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

<u>WRIT PETITION No.41032 of 2017</u>

<u>ORDER:</u> (Per the Hon'ble Sri Justice P. Keshava Rao)

Heard the learned counsel for the petitioner as well as the respondents.

The relief sought in the writ petition is as follows:

> "... this Hon'ble Court may be pleased to issue writ or order or direction more particularly one in the nature of the writ of Mandamus declaring the order of the D.R.T., Visakhapatnam in I.A.No.603 of 2017 in S.A.No.126 of 2016 dated 31.07.2017 as unsustainable, set aside the same and direct the 3rd respondent to refund the amount of Rs.92,50,000/- (Rupees ninety two lakhs fifty thousand) deposited by the petitioner towards 25% of the bid amount pursuant to the auction conducted by the 3rd respondent on 14.09.2016 under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act pursuant to the tender-cum-auction notice dated 07.09.2016 in respect of item No.28 of the properties with interest @ 18% p.a."

The facts of the case are that the 2nd respondent being the Authorized Officer of the 1st respondent Bank published tender-cum-e auction notice dated 07.09.2016 under the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, "the SARFAESI Act, 2002"), proposing to sell the properties mentioned therein. Out of the said properties, the property bearing residential house No.40-12-1 admeasuring 562 square yards in Sy.No.71/2 of Patamata, Vijayawada, (hereinafter referred to as "the subject property") was shown as item No.28. Pursuant to the said e-auction notice, the petitioner participated in the auction conducted by the 2nd respondent on 14.09.2016 and became the highest bidder, for Rs.3,70,00,000/-. As per the terms and conditions of the auction notice, the petitioner paid an amount of Rs.92,50,000/- being the 25% of the bid amount. Subsequently, on 15.09.2016, the 2nd respondent while acknowledging the receipt of the above said amount issued a letter dated 15.09.2016, informing the petitioner that challenging the auction proceedings initiated by the 1st respondent Bank under the provisions of the SARFAESI Act, 2002, the borrower M/s. Suncorp Lifestyles Limited (SLL) and the guarantors i.e., respondent Nos.3 and 4 herein have filed a securitization application being S.A.No.126 of 2016 on the file of the Debt Recovery Tribunal, Visakhapatnam (for short, "the Tribunal") and sought stay of the auction. However, the learned Tribunal though have not granted any stay, directed the 1st respondent Bank to go ahead with the sale, but the sale shall not be confirmed till the outcome of the above said S.A. It is also stated that in the circumstances and as directed by the learned Tribunal, respondent Nos.1 and 2 are not confirming the sale and not issuing any sale confirmation letter to the petitioner saying that the same will be issued after the outcome of the above S.A. filed by respondent Nos.3 and 4. In response to the said letter, the petitioner addressed a letter dated 20.09.2016 to the 2nd respondent enquiring as to why such a condition was newly incorporated in letter dated 15.09.2016 which was not informed either in the auction notice dated 07.09.2016 or at the time of confirming the bid. Thereafter, the petitioner addressed another letter dated 13.10.2016 stating that as per the terms and conditions of the e-auction notice, he has deposited 25% of the total bid amount immediately after completion of the auction. However, he expressed his concern that even a month after he paid 25% of the bid amount he was not being informed on the progress of the sale confirmation and requested to issue sale confirmation as early as possible with balance amount to be paid to the 1st respondent Bank after deduction of the interest earned on Rs.92,50,000/-. As there was no response to the said letter, the petitioner sent another letter dated 21.12.2016 through mail to the 2nd respondent stating that since it is more than three months from the date of auction and he has paid 25% of the bid amount, he has not received any sale confirmation. Therefore, he would like to terminate/exit from the deal with immediate effect i.e., from 21.12.2016. The petitioner also requested the 2nd respondent to immediately return the 25% advance paid by him as there is no firm commitment. In the said letter, the petitioner has specifically mentioned that once the learned Tribunal order comes in favour of the Bank, respondent Nos.1 and 2 may call for auction once again at their convenience. In response to the said letter, the 2nd respondent addressed a letter dated 30.12.2016 to the petitioner reiterating the version made in letter dated 15.09.2016 and further stated that they are following up to get the S.A. dismissed so as to enable them to get sale confirmation in favour of the petitioner and thereafter receive the balance bid amount and then register the auction property in his favour. It is also mentioned in the said letter the dates of adjournment the said securitization application underwent and the delay in issue of sale confirmation and handing over of the possession of the auctioned property to the petitioner is beyond the control of the Bank, but it is on account of the proceedings pending before the learned Tribunal. That apart, it is also stated regarding the termination/exit from the deal with immediate effect that as the matter is subjudice, they are not in a position to accede to the request of the petitioner and hence cannot return the 25% advance paid against the auction amount at that stage and requested to bear with them till the outcome of the S.A. As no positive response was forthcoming from the 2nd respondent, the petitioner addressed letters dated 03.01.2017 and 09.02.2017 to the 2nd respondent seeking refund of the amount deposited by him in view of the inordinate delay in issuing the sale confirmation letter and specifically stated that the 2nd respondent cannot conveniently link the advance paid by him with the proceedings pending before the learned Tribunal and it is a dispute between the Bank and the borrower and the guarantors. As the correspondence was not yielding any positive results, the petitioner approached the learned Tribunal by way of applications for impleading himself and for refunding the 25% of the amount paid by him vide I.A.Nos.602 and 603 of 2017 respectively in the pending S.A. In response to the application filed for refund of the 25% of the bid amount, the respondent Bank filed a counter opposing the same. The learned Tribunal, on consideration of the said application, was pleased to dismiss I.A.No.603 of 2017 by orders dated 31.07.2017. However, I.A.No.602 of 2017 filed to implead the petitioner as a party to the above said S.A., is kept pending and it is still under consideration. Aggrieved by the said orders, the present writ petition is filed.

In response to the affidavit filed in support of the writ petition, respondent Nos.1 and 2 filed a counter affidavit denying the averments made in the affidavit and contended *inter alia* that the writ petition filed is not maintainable since the order impugned is an appealable order before the learned Debts Recovery Appellate Tribunal under Section 18 of the SARFAESI Act, 2002. The writ petition is filed only to get over the limitation and bypass the statutory remedy of appeal. As far as pendency of S.A. before the Tribunal is concerned, respondent Nos.1 and 2 have stated that the 3rd respondent herein having obtained the stay order as early as on 14.09.2016 had been prolonging the disposal of the S.A. and in the process frustrating the auction purchasers. As far as the suppression of the information relating to pendency of filing of S.A. before the learned Tribunal is concerned, respondent Nos.1 and 2 have stated that the learned Tribunal has passed the interim stay order on the date of auction i.e., on 14.09.2016 and the Bank has informed the successful bidder i.e., the petitioner at the time of auction and also after the auction about filing of S.A. and the interim order passed by the learned Tribunal. The said fact was also mentioned in the letter dated 15.09.2016 addressed by the 2nd respondent to the petitioner. The inability of the Bank to comply with the demand of the petitioner is on account of interim order passed by the learned Tribunal and non-disposal of the S.A. Therefore, the petitioner is not entitled to find fault with the Bank and the delay is not on its part. The bank is always ready and willing to issue the sale confirmation and the sale certificate on receiving the balance sale consideration. As the auction is not cancelled, the question of refunding the amount or forfeiting the EMD does not arise and the petitioner cannot claim refund of the amount.

In reply to the said counter, the petitioner has filed a reply affidavit stating that had the pendency of the litigation between the Bank and the borrower is informed at any time prior to the auction, the petitioner would have thought of either to participate or not in the e-auction. However, the petitioner has categorically mentioned that the Bank has not mentioned about filing of S.A. either in the e-auction notice or informed to the bidders, including the petitioner, though the same was within its knowledge. He also stated that the material on record clearly disclose that the S.A. was filed as long as on 05.05.2016 and the application was served on the counsel for respondent Nos.1 and 2 on 02.07.2016. He further stated that without prejudice to his rights that if the bank has already issued auction sale notice on 04.08.2016 and the paper publication matter was also sent for effecting publication, nothing prevented the bank from issuing a supplement notification at least in the website of the bank if not in newspapers as the auction was proposed to be conducted on 14.09.2016 i.e., more than 30 days after publication of the auction notice. As such, it is evident that the bank for obvious reasons felt that it is not necessary and did not disclose the pendency of the securitization application in the e-auction notice or prior to the conduct of auction, but, however, trying to justify the non-disclosure of the said particulars without any valid reasons. In this context, to attribute mala fides and the bank is not fair and reasonable in not mentioning the above said aspect, as the auction was conducted by online submission of bids (e-auction), the question of informing the successful bidder at the time of auction does not arise at all. The petitioner was never informed much less on the date of e-auction about pendency of S.A. before the learned Tribunal. Therefore, the bank cannot be expected to take the stand of private litigant and act detrimental to the interest of the genuine auction purchasers like the petitioner.

From a perusal of the pleadings and the material available on record, the undisputed facts, which emerge for resolving the dispute in the present writ petition, are as under:

1) Whether respondent Nos.1 and 2 are having the knowledge of filing S.A.No.126 of 2016 by the time the e-auction notice was issued as well as on the date of the auction i.e., 14.09.2016.

2) Whether the act of suppressing the filing of securitization applications before the auction by the respondent Bank is fair and reasonable.

3) Whether the auction conducted on 14.09.2016 is contrary to and in violation of the mandatory procedure as contemplated under the provisions of the SARFAESI Act, 2002, and the Security Interest (Enforcement) Rules, 2002.

Point No.1:-

A perusal of the material on record clearly discloses that the securitization application was filed as long as on 05.05.2016. The said application was served on the Bank through its counsel on 02.07.2016. In fact, the counsel appearing for the 1st respondent Bank through his letter dated 02.08.2016 addressed to the

Assistant General Manager, State Bank of India, SAM Branch II, Kachiguda, Hyderabad, informed the bank that respondent Nos.3 and 4 filed S.A.No.126 of 2016 before the learned Tribunal at Visakhapatnam and the case is posted to 19.10.2016 for filing counter and reply. They are requested to furnish parawise remarks and the stand to be taken to enable him to prepare the counter. In the said letter, the counsel also requested to send the copies of the demand notice issued under Section 13(2), acknowledgments, possession notice issued under Section 13(4) and the paper publications and the sale notice issued under Section 8(6) of the Rules, 2002, and the copies for the purpose of preparing the counter. This letter coupled with the averment made in the counter affidavit by respondent Nos.1 and 2 that the bank has informed the successful bidder at the time of auction and also after the auction about the S.A. and also the interim order passed by learned Tribunal on 14.09.2016, reveals that respondent Nos.1 and 2 have the information about filing of S.A. by respondent Nos.3 and 4 much prior to the conducting of the auction. Though such an averment is made in the counter affidavit by a responsible officer of the 1st respondent bank, no evidence is placed before the Court to the effect that the said aspect of filing of S.A. was informed to the petitioner. However, the averment that the petitioner was informed about pendency of the S.A. on the date of auction itself and after the auction, may not be correct for the reason that the auction was conducted through online submission of bids (e-auction) and as such the question of informing the successful bidder or anybody or any other bidder at the time of auction does not arise at all. Even in the letter dated 15.09.2016 addressed by the 2nd respondent to the petitioner also it is not disclosed the fact that the petitioner was informed about the pendency of the S.A. at the time of auction or after the auction was conducted.

In the reply affidavit the petitioner has categorically denied that he was informed about the filing of S.A. either at the time of auction or after the auction was conducted. On the other hand, the conduct of respondent Nos.1 and 2 in making an averment that the petitioner was informed about pendency of S.A. at the time of auction and after the auction was conducted when admittedly the bidding is through e-auction, the question of informing the petitioner does not arise at all. In this context, it is also relevant that respondent Nos.1 and 2 are silent as to the mode of communication through which the petitioner was informed about the same. These aspects clinchingly evidence that respondent Nos.1 and 2, though were having knowledge of filing of S.A. on the date of auction, have suppressed the same and not informed to the petitioner for obvious reasons. This conduct on the part of respondent Nos.1 and 2 demonstrate the lack of *bona fides* and fairness in making the submissions.

Point No.2:-

As far as the second point whether the suppression of filing of S.A. before the auction by the respondents is fair and reasonable is concerned, the respondents having made a statement in the counter affidavit that the petitioner was informed about the filing of

S.A. at the time of auction and after the auction was conducted, no material is placed before this Court and no evidence is forthcoming in that aspect. That apart, when the procedure followed for conducting auction is by way of e-auction sale, the question of informing the petitioner by the respondent Bank about filing of S.A. also appears to be made only for the purpose of getting over the suppression of information relating to filing of S.A. prior to conducting the auction. After the auction process is over, when the petitioner is insisting for issuance of confirmation of sale and sale certificate, the reply of the respondent Bank that since the matter is subjudice before the learned Tribunal, the request of the petitioner for return of the 25% of the bid amount cannot be acceded to and asking the petitioner to wait till the conclusion/finalization of the proceedings before the Tribunal also speak volumes about the lack of *bona fides* on the part of the respondent Bank in dealing with the petitioner for return of the advance amount. Further, since the sale is not confirmed, it is always open to the respondent Bank to return the advance amount to the petitioner and after finalization of the proceedings before the learned Tribunal they can conduct a fresh auction. Therefore, the respondents cannot sit over the substantial amounts deposited by the petitioner and asking him to wait till the proceedings are concluded for continuation of the proceedings culminating in registration of the sale certificate. In the light of the above said aspects, the respondent Bank is not fair and reasonable while dealing with the petitioner in refund of the 25% of the bid amount paid by him on the date of auction.

Point No.3:-

As far as the point whether the auction conducted is in compliance with the mandatory procedure as contemplated under the provisions of the SARFAESI Act, 2002 and the Rules is concerned, this Court feels to extract Rule 8(6) of the Rules, which reads as under:

> "8. Sale of immovable secured assets:- (6) The Authorized Officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5):
>
> Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which shall include,-
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> (a) The description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor,
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> (b) The secured debt for recovery of which the property is to be sold;
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> (c) Reserve price, below which the property may not be sold;
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> (d) Time and place of public auction or the time after which sale by any other mode shall be completed;
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> (e) Depositing earnest money as may be stipulated by the secured creditor;
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> (f) Any other thing which the Authorized Officer considers it material for a purchaser to know in order to judge the nature and value of the property."

As far as Rule 8(6)(f) is concerned, the Authorized Officer while conducting sale of any secured asset either by inviting tenders from public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which include any other thing which the Authorized Officer considers it material for a purchaser to know in order to judge the nature and value of the property.

In the case on hand, by the date of auction though a securitization application is pending before the learned Tribunal, it was not brought to the notice of the bidders, including the petitioner. The pendency of the said S.A., certainly is an issue for purchaser to know the nature and value of the property. Had it been mentioned in the sale notice or even, according to respondent Nos.1 and 2, since they came to know about the pendency of S.A. after publication of the sale notice, by way of an addendum, the bidders, including the petitioner, would have assessed the nature and value of the property and would have arrived at a decision to participate in the bid or not. Non-disclosure of the same would not only violate the mandatory procedure in disclosing the entire information in order to judge the nature and value of the property in compliance with Rule 8(6)(f) of the Rules, but also put the bidders, including the petitioner, in dark about the nature and value of the property. This act of the respondents would certainly cause prejudice to the rights and interest of the bidders in assessing the nature and value of the property. In this context, the Hon'ble Apex Court was pleased to consider this aspect in **Mathew Varghese v. M. Amritha Kumar and others**[1] and held as under;

> "33.2. Secondly, when such a secured asset of an immovable property is brought for sale the intending purchasers

[1] (2014) 5 SCC 610

should know the nature of the property, the extent of liability pertaining to the said property, any other encumbrances pertaining to the said property, the minimum price below which one cannot make a bid and the total liability of the borrower to the secured creditor. Since, the proviso to sub-rule (6) also mentions that any other material aspect should also be made known when effecting the publication, it would only mean that the intending purchaser should have entire details about the property brought for sale in order to rule out any possibility of the bidders later on to express ignorance about the factors connected with the asset in question."

Further, even this Court while dealing with a similar issue in **K. Chandrasekhar v. Government of India and others**[2] held as under:

"Thus, it is clear that mentioning of pendency of S.A. before the DRT in the e-auction notice was significantly important, not only to know the nature of the property and extent of the liability but also to know any other encumbrances pertaining to the property. When viewed in the said context, certainly, non-mentioning of pendency of the S.A. before the DRT in the e-auction notice accounts for non-adherence to the procedure prescribed by the proviso to Rule 8(6) of the Rules. This apart, in our view, the conduct of the respondents is worth mentioning. The respondents not only failed to mention about pendency of the S.A. before the DRT in the e-auction notice, but also when the auction was held on 25.10.2012, on which day, the petitioner deposited Rs.6,62,500/- towards 25% of the sale price (bid amount), he was not made known about the pendency of S.A. Only when respondent No.3 issued letter, dated 06.11.2012, confirming sale of the property in favour of the petitioner for a total sale consideration of Rs.26,50,000/-, a clause was incorporated therein that sale confirmation was subject to outcome of the S.A. pending before the DRT. This conduct of the respondents is sufficient enough to accede to the request of the petitioner in setting aside the forfeiture letter, which the respondents sought to construe that it was an order of forfeiture, dated 06.02.2013. Thus, we have no hesitation to set aside the letter of forfeiture, dated 06.02.2013 forfeiting the amount of Rs.6,62,500/-, which was deposited by the petitioner towards 25% of the sale price of the bid and direct respondents 1 to 3 to return the said amount to the petitioner. However, though, the petitioner claimed interest at 12% per annum, we are of the view that the same cannot be granted.

Adverting to the contention of the learned counsel for the respondents that the instant writ petition is not maintainable under Article 226 of the Constitution of India, since the action of the respondents in forfeiting the amount is in accordance with sub-rules (4) and (5) of Rule 9 of the Rules through the order, dated 06.02.2013, which is not challenged by the petitioner and that the remedy available to the petitioner has been by way of appeal before the appellate authority under the SARFAESI Act, we

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[2] 2015 (6) ALD 185 (DB)

> are not in agreement with the learned counsel, for the reason that there has been clear violation of principles of natural justice as the very pendency of S.A. before the DRT was not disclosed in the e-auction notice besides not disclosing the same at the time when auction was held on 22.09.2012 and it was communicated through the letter, dated 06.11.2012. This apart, as mentioned by us in the above, respondents put forth evasive answer despite the petitioner ventilating that in the e-auction notice, dated 25.10.2012, pendency of S.A. before the DRT is not mentioned; when such is the conduct of the respondents, we intend to put an end to the controversy, since we are not inclined to drive the petitioner to approach the DRT at this distance of time."

Now coming to the aspect of *bona fides* on the part of respondent Nos.1 and 2, the 2nd respondent being a responsible officer of the 1st respondent Bank, which is a nationalized bank and an instrumentality of the State, is not expected to behave like a chronic private litigant and act detrimental to the interest of the genuine auction purchasers. The sequence of events that have taken place in the case on hand would also disclose that the respondent Bank has not acted fairly while conducting the auction on 14.09.2016 by suppressing the relevant information relating to filing of S.A. In order to cover up the said aspect, the inconsistent statement made in the counter affidavit that it was informed to the petitioner on the date of auction and after the auction was conducted when admittedly the bidding was through e-auction process, speak volumes about the *mala fides* on the part of respondent Nos.1 and 2 in conducting auction and while dealing with the purchasers. The 2nd respondent being the responsible officer of the 1st respondent Bank is expected to act in a manner known to law. He cannot conduct the auction in violation of the mandatory procedure as contemplated under the provisions of the SARFAESI Act, 2002, and the Rules. Therefore, this Court feels that it is a fit case where though there is no prayer to set aside the auction, the auction dated 14.09.2016 is set aside and respondent Nos.1 and 2 are hereby directed to refund the sum of Rs.92,50,000/- to the petitioner deposited towards 25% of the bid amount pursuant to the e-auction conducted on 14.09.2016 along with interest @ 18% per annum from the date of deposit, within four weeks from the date of receipt of a copy of this order.

Accordingly, the writ petition is allowed. No order as to costs.

Miscellaneous petitions, if any, shall stand closed.

SANJAY KUMAR, J

P. KESHAVA RAO, J

Date: 06.04.2018.
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