 18.01.2010.

Learned senior counsel would point out that the sale scheduled to be held on 10.12.2009 was not stayed at the behest of the borrowers and on the other hand, the said sale was permitted to go on but only its confirmation was stayed. Despite the same, the bank, in its own wisdom, chose not to proceed with the said sale. He would therefore submit that the factum of the said sale not being held on 10.12.2009 is not at all attributable to the borrowers but solely to the bank's own decision not to go ahead with it. As regards the allegation that the borrowers suppressed material information when they approached this Court by way of W.P.No.4170 of 2010, the learned senior counsel would point out that all relevant aspects, including issuance of the sale notice issued on 06.01.2010 and filing of

S.A.No.11 of 2010 (S.A.No.40 of 2010) against the same, were disclosed by the borrowers therein. He would also point out that the said writ petition was disposed of after notice and opportunity of hearing was given to the bank, which was represented by counsel. Despite the same, if no mention was made in the final order dated 17.03.2010 as to the sale having already taken place on 18.01.2010, he would submit that the blame therefor could not be laid only at the door of the borrowers. In any event, *per* the learned senior counsel, the said issue has no bearing on the determination of the validity of the later sale notice issued on 06.01.2010, as there can be no estoppel against the statute. Learned senior counsel would submit that even if the borrowers had failed to disclose the factum of the sale that took place on 18.01.2010 in the earlier writ petition, it would not impair their entitlement to assail the same by independent proceedings.

In reply, Sri P.Rama Sharana Sharma, learned counsel, would state that despite the Appellate Tribunal at Chennai directing disposal of the S.A.s within three months from that day, the matter dragged on till 15.09.2016, and in the meanwhile the auction purchasers continued to remain in possession of the properties purchased by them, as long back as in the year 2010. He would therefore submit that overturning these settled events at this late stage may not be desirable on mere technicalities.

Sri Maruthi Jadhav, learned counsel, would inform this Court that the bank, aggrieved by the setting aside of the auction sale held on 18.01.2010, filed Appeal No.79 of 2016 before the Appellate Tribunal at Kolkata. Be that as it may.

Perusal of the writ affidavit filed by the borrowers in support of W.P.No.4170 of 2010 bears out that they adverted to the issuance of the sale notice issued on 06.01.2010 and the filing of S.A.No.11 of 2010 assailing the same. No doubt, they did not mention about the auction sale held on 18.01.2010 but they referred to the order dated 19.02.2010 passed by the Tribunal at Hyderabad directing *status quo* to be maintained. Significantly, though the bank filed a counter in this writ petition in March 2010, it chose not to disclose the auction sale already held by it on 18.01.2010.

In our opinion, this aspect does not have any impact on the present matter as the said writ petition related to proceedings before the Appellate Tribunal at Mumbai with regard to deposit of amounts as directed for entertaining the appeal against dismissal of S.A.No.53 of 2006, which was filed against the possession notice. The subsequent sale notice which was the subject matter of S.A.No.11 of 2010 (S.A.No.40 of 2010) was not the subject matter of consideration in the said writ petition. Further, this failure on the part of the borrowers is not sufficient in itself to non-suit them when they allege violation of the statutory mandate by the bank. The contention of Sri P.Rama Sharana Sharma, learned counsel, that the conduct of the borrowers disentitled them from seeking relief is accordingly rejected.

Though Sri P.Rama Sharana Sharma, learned counsel, advanced arguments to the effect that the borrowers, if they were aggrieved by the sale, ought to have filed applications under Rules 60 and 61 in Part III of the Second Schedule to the Income-tax Act, 1961 (*for brevity*, 'the Act of 1961') to set aside the said sale, this Court finds no merit in this submission. No doubt, in terms of Section 37 of the SARFAESI Act, read with Section 29 of the RDDB Act, the provisions of the Second Schedule to the Act of 1961 shall, as far as possible, apply with necessary modifications as if the said provisions and the rules referred to the amount of debt due under this Act instead of the income tax. But, the provision itself makes it clear that such applicability would be to the extent possible and with necessary modifications. Once the SARFAESI Act itself provides the remedy under Section 17 thereof to any person aggrieved by sale of the secured asset under Section 13(4) thereof, the question of the remedies prescribed under Rules 60 and 61 in Part III of the Second Schedule to the Act of 1961 being invoked by any such aggrieved person would not arise. The borrowers therefore had no right to invoke the provisions of the said rules to seek setting aside of the sale held on 18.01.2010. This argument is accordingly rejected.

As regards the main issue, i.e., violation of the statutory mandate, it is clear that the bank maintained only a gap of 12 days and not 30 days. The auction sale notice dated 05.01.2010 under Rule 9(1) of the Rules of 2002 was admittedly published by the bank in newspapers on 06.01.2010, whereunder the auction sale was scheduled to be held and was actually held on 18.01.2010. It would be apposite at this stage to examine the relevant statutory provision.

Rule 9(1) of the Rules of 2002 reads as under:

> '**9. Time of sale, Issue of sale certificate and delivery of possession, etc :--** (1) No sale of immovable property under these rules shall take place before the expiry of thirty days from the date on which the public notice of sale is published in newspapers as referred to in the provision to sub-rule (6) or notice of sale has been served to the borrower.'

The clear language of the provision puts it beyond doubt that the secured creditor is required to maintain a gap of 30 days from the date on which the public notice of sale is published in newspapers and the date of the actual sale.

Though Sri P.Rama Sharana Sharma, learned counsel, would contend that the decision of the Supreme Court in **MATHEW VARGHESE**[1] cannot be applied retrospectively, it is manifest that what was interpreted by the Supreme Court in the said decision was the unamended Rule 9(1) of the Rules of 2002, which was obtaining as on the date of the auction, i.e., 18.01.2010. The question of applying this decision retrospectively therefore does not arise. In terms of the said decision, which interpreted this statutory provision to mean that a clear 30 days notice is mandatory between the date of publication of the sale notice in newspapers and the date of the actual sale, there can be no doubt that the bank violated the statutory mandate in publishing the sale notice on 06.01.2010 and holding the sale on 18.01.2010.

Though much has also been made of the fact that the borrowers secured an interim order in relation to the earlier auction sale which was scheduled to be held on 10.12.2009, this Court finds that no stay of the said sale was ordered and it was only the confirmation of the sale, if it materialized, that was stalled. Despite the same, the bank unilaterally chose not to proceed with the said sale. The borrowers had no role to play in this decision and therefore, the failure of the sale scheduled to be held on 10.12.2009 cannot be attributed to them. In any event, this aspect of the matter does not disqualify them from complaining of the illegality in the subsequent auction sale notice issued on 06.01.2010. As they approached the competent forum well before the sale on 18.01.2010 proposed pursuant thereto, the question of their waiving any objections that they may have had with regard to the mandate of Rule 9(1) of the Rules of 2002 does not arise.

The doctrine of *lis pendens* denotes the common law maxim '*pendente lite nihil innovetur*', i.e., pending the suit nothing should be changed. *Lis pendens* is constructive notice to a purchaser that he will be bound by a decree to be entered in a pending suit. Therefore, once the sale notice issued on 06.01.2010 was subjected to challenge even before the sale was held on 18.01.2010, further developments pursuant to the impugned sale notice were necessarily subject to further orders in the case. Therefore, upon institution of S.A.No.40 of 2010 (S.A.No.11 of 2010) assailing the auction notice issued on 06.01.2010, all steps taken pursuant thereto were subject to further orders therein. Once the said sale notice was found to be illegal, being violative of the statutory mandate of Rule 9(1) of the Rules of 2002, the auction sale held pursuant thereto necessarily had to fail. The doctrine of *lis pendens* therefore clearly applied and the Tribunal was entitled to take note of the developments during the pendency of the case and set aside the later developments built upon the illegal sale notice issued on 06.01.2010. The foundation of the auction sale notice having been demolished the super-structure of the actual sale based thereon cannot stand. This Court therefore finds no illegality in the Tribunal at Visakhapatnam setting aside the said sale despite the fact that the prayer in the S.A. was not amended and no express challenge was laid to the actual sale held on 18.01.2010 and the sale certificates issued pursuant thereto.

Further, the defect in the auction sale notice issued on 06.01.2010 and the consequent auction sale held on 18.01.2010 was fatal and incurable, as the same were in utter violation of the mandate of Rule 9(1) of the Rules of 2002, and there was no possibility of inferring any waiver of the said mandate by the borrowers. Mere passage of time would not cure such a defect so as to vest the auction purchasers with any vested rights. Illegality, unlike fine wine, does not mature to a degree of higher acceptance over a period of time.

On the above analysis, this Court finds no grounds to interfere with the order under challenge, be it on facts or in law. The writ petition is devoid of merit and is accordingly dismissed. Interim order dated 20.10.2016 shall stand vacated. Pending miscellaneous petitions shall also stand dismissed. No order as to costs.

SANJAY KUMAR, J

P.KESHAVA RAO, J

20th FEBRUARY, 2018

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