HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU

Writ Petition Nos.37924 and 38021 of 2017

COMMON ORDER: {Per Hon'ble Sri Justice Ramesh Ranganathan}

W.P.No.38021 of 2017 is filed by the borrower seeking a mandamus to declare the order passed by the Debts Recovery Appellate Tribunal, Kolkata dated 25.07.2017, in so far as it reversed the finding of the Debts Recovery Tribunal, Hyderabad in S.A.No.238 of 2015, as illegal, arbitrary and against principles of natural justice. A consequential direction was sought to set aside the same, and to permit the petitioner to redeem the property, auctioned by the 1st respondent-bank, by paying Rs.1,69,74,777/- plus expenses incurred by the 1st respondent-bank for the sale of the property. In its order in S.A.No.238 of 2015 dated 13.10.2016, the Debts Recovery Tribunal held that the petitioner was entitled to redeem the schedule property, auctioned by the 1st respondent, by paying the value fetched in the said auction sale i.e Rs.1,69,74,777/- plus expenses incurred by the 1st respondent-bank for the sale of the property

W.P.No.37924 of 2017 is filed by IDBI Bank Limited seeking a mandamus to declare the order passed by the Debts Recovery Tribunal, Hyderabad in S.A.No.238 of 2015 dated 13.10.2016, as confirmed by the judgment of the Debts Recovery Appellate Tribunal, Kolkata dated 25.07.2017, as illegal, arbitrary and against principles of natural justice. A consequential direction is sought to set aside the same, and to direct the Debts Recovery Tribunal to consider S.A.No.238 of 2015 afresh, and give a finding in respect of the seven properties. The parties shall, hereinafter, be referred to as they are arrayed in W.P.No.37924 of 2017.

It is the petitioner's case that, at the request of the 1st respondent, the petitioner-bank had sanctioned a working capital loan facility, by way of cash credit of Rs.3.00 crores, vide sanction letter dated 06.03.2009. As security for the due repayment of the said loan, the 1st respondent executed various loan/security documents on 16.03.2009. An additional loan facility, aggregating to Rs.8,88,93,000/-, was sanctioned to the 1st respondent by the petitioner-bank vide sanction letter dated 06.02.2010. As security for due repayment of the said loan, the 1st respondent executed various loan/security documents on 15.02.2010. The petitioner-bank, thereafter, sanctioned an additional loan facility, aggregating to Rs.9,05,73,000/-, vide sanction letter dated 23.06.2011. As security for due repayment of the said loan also, the 1st respondent executed various loan/security documents on 20.07.2011. The 1st respondent created an exclusive charge on their entire current assets, fixed assets, present and future assets, by way of hypothecation over its movable assets. The partner of the 1st respondent created an equitable mortgage by way of deposit of title deeds i.e the sale deed dated 02.11.2000, the partition deed dated 15.07.2011, and another partition deed dated 15.07.2011.

In all seven properties, mortgaged by the 1st respondent in favour of the petitioner-bank, were sought to be enforced under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the SARFAESI Act"). A possession notice, under Section 13(4) read with Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 (for short "the Rules"), was issued, and a sale notice under Rule 9(1) of the Rules was published, with regards all the seven secured assets. The petitioner-bank filed O.A.No.803 of 2015 before the Debts Recovery

Tribunal, Hyderabad for recovery of Rs.11,85,70,210/-, and the said O.A is said to be still pending adjudication before the Debt Recovery Tribunal.

The 1st respondent filed S.A.No.238 of 2015 before the Debts Recovery Tribunal, Hyderabad which, by its order dated 27.04.2015, directed the 1st respondent to deposit 25% of the amount claimed by the petitioner-bank in its possession notice. The 1st respondent failed to comply with the said order, and did not deposit 25% of the amount as directed by the Tribunal. Instead, the 1st respondent questioned the order of the Debts Recovery Tribunal dated 27.04.2015 by way of W.P.No.14751 of 2015 before this Court, and the said writ petition was dismissed by order dated 01.10.2015. As the 1st respondent had failed to comply with the order of the Debts Recovery Tribunal in S.A.No.238 of 2015 dated 27.04.2015, the petitioner-bank caused publication of a fresh notice under Rule 9(1) of the Rules, and conducted an auction on 31.07.2015. The sale was confirmed in favour of the highest bidder in the auction for a consideration of Rs.1,69,74,777/-. While the highest bidder deposited 25% of the sale consideration on the date of the auction itself, he deposited the remaining 75% on 22.08.2015 one week beyond the 15 day period stipulated in Rule 9(4) of the Rules.

The Debts Recovery Tribunal, Hyderabad disposed of S.A.No.238 of 2015 by its judgment dated 13.10.2016. It is useful to extract the relevant portion of the order of the Tribunal which reads as under:

> "…. I do not agree with the submissions made by the Ld. Advocate for the Respondent No.2 Auction Purchaser that written consent from the borrowers for extension of time would not be possible since they will not ever cooperate for the sale of their assets. It is very clear from the judgment of the Hon'ble Supreme Court that the expression 'written consent of the parties' include the consent

of the secured creditor, borrower and the auction purchaser. It is not sufficient that the auction purchaser requests the Bank for extension of time and the Bank unilaterally extends the time. If such would be the case, the Bank may extend the time, which would not be reasonable in time and the same would be detriment to the borrower as he is bound to pay the interest till the date of receipt of the entire amount towards the loan account. Hence, the interests of the borrower shall also be kept in mind while extending the time for payment of the sale consideration. In the present case, it is clearly evident that the Applicant has not paid the amounts strictly in compliance of Rule 9(4) and the extension of time granted by the Bank for the payment of such amounts is not supported by the consent of the Applicant borrower.

In the above circumstances, this Tribunal holds that the auction sale of the property, which is subject matter of the Schedule Properties of the SA, conducted by the Bank on 31/07/2015 pursuant to the Auction Sale Notice dt.25/06/2016 published in the newspapers dt.26/06/2016 is liable to be set aside....”

Thereafter, relying on the judgment of this Court in **Mitra Educational and Welfare Society vs. The Authorsied Officer, State Bank of India**[1], the Debts Recovery Tribunal held that when the secured creditor brings any one particular secured asset to sale, and when there are more such secured assets, it may not be necessary for the borrower to liquidate the entire outstanding liability in the loan account, and it is enough if the borrower pays the value fetched at the sale/public auction of that particular secured asset and retrieve the said property; and the borrower was, in addition, required to tender the incidental costs, charges and expenses which the bank had incurred for undertaking the securitisation measures. Accordingly, S.A.No.238 of 2015 was allowed and the following directions were issued:

(ii) The auction sale of the property bearing Municipal No.16-2-836/1/A/5, (old forming part of house bearing No.16-2-836/1, admeasuring 600 sq. yds., and situated at Saidabad, Hyderabad, conducted by the Respondent bank

[1] Judgment in W.P.No.43082 of 2015 dated 06.04.2016.

on 31/07/2015 pursuant to the Auction Sale Notice dt.25/06/2015 published in the newspapers dt.26/06/2015 is hereby set aside;

(iii) Consequently, the Sale Certificate dt.26/08/2015 issued in favour of the Respondent No.2 Auction Purchaser is also hereby set-aside;

(iv) The Respondent No.2 Auction Purchaser is entitled to the refund of the entire Sale Consideration from the Respondent No.1 Bank;

(v) The Applicant is at liberty to redeem the property by paying an amount of Rs.1,69,74,777/-, within 1 month hereof;

(vi) The Respondent Bank shall advice the Applicant with respect to the expenses incurred by the Bank towards sale of the aforesaid property within 1 week upon receipt of the aforesaid amount from the Applicant;

(vii) The Applicant shall pay the said expenses within 2 weeks from the date of receipt of the said communication from the Respondent Bank;

(viii) In the event the Applicant fails to pay the amounts, as stated supra, the Respondent No.1 Bank shall be at liberty to proceed afresh for the sale of the property in accordance with law.

Aggrieved thereby, both the petitioner-bank and the auction purchaser filed Appeal Nos.94 of 2016 and 29 of 2017 before the Debts Recovery Appellate Tribunal, Kolkata. While affirming the order of the Debts Recovery Tribunal, in so far as non-compliance with Rule 9(4) of the Rules is concerned, the Debts Recovery Appellate Tribunal, however, set aside the order of the Debts Recovery Tribunal to the extent the 1st respondent was permitted to pay the amount received from the auction purchaser of Rs.1,69,74,777/-, instead of the entire debt which is said to be in excess of Rs.11.85 crores. Aggrieved by the order of the Debts Recovery Appellate tribunal, all the three parties i.e the petitioner-bank, the 1st respondent-borrower and the auction purchaser have invoked the extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India.

Sri C.Prabhakar, learned counsel for the petitioner-bank, would question the order of the Debts Recovery Appellate Tribunal on the following grounds:

(i) the word "parties", used in Rule 9(4) of the Rules, is an expression which is not defined either in the SARFAESI Act or in the Rules; and, in the light of the amendment to Rule 9(4) of the Rules by G.S.R.1046 (E) dated 03.11.2016, the word "parties" must be understood as meaning only the secured creditor and the purchaser, and not the borrower;

(ii) the 1st respondent had failed to challenge the auction sale held on 31.07.2015 within 45 days of the sale; and

(iii) while the Tribunal dealt only with only one of the seven assets which was sold, it failed to record any finding with respect to the other six secured assets, though the 1st respondent had questioned the validity of the Rule 8(6) notice, and publication of the Rule 9(1) notice, with respect to all the seven secured assets.

On the other hand, Sri G.K.Deshpande, learned counsel for the 1st respondent, would submit that, in the S.A filed by it, the 1st respondent had questioned the notice issued under Rule 8(6), and the sale notice published under Rule 9(1), of the Rules; on coming to know that one of the assets was sold on 31.07.2015, the 1st respondent had filed a petition seeking amendment of the prayer to challenge the auction sale, and to implead the auction purchaser; the Debts Recovery Tribunal had allowed the amendment petition by its order dated 03.12.2015; the said order of the Debts Recovery Tribunal has attained finality, as neither the petitioner-bank nor the auction purchaser have questioned the validity of the said order; the contention based on Section 17(1) of the SARFAESI Act is, therefore, not tenable; the Debts Recovery Tribunal has dealt with the validity of the Rule 8(6) notice with respect to the other six secured assets also, and has upheld the action of the petitioner-bank in issuing the said notice; nothing prevented the petitioner-bank from proceeding to put the other six secured assets to sale; the scope of Rule 9(4) of the Rules was construed by the Supreme Court in **Sri Siddeshwara Cooperative Bank Ltd. vs. Ikbal**[2]; the order of the Debts Recovery Appellate Tribunal, to the limited extent it held that the 1st respondent was liable to repay the entire dues of the petitioner-bank, relying on **Mathew Verghese vs. M.Amritha Kumar**[3], is erroneous; the Debts Recovery Appellate Tribunal failed to notice that Section 13(8) of the SARFAESI Act, prior to its amendment by Act 44 of 2016 with effect from 01.09.2016, used the expression "***that secured asset***"; the judgment of the Division Bench of this Court, in **Mitra Educational and Welfare Society**[1], wherein these words were construed, is applicable; and the Debts Recovery Tribunal was, therefore, justified in permitting the 1st respondent to pay Rs.1,69,74,777/-, instead of repayment of the entire debt which is in excess of Rs.11.25 crores; and the order of the Debts Recovery Appellate Tribunal, to this limited extent, necessitates interference.

In examining the scope of Rule 9(4) of the Rules, it is useful to take note of its contents both before and after its amendment. Rule 9(4) of the Rules, prior to its amendment, stipulated that the balance amount, of purchase price payable, shall be paid by the purchaser to the authorised office on or before the fifteenth day of confirmation of the sale of the immovable property, or such extended period as may

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[2] (2013) 10 SCC 83
[3] (2014) 5 SCC 610

be agreed upon in writing between the parties. The words "***as may be agreed upon in writing between the parties***" were substituted by the words "***as may be agreed upon in writing between the purchaser and the secured creditor, in any case not exceeding three months***" vide G.S.R.1046(E) dated 03.11.2016 with effect from 04.11.2016. As the amendment to Rule 9(4) of the Rules came into force with effect from 04.11.2016 and as, in the present case, the auction was held on 31.07.2015, more than a year prior thereto, it is the pre-amended Rule 9(4) of the Rules which is applicable.

As the auction purchaser has, admittedly, not paid the balance sale consideration within 15 days, of confirmation of the sale on 03.08.2015, which expired by 18.08.2015, and the said amount was paid four days thereafter on 22.08.2015, it is only if the extended period has been agreed upon in writing between the parties would receipt of the balance sale consideration on 22.08.2015 be justified. The words "***as may be agreed upon in writing between the parties***", as used in the pre-amendment Rule 9(4) of the Rules, arose for consideration in **Sri Siddeshwara Cooperative Bank Ltd.**[2] and the Supreme Court observed that the words "***parties***", for the purposes of Rule 9(4) of the Rules, meant that the secured creditor, the borrower and the auction purchaser should give their consent in writing. The word "***parties***", in the pre-amended Rule 9(4), included the borrower. It is only if the 1st respondent had given its consent, for the auction purchaser to pay the balance sale consideration within the extended period, could the petitioner-bank have received the said amount. Admittedly, the 1st respondent-borrower has not given its consent in writing to the petitioner-bank receiving the balance sale consideration, beyond the stipulated period of 15 days, from the auction purchaser. We are satisfied, therefore, that the

Debts Recovery Appellate Tribunal has not committed any error in affirming the order of the Debts Recovery Tribunal to the extent it held that receipt of the sale consideration from the auction purchaser beyond the period of 15 days, without the consent of the borrower, vitiated the sale.

Sri C.Prabhakar, learned counsel for the petitioner-bank, would, however, contend that the amendment to Rule 9(4) of the Rules by G.S.R.1046(E) dated 03.11.2016 is clarificatory in nature; since the expression "***parties***" was not defined earlier either in the Act or in the Rules, the clarificatory amendment to Rule 9(4) of the Rules must be held to apply retrospectively; and, consequently, the word "***parties***" in the pre-amended Rule 9(4) must be understood as only the secured creditor and the purchaser, and not the borrower. We must express our inability to agree.

The scope of the pre-amended Rule 9(4) of the Rules was considered by the Supreme Court in **Sri Siddeshwara Cooperative Bank Ltd.**[2] and it was held that the word "***parties***" in Rule 9(4) of the Rules, as it then stood, included the secured creditor, the borrower and the auction purchaser. It is with a view to overcome the interpretation, placed on the word "***parties***" by the Supreme Court in **Sri Siddeshwara Cooperative Bank Ltd.**[2], that Rule 9(4) was amended and the word "***parties***" was substituted by the words "***the purchaser and the secured creditor***", thereby excluding the borrower. Further the amendment itself has been specifically brought into force only with effect from 04.11.2016 and consequently, in so far as the sale which was confirmed prior thereto, it is the pre-amended Rule 9(4) of the Rules which is applicable; and absence of consent of the borrower would vitiate confirmation of the sale by the petitioner-bank.

In its order in S.A.No.238 of 2015 dated 13.10.2016, the Debts Recovery Tribunal has dealt with the question of violation of Rule 8(6) of the Rules with respect to the other six secured assets also, and it has held that the petitioner-bank had satisfied the requirements of Rule 8(6). Consequently, nothing prevents the petitioner-bank from proceeding to put the other six secured properties to sale in accordance with the provisions of the SARFAESI Act and the Rules.

The only other contention which requires examination is the contention, urged by Sri G.K.Deshpande, learned counsel for the 1st respondent, that the 1st respondent is entitled to redeem the value of the asset which was sold, and not the entire debt due. As the learned counsel has placed reliance on the Division Bench judgment of this Court, in **Mitra Educational and Welfare Society**[1], in this regard, it is necessary to refer thereto.

Section 13(8) of the SARFAESI Act, prior to its amendment by Act 44 of 2016, stipulated that, if the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset. While interpreting the word "***that secured asset***", the Division Bench of this Court in **Mitra Educational and Welfare Society**[1], opined that, even if the borrower has created different security interests in different movable/immovable properties, the expression "***that secured asset***" gives him an option to retrieve that particular asset which is sold by the secured creditor; where more than one collateral security has been created by the borrower as security for the loan availed, and only one such security interest has fallen for sale, the right of the borrower to retrieve that secured asset cannot be denied; for retrieving that particular secured asset, it may not be necessary for the borrower to liquidate the entire outstanding liability in the loan account; and it is enough if he pays the value fetched at the sale/public auction of that particular secured asset, and retrieves it.

The attention of the Division Bench was not drawn to the judgment of the Supreme Court in **Mathew Verghese**[3] wherein, while construing the scope of the pre-amended Section 13(8) of the SARFAESI Act, the Supreme Court observed that any sale or transfer of a secured asset cannot take place without duly informing the borrower of the time and date of such sale or transfer, in order to enable the borrower to tender the dues of the secured creditor with all costs, charges and expenses; Section 13(8) clearly stipulates that the borrower retains his full right to redeem the property by tendering all the dues to the secured creditor, at any time before the date fixed for sale or transfer; and the right of redemption, conferred under Section 13(8) of the SARFAESI Act, is to repay the entire debt due to the secured creditor.

The words "***if the dues of the secured creditor***", used in Section 13(8) of the SARFAESI Act, would only mean the dues in its entirety, and not the price fetched on the sale of one of the secured assets in a public auction. The words "***that secured asset***" in Section 13(8) is preceded by the words "***transfer or sale***", and even in case one of the secured assets is brought to sale, the borrower is obligated to repay the entire dues of the secured creditor together with costs, charges and expenses before the date fixed for sale or transfer, to prevent the secured creditor from either selling or transferring, or from taking further steps for the transfer or sale of, that secured asset.

If Parliament had intended to permit the borrower to repay only the amount fetched in the auction, it would not have used the words "***dues of the secured creditor***". In any event, since Section 13(8) of the SARFAESI Act has been construed in **Mathew Verghese**[3] to mean the dues of the secured creditor in its entirety, and since the attention of the Division Bench of this Court in **Mitra Educational and Welfare Society**[1] was not drawn to the earlier judgment of the Supreme Court in **Mathew Verghese**[3], we are bound by the decision of the Supreme Court and not by the judgment of the Division Bench of this High Court. We see no reason, therefore, to interfere with the order of the Debts Recovery Appellate Tribunal in holding that the 1st respondent is required to repay the entire dues of the secured creditor to ensure that the secured creditor does not put any of the secured assets to sale.

Sri G.K.Deshpande, learned counsel appearing on behalf of the 1st respondent, would place reliance on paragraphs 40 and 41 of the judgment of the Supreme Court in **Mathew Verghese**[3] which read as under:

> "40. Reliance was also placed upon the decision in *Mardia Chemicals Ltd. vs. Union of India.* In para 54, while dealing with the contention raised on behalf of the secured creditor that the right of redemption would be available to the mortgagor only if the amount due according to the secured creditor is deposited, this Court held as under:
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> > "54. ...Shri Sibal, however, submits that it is the amount due according to the secured creditor which shall have to be deposited to redeem the property. May be so, some difference regarding the amount due may be there but it cannot be said that right of redemption of property is completely lost. In cases where no such dispute is there, the right can be exercised and in other cases the question of difference in amount may be kept open and got decided before sale of property".
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> 41. Here again we find that even if there was some difference in the amount tendered by the borrower while exercising his right of

> redemption under Section 13(8), the question of difference in the amount should be kept open and can be decided subsequently, but on that score the right of redemption of the mortgagor cannot be frustrated. Elaborating the statement of law made therein, we wish to state that the endeavour or the role of a secured creditor in such a situation while resorting to any sale for the realisation of dues of a mortgaged asset, should be that the mortgagor is entitled for some lenience, if not more to be shown, to enable the borrower to tender the amounts due in order to ensure that the constitutional right to property is preserved, rather than it being deprived of."

According to the learned counsel, the aforesaid paragraphs indicate that it is open to the borrower to pay the auction amount and secure release of that particular asset which is brought to sale. We must express our inability to agree. All that has been held, in the aforesaid paragraphs of the judgment in **Mathew Verghese**[3], is that, if there is some difference between the amount tendered by the borrower while exercising his right to redeem under Section 13(8) of the SARFAESI Act, the question of difference in the amount must be kept open for a decision subsequently but, on that score, the right of redemption of the mortgagor cannot be frustrated. The aforesaid observations of the Supreme Court only means that, if there is a minor dispute regarding the extent of dues payable to the secured creditor by the borrower, and if the borrower is ready and willing to redeem the entire amount due to the secured creditor, and pay the said sum as computed by them, then the differential amount can be permitted to be paid later under Section 13(8) of the SARFAESI Act. The law declared by the Supreme Court, in **Mathew Verghese**[3], does not permit a borrower, after an auction is held, to come forward and tender payment of merely the auction amount for release of the auctioned secured asset.

Viewed from any angle, both the Writ Petitions fail and are, accordingly, dismissed. Miscellaneous petitions pending, if any, shall stand closed. There shall be no order as to costs.

(RAMESH RANGANATHAN, J)

(D.V.S.S.SOMAYAJULU, J)

24th October, 2018
JSU

HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU

<u>Writ Petition Nos.37924 and 38021 of 2017</u>

<u>Date: 24.10.2018</u>

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