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

WRIT PETITION No.11061 of 2017

ORDER: (Per the Hon'ble Sri Justice P. Keshava Rao)

Heard the learned counsel for the petitioners, learned Standing counsel for the 1st respondent and the learned counsel for respondent Nos.2 to 8.

The prayer in the writ petition is as under:

> "For the reasons stated in the accompanying affidavit, it is hereby prayed that this Hon'ble Court may be to issue a writ, order or direction, more particularly one in the nature of writ of mandamus, to declare the proceedings of the respondent dated 23.02.2017 vide Ref.SARFAESI/2017, Sale Notice Sai Bharghavi, JVS in conducting the e-auction of the petitioners agriculture lands situated in R.S.Nos.597 admeasuring Ac.6.34 cents situated at Bhimavaram, West Godavari District and agriculture land in R.S.Nos.236/3 and 251 admeasuring Ac.3.98 situated at Mallavaram Village, West Godavari District, respectively as illegal, arbitrary and contrary to Section 31(1) of the SARFAESI Act, 2002 and consequently set aside the same and pass such other order or orders as this Hon'ble Court may deem fit and proper in the circumstances of the case."

The facts of the case are that the petitioners have availed credit facility/loan for a sum of Rs.9 Crores from Canara Bank (for short, "the Bank"), Governorpeta Branch, Vijayawada, Krishna District, between the years 2006-08 by way of equal release of the loan facility for the purpose of constructing the Rice Bran Oil Extract Solvent Unit in the West Godavari District. For the purpose of releasing of the said loan, the security interest was created in respect of five items (as mentioned in para 3 of the affidavit), which include the two disputed properties in the present writ petition. After disbursement of the said loan, the petitioners have paid a sum of Rs.4.60 crores towards interest and principle. Pursuant to non-payment of the loan amount and after invoking the provisions of

Sections 13(2) and 13(4) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, "the SARFAESI Act, 2002"), the Bank sold out item No.1 i.e., the plant and machinery in the auction and recovered a sum of Rs.3 crores. Simultaneously, the Bank also sold item Nos.2 and 3 i.e., the residential plots to a tune of Rs.14 lakhs apart from a four wheeler of the 2nd petitioner and credited Rs.5 lakhs to the loan account. Thereafter, the Bank issued a notice under Section 13(4) of the SARFAESI Act, 2002, read with Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 (for short, "the Rules, 2002"), dated 23.02.2007, for sale of item Nos. 4 and 5, which are the subject properties in the present writ petition, through e-auction to be held on 16.03.2017. The said items are as under:

> "4. EMT of agriculture landed property in RS.No.597 admeasuring Ac.6.34 cents situated at Bhimavaram, West Godavari District.
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> 5. EMT of agriculture landed property in RS.No.236/3 and 251 admeasuring Ac.3.98 cents situated at Mallavaram Village and Gram panchayat, West Godavari District."

The petitioners have categorically stated that the procedure adopted for sale of the above said two items is contrary to the provisions of Section 31 (i) of the SARFAESI Act, 2002, since any security interest created in agricultural land, the provisions of the SARFAESI Act, 2002, are not applicable and as well as contrary to the definition of "Security Interest" under Section 2(ZF) of the SARFAESI Act, 2002. However, the Bank in violation of the provisions of the SARFAESI Act, 2002, and without any authority of law issued the impugned e-auction notice proposing to sell item Nos.4 and 5 and as such the same is not sustainable in the eye of law. To substantiate that item Nos.4 and 5 are agricultural lands, it is stated in the affidavit that 10(1) Adangals issued by the concerned authority for Fasili 1426 reveal that the subject lands are zirayati i.e., agricultural lands and standing crop of paddy is in existence. The Revenue Divisional Officer also issued pattadar pass books and title deeds in respect of the subject lands to the effect that they are the agricultural lands. Apart from that the Village Revenue Officer of the concerned village had also collected the agricultural cist (revenue tax) for the said lands. In these circumstances, the impugned proceedings are challenged.

Per contra, the 1st respondent filed a counter affidavit denying the averments made in the affidavit filed in support of the writ petition and contended *inter alia* that the writ petition as filed is not maintainable since the petitioners have not exhausted the alternative remedy available to them under Section 17 of the SARFAESI Act, 2002. The petitioners in all have availed the loan facility to the tune of Rs.834.09 lakhs in the form of cash credit and term loan on 26.06.2006, 11.06.2007, 27.02.2008 and 22.08.2009 respectively. The loan was not repaid in terms of the loan agreement and as such the account was classified as non-performing asset on 31.03.2010. Thereafter, a notice under Section 13(2) of the SARFAESI Act, 2002, was issued on 22.06.2010 demanding payment of Rs.820.42 lakhs with further interest from 01.04.2010. However, the petitioners have not responded to the said demand notice. Therefore, the question of compliance of Section 13(3)(A) of the SARFAESI Act, 2002, may not arise. As the petitioners have not paid any amount within the period of 60 days in compliance with the notice issued under Section 13(2) of the SARFAESI Act, 2002, the provisional notice was issued under Section 13(4) on 24.02.2011 in respect of the above referred two properties and the possession was also taken on the said date and possession notice was also published in English as well as vernacular newspapers on the same day. Thereafter, a sale notice was issued on 04.05.2011 in compliance with Rules 8(6) and 9(1) of the Rules, 2002, and the same was served on the petitioners and the guarantors on 16.05.2011. The said notice was also published in English and vernacular newspapers on 07.05.2011. However, the sale could not be materialized for want of bidders. It is also stated in the counter affidavit that the Bank has also filed an application under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, before the Debts Recovery Tribunal, Visakhapatnam, for issuance of a recovery certificate for a sum of Rs.1,19,64,183=34 ps with interest as per the contractual rate as on 24.06.2012 till the date of realization. The said O.A. was posted for *ex parte* evidence. In the meanwhile, the petitioners addressed a letter on 24.06.2013 to the Bank giving an offer of One Time Settlement (for short, "OTS") for a total sum of Rs.509.00 lakhs as full and final settlement. Again the petitioners addressed letters dated 26.06.2013, 17.07.2013 and 22.07.2013 increasing the OTS amount. Finally, the Bank accepted the offer of Rs.607.00 lakhs towards full and final settlement subject to the condition that the said entire amount has to be paid within three months and the same was communicated vide letter dated 30.08.2013. Another letter dated 03.09.2013 was also addressed to the petitioners communicating sanction of OTS to them. However, on 27.09.2013, again the petitioners have addressed another letter asking the Bank to reduce the OTS offer to Rs.40.00 lakhs. However, the Bank vide letter dated 10.10.2013 informed the petitioners that their request to reduce the amount under OTS is rejected. Thereafter, the petitioners addressed another letter dated 01.12.2013 offering to pay Rs.607.00 lakhs by 20.12.2013, but as requested and agreed, have not paid the said amount within the stipulated period. Further, on the request of the petitioners, further time was granted till 06.03.2014 for payment of the amount under OTS scheme. Even then, no amount was paid. Thereafter, the OTS scheme was withdrawn. About one month thereafter, on 13.04.2016 the petitioners addressed one more letter giving a fresh OTS proposal and offered Rs.375.00 lakhs towards full and final settlement which offer was rejected by the Bank. The petitioners vide letter dated 15.04.2016 increased the amount to Rs.415.00 lakhs. The said proposal was permitted by the Bank on 24.06.2016 with a condition to pay the amount within three months from that date, as there was recovery of some amount by auctioning the plant and machinery etc., but the petitioners once again failed to make any payments and thereby the OTS stands automatically withdrawn. In those circumstances, sale notice was again published in English and vernacular newspapers on 06.11.2016. Even on the second occasion, the sale could not be materialized for want of bidders. It is further stated in the counter affidavit that the plea taken by the petitioners that agricultural land cannot be auctioned under the provisions of the SARFAESI Act, 2002, is not tenable in the eye of law. The land use of entire extent of Ac.6.34 cents referred to in the writ affidavit was converted into residential use at the instance of the petitioners under Memo No.8662/H1/2006-2 dated 12.06.2007. In fact, treating the same as non-agricultural property, the petitioners have offered the property under higher valuation at the time of availing the loan by showing the same as residential site. Therefore, the plea of the petitioners that the subject lands are agricultural lands and cannot be auctioned by operation of Section 31 of the SARFAESI Act, 2002, is not sustainable. In fact, the petitioners have deliberately and willfully suppressed the said aspect in the writ affidavit and also approached the concerned authority for sanction of the layout plan. Therefore, the documents relied on by the petitioners for treating the subject properties as agricultural land cannot be accepted. It is also specifically stated that from the date of taking possession of the subject properties till the auction proceedings were initiated, the petitioners never questioned the action of the Bank for auctioning the properties. Pursuant to the e-auction conducted on 16.03.2017, the sale was knocked down in favour of the highest bidders. The entire sale consideration was also paid in respect of the residential site admeasuring 18662 square yards i.e., Ac.6.34 cents situated at Ward No.32, R.S.No.597, Bhimavaram, for a sum of Rs.4,46,00,000/-. As far as the land admeasuring Ac.2.96 cents and Ac.1.02 cents situated in R.S.Nos.251 and 263/3 respectively of Mallavaram Village was knocked down in favour of one Sri Murali Menta for Rs.39,90,000/-. The sale was confirmed in favour of the highest bidder on payment of first 25% and thereafter on receiving the entire bid amount. The sale certificates were also issued on 03.04.2017 in favour of the highest bidders. Therefore, both the properties are not the agricultural lands in the light of the Memo dated 12.06.2007 issued by the Municipal Administration and Urban Development Department, Government of Andhra Pradesh. Thus, there are no merits in the writ petition and the same is liable to be dismissed.

In the writ petition, respondent Nos.2 to 8 were impleaded as per the orders of this Court in WPMP.No.20351 of 2017 dated 06.07.2017. Respondent Nos.2 to 8 have also filed a counter affidavit denying the affidavit averments raising a preliminary objection that the writ petition is not maintainable against the person in office without making the body corporate, M/s. Canara Bank, which is a juristic person, for whom the 1st respondent is representing as an authorized officer. It is categorically denied that the subject lands are agricultural lands. The said lands are designated to be Residential Use Zone vide Memo dated 12.06.2007. The petitioners have created security interest over the subject lands treating them as non-agricultural land and as such they are estopped from raising any claim contrary to the same. In fact, as per the endorsement in Roc.No.4220/05/GL dated 19.12.2011 issued by the Commissioner, Bhimavaram Municipality, it is proposed to cancel the permission granted for the proposed change of land use in the event of non-compliance of the applicants for payment of development charges. Since there is a serious dispute with regard to the subject lands as agricultural lands or otherwise, it is a disputed question of fact and cannot be adjudicated in the present writ petition under Article 226 of the

Constitution of India. It is also stated in the counter affidavit that the Bank has invoked the provisions of the SARFAESI Act, 2002, as long back as on 22.06.2010 by issuing the notice under Section 13(2) of the SARFAESI Act, 2002, and issued the impugned proceedings on 23.02.2017 scheduling e-auction for sale of the subject properties to be held on 16.03.2017. All through the petitioners have not challenged the same. Since they have purchased the subject lands in the e-auction notice held on 16.03.2017, at this stage the petitioners have approached this Court invoking the extraordinary jurisdiction which is not available to them in law.

The petitioners filed a reply affidavit to the counter-affidavit filed by the respondents 2 to 8 denying the contentions raised by the respondents 2 to 8 that the writ petition is not maintainable unless they exhaust the alternative remedy of Securitization Application under Section 17 of the SARFAESI Act, 2002 for the reason that invoking the provisions of the SARFAESI Act, 2002 is not permissible under the provisions of the Exemption Clause i.e. Section 31 of the SARFAESI Act, 2002 and the said auction has no authority in law. Since the bank authorities have initiated the proceedings in violation of the provisions of the Section 31 of the SARFAESI Act, 2002 and without jurisdiction, the alternative remedy is not a mandate and the writ petition is maintainable. It is also stated in the reply affidavit that the subject property mortgaged is an agricultural land and though the government had issued conversion proceedings, the petitioners have not paid the developmental and conversion charges to the tune of Rs.5,13,160/- and subsequent gifting of property in favour of the local body i.e.

Bheemavaram Municipality. Therefore, unless and until the entire proceedings are culminated in issuing final orders in that regard, the land cannot be treated as non-agricultural land. It is also stated that since the demand notice under Section 13(2) of the SARFAESI Act, 2002 and taking possession of subject land under Section 13(4) of the SARFAESI Act, 2002 are not challenged by the petitioners herein, it cannot give a right for the bank authorities to invoke the provisions of the SARFAESI Act, 2002 for sale of the agricultural lands, more particularly, when the statute is silent in that regard. It is also stated that the respondents 2 to 8, colluded with the bank authorities to grab the subject property for a low market value for Rs.4.80 Crores and odd which is a meager amount and also stated that Advocate-Commissioner may be appointed for getting a clarity picture with regard to the subject property.

The learned counsel for the petitioners, to substantiate his contention that the subject lands are agricultural lands, relied on the copies of 10 (1) Adangals, the certificate issued by the Tahsildar, Bheemavaram, the proceedings of the government of Andhra Pradesh MA & UD Department in Memo No.8662/H1/2006-02 dated 12.06.2007 evidencing the change of the land use of the land from the agricultural use zone to residential use zone, the Endorsement in proceedings Roc No.4220/05/G1; dated 19.12.2011 regarding demand of Bheemavarm Municipality for payment of developmental charges for conversion of the land use from agriculture to residential use, a Certificate in proceedings No.4220/2005/G1, dated 10.04.2017 by the Commissioner Bheemavaram Municipality stating that the proposal for change of land use from agricultural land use to residential land use is pending and photographs showing that the subject land is an agricultural land. Therefore, unless and until the conversion proceedings are finalized, it cannot be said that the agricultural land loses its character. As the development and conversion charges are not paid by the petitioners, it cannot be said that the subject lands are not the agricultural lands. A certificate dated 27.1.2018 issued by the Village Revenue Officer, Mallavaram village, Narsapur mandal, West Godavari District evidencing that the subject land along with other lands are the agricultural lands in which paddy is being cultivated and the land tax is paid by the petitioners.

Per contra, the learned Senior Counsel Sri Deepak Bhattacharjee appearing for the 1st respondent, has supported his arguments in the light of the contentions raised in the counter affidavit relying on the copies of the letters evidencing deposit of title deeds enclosing the schedules, copy of the sale certificate dated 03.04.2007 in respect of the subject properties and also the conversion proceedings as stated supra. In none of the proceedings the subject lands are shown as agricultural lands. In fact, in sale certificate dated 03.04.2017 the land in RS No.597 was shown as all that part and parcel of the property consisting of 18662 square yards. The affidavit dated 15.03.2006 given by the wife of the second petitioner herein before the bank authorities also would not indicate that the subject lands are the agricultural lands. Therefore, there is no irregularity or illegality on the part of the bank authorities in initiating the proceedings under the provisions of the

SARFAESI Act, 2002. The learned counsel for the respondents 2 to 8 also supported the version of the first respondent.

The point to be considered in the present writ petition is whether the subject lands are the agricultural lands, if so, whether the proceedings initiated by the Canara Bank under the provisions of the SARFAESI Act, 2002 are without jurisdiction.

To appreciate the contentions raised by the parties, the scope of Section 31 of the SARFAESI Act, 2002 has to be considered and the same is extracted hereunder:

> "31. Provisions of this Act not to apply in certain cases – The provisions of this Act shall not apply to —
>
> (i) any security interest created in agricultural land."

A perusal of the above said provision and the language employed therein would reveal that any security interest created in the agricultural land alone has to be exempted from the provisions of the SARFAESI Act, 2002. As such, in the first instance the question to be considered is whether the security interest created in the instant case is the agricultural land or a mere landed property. As discussed supra, we have noticed from the documents filed on record that the security interest created in the subject lands are described as the landed property. The revenue documents filed in the form of 10(1) Adangals also will not support the contention of the petitioners that the lands are the agricultural lands or the lands are actually put to agricultural use. On the other hand, the conversion proceedings issued by the Government of Andhra Pradesh in Memo dated 12.06.2007 also reveal that the subject lands are not the agricultural lands. It is relevant to mention that the counsel for the 1st respondent, placed on record a plan showing the proposed layout in RS No.597 of Bheemavaram village signed by the wife of the 2nd respondent and it would also reveal that the land has been developed and divided into plots. The other documentary evidence in the form of letters evidencing deposit of title deeds, the affidavit dated 15.03.2006 filed by the wife of the second petitioner before the bank authorities also will not disclose that the subject lands are the agricultural lands. Therefore, unless it is established that when the security interest created in any land describing the security interest as agricultural land, the benefit under Section 31 of the SARFAESI Act, 2002 cannot be extended to the borrower or creator of interest. It is also brought to our notice that in similar circumstances, this Court has dealt with a similar issue in Sri C. Malla Reddy v. The Authorised Officer, IDBI Bank Limited, Hyderabad and others[1] and it is held as under:

> "This apart, the learned counsel for the petitioner, in support of his plea that the land in question is agricultural land, but not non-agricultural land, pressed into service the revenue record in the form of Pahanis and other documents obtained for the relevant years. It is true that the Pahanis and other village account has clearly brought out that the petitioner possesses land to the extent of Ac.1.03 guntas situated in Survey No. 51/EE, Alwal Village and also he possesses Ac.0.15 guntas of land in Survey No. 51/AA of the same village. When we look at the provisions of the Andhra Pradesh Rights in Land and Pattadar Passbooks Act, 1971, it emerges that the expression land which is defined in sub-section (4) of Section 2 of that enactment, brings out that land means land which is used or is capable of being used for the purpose of agriculture, including horticulture, but does not include land used exclusively for non-agricultural purposes. Thus, if the land is also capable of being used for agricultural purposes, but not necessarily being used for agricultural purposes as such, it also answers the description of the expression land found mentioned in the said Act. Therefore, the record is prepared under Section 3 of the said enactment of every land, which is merely capable of being used for agricultural or horticulture purposes, but not necessarily being used as it is for the said purpose. Therefore, we have no difficulty to reject the contention of the learned counsel for the petitioner that since revenue record maintained under the aforementioned 1971 Act has been produced by him, it has to be invariably inferred that the security interest created by the petitioner in favour of the bank is relating to agricultural land and hence, the provisions contained under Section 31 of the SARFAESI Act should come to his rescue. Only when a security interest is specifically created describing the

[1] 2016(4) ALD – 687 DB

> security interest as agricultural land, then alone, the benefit of Section 31 of the SARFAESI Act will enure to such creator of interest, but not otherwise. This apart, as we have already noted supra, sub-section (1) of Section 14 of the SARFAESI Act has contained two separate limbs; one is taking possession of the secured asset and the next step is making over the said asset to the secured creditor."

That apart, the other contention canvassed by the learned counsel for the petitioners as well as the respondents that the subject property is an agricultural land or not with reference to photographs, this Court is unable to accept any of the contentions on the ground that by looking at the photographs, this Court in exercising extraordinary jurisdiction under Article 226 of the Constitution of India, cannot decide the disputed questions of fact, more particularly, whether the subject land is agricultural land or not. Even on this count also, the writ petition as filed, is not maintainable. Therefore, there are no merits in the writ petition and the same is liable to be dismissed.

Accordingly, the writ petition is dismissed. No costs.

Miscellaneous petitions, if any, shall also stand dismissed.

JUSTICE SANJAY KUMAR

JUSTICE P. KESHAVA RAO

Date: 10.04.2018
ES/CCM