HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO
AND
HONOURABLE SRI JUSTICE K.LAKSHMAN

I.A.No.2 of 2019
In/and
WRIT PETITION NO.5058 OF 2019

O R D E R
(*Per Sri Justice M.S.Ramachandra Rao)*

The 2nd respondent herein had availed certain credit facilities from the 1st respondent bank by creating an equitable mortgage on 22.03.2010 of a house plot admeasuring 1166 square yards bearing Plot No.476, House No.8-2-293/82/A/476/A, Survey No.403/1, Old Shaikpet, New Survey No.120 and 102/1 of Hakeempet Village, Road No.22, Jubilee Hills, Hyderabad (hereinafter referred to as 'the subject property').

2. Prior thereto, the 3rd respondent herein had filed against the 2nd respondent, its Managing Director and a Director, a suit O.S.No.72 of 2010 for recovery of Rs.23,33,30,430/- before the III Additional Chief Judge, City Civil Court at Hyderabad and in that suit on 08.02.2010 in I.A.No.531 of 2010, there was a *status quo* order granted by the said Court regarding alienation of the subject property. The interim order granted on 08.02.2010 in I.A.No.531 of 2010 in O.S.No.72 of 2010 was extended until further orders on 23.03.2010.

3. Thus, the very creation of the equitable mortgage by the 2nd respondent in favour of the 1st respondent bank was in violation of the *status quo* order granted by the III Additional Chief Judge, City Civil Court, Hyderabad.

4. On 25.03.2010 in the same suit in I.A.No.532 of 2010 filed by the 3rd respondent seeking orders of attachment before judgment of the above property, an undertaking was filed by the 2nd respondent and its Directors that they would not transfer the subject property pending disposal of the said I.A. This undertaking was given by the 2nd respondent suppressing the creation of the mortgage by the 2nd respondent in favour of the 1st respondent bank.

5. The loan account of the 2nd respondent with the 1st respondent bank became a non-performing asset and the 1st respondent bank initiated recovery proceedings under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity, 'the SARFAESI Act') and put up in auction the subject property for sale on 31.10.2018. In the auction sale notice dt.27.09.2018, the 1st respondent bank did not mention anything about the litigation or the Civil Court's status quo orders/undertakings in respect of the subject property.

6. Two days prior to the auction to be held on 31.10.2018, i.e., on 29.10.2018, the following notice was received by the petitioner from the 1st respondent Bank:

'***<u>NOTICE TO AUCTION PURCHASERS</u>***

One 3rd party viz M/s Sepco Electric Power Construction Corporation filed Suit in OS No.72/2010 on file of 3rd ACJ Court, CCC Hyderabad and obtained simple money decree against the borrower. In EP No.17/2017 got attachment of this property and several other properties in the year 2017 only. They have challenged the action of the bank by filing SA. No.507 /2013 and after examining all the details of the

Hon'ble DRT2 Hyderabad upheld the mortgage right of the bank and disallowed their claim. The attachment and claim of SEPCO is not valid and tenable and not binding on the bank. However once again they have filed SA No. 438/2018 and DRT has not passed any stay order. Bank is filing claim petition in EP to raise attachment to facilitate registration of sale Certificate.

The borrower also filed SA No. 430 /2018 with untenable allegations and in the said SA also there is no stay order.

Both the SAs are posted to 30th October for counter of bank and hearing.

OA filed by the bank for recovery of the debt is pending in DRT2 Hyderabad in OA No.646/2012.

Sd/-
Authorised Officer,
State Bank of India,
Secunderabad.
Date:29.10.2018.'

No documents of any of the legal proceedings referred to in the said notice were furnished to the petitioner.

7. The petitioner participated in the auction and became the highest bidder for Rs.17,61,00,000/- and the petitioner deposited 25% of the said bid amount of Rs.4,40,25,000/- on 01.11.2018 with 1st respondent.

8. On 14.12.2018, the 1st respondent Bank wrote to the petitioner to pay the balance amount of Rs.13,20,75,000/- within 15 days from the said date.

9. The petitioner then addressed a letter to the 1st respondent bank on 27.12.2018 requesting it to provide the documents relating to the litigation referred to in the notice dt.29.10.2018 and seeking 90 days

time to go through all the documents in order to make necessary payment towards the balance sale consideration.

10. The petitioner also sought the status of S.A.Nos.430 and 438 of 2018 pending before the Debts Recovery Tribunal-II, Hyderabad, both of which were referred to in the notice dt.29.10.2018. It was also requested that the 1st respondent extended the timelines for paying the balance sale consideration up to 15th March, 2019.

11. Strangely, the 1st respondent wrote a reply on 07.01.2019 to petitioner stating that *it is not in a position to provide the documents requested by the petitioner* except copies of the original title deeds and link documents. However, extension of time up to 13.03.2019 was granted.

12. On 08.03.2019, the 1st respondent informed the petitioner that if the petitioner did not pay the balance sale consideration, the 1st respondent would forfeit Rs.4.40 crore which the petitioner had deposited with the 1st respondent.

13. Challenging this action of the 1st respondent, the instant Writ Petition is filed by the petitioner.

The interim order granted on 12.3.2019

14. On 12.03.2019, this Court granted an interim direction restraining the 1st respondent not to order forfeiture of the amount deposited by the petitioner noting that only two dates are essential for disposal of the Writ Petition: (a) the date on which the civil Court granted an order of

attachment before judgment; and (b) the date on which the mortgage of the very same property was created in favour of the 1st respondent bank.

15. I.A.No.2 of 2019 was filed to vacate the said order by the bank.

Contentions of Counsel for the Petitioner

16. Learned counsel for the petitioner contends that when the very mortgage in favour of the 1st respondent created on 22.03.2010 by the 2nd respondent is in violation of the Civil Court's order of the *status quo* granted on 08.02.2010 in I.A.No.531 of 2010 in O.S.No.72 of 2010 and when the said order was extended on 25.03.2010 until further orders, it was the duty of the 1st respondent bank not to proceed with the auction under the SARFAESI Act. It was also contended that the suit O.S.No.72 of 2010 was decreed on 15.06.2015 and the order of *status quo* granted in I.A.No.531 of 2010 was made absolute on 15.06.2015 and the undertaking given in I.A.No.532 of 2010 was also made absolute on 15.06.2015 and subsisting, that the said orders have not been vacated till date, and it was not open to the 1st respondent bank to proceed with the auction. It is contended that the 1st respondent bank was duty bound to notify the petitioner about the legal complications relating to the title of the property and in these circumstances, the 1st respondent bank played fraud on the petitioner by proceeding with the auction and in proceeding to forfeit the sum of Rs.4.40 crore paid by the petitioner. It is contended that the 1st respondent bank, an instrumentality of State, is expected to act in a fair and transparent manner and when the validity of the equitable mortgage is put in issue in S.A.No.438 of 2018, the bank ought

to have returned the bid amount deposited by the petitioner. Petitioner's counsel contends that it has thus acted in an arbitrary and fraudulent manner and so the petitioner is entitled to refund of the 25% bid amount.

<u>The 3rd respondent's contentions</u>

17. The 3rd respondent supported the petitioner and contended that when the *status quo* order and the undertaking not to transfer the property were passed against the subject property in O.S.No.72 of 2010, the very creation of the equitable mortgage by the 2nd respondent in favour of the 1st respondent bank on 23.03.2010 is in violation of the orders of the Civil Court and amounted to Contempt of Court. It is contended by the 3rd respondent that the said *status quo* order and the undertaking given by the 2nd respondent not to transfer or alienate the property continued till the suit was decreed and were made absolute on 15.06.2015; and after the suit was decreed on 15.06.2015, the 3rd respondent filed E.P.No.17 of 2017 before the I Additional Chief Judge, City Civil Court, Hyderabad. It contended that after the factum of the mortgage of the property came to the knowledge of the 3rd respondent, it immediately filed S.A.No.438 of 2018 before the Debts Recovery Tribunal, Hyderabad, contending that the mortgage is not valid and proper and the 1st respondent bank was also put on notice by letter dt.10.08.2013 intimating about the orders passed on 08.02.2010 by the civil Court and the actions of the 1st respondent in accepting the mortgage and putting the property in auction are null and void and in contempt of the orders passed by the civil Court.

The stand of the 1st respondent

18. Its first contention is that there is an effective alternative remedy under Section 18 of the SARFAESI Act before the Debts Recovery Appellate Tribunal.

19. It is not in dispute that the Chairman, Debts Recovery Appellate Tribunal for the State of Telangana is located in Kolkata and there is no Chairman appointed till date for the Debts Recovery Appellate Tribunal at Kolkata. Parties interested in availing the remedy of appeal under Section 18 of the SARFAESI Act have to first file an appeal in Kolkata and then go to Allahabad which is the incharge Debts Recovery Appellate Tribunal.

20. In our considered opinion, this alternative remedy under Section 18, in the facts and circumstances of the case, cannot be said to be an effective alternative remedy. Therefore, the said contention is rejected.

21. Secondly, reliance is placed by the 1st respondent on the order dt.05.10.2018 in S.A.No.161 of 2018, wherein a securitization application filed by the 3rd respondent to set aside the e-auction sale notice dt.01.08.2013 fixing the auction date on 02.09.2013 was dismissed. In the said order, the Debts Recovery Tribunal, Hyderabad, was of the view that there is no attachment over the subject property and if there is violation of the *status quo* order against the 2nd respondent or its Directors, it can only be dealt with under the provisions of the

Contempt of Courts Act. It placed reliance on the judgment in Y.**Kesavulu vs. T.Kalavathi**[1].

22. This order does not bind the petitioner since petitioner is not a party to it.

23. The 1st respondent bank does not dispute either the factum of the *status quo* order being granted in I.A.No.531 of 2010 in O.S.No.72 of 2010 on 08.02.2010 or its subsequent extension on 25.03.2010 by the civil Court or the undertaking given by the 2nd respondent on 25.03.2010 in I.A.No.532 of 2010.

24. It also does not dispute that the orders granted in I.A.Nos.531 of 2010 and 532 of 2010 were made absolute after the suit was decreed on 15.06.2015 and that the 3rd respondent filed E.P.No.17 of 2017 before the I Additional Chief Judge, City Civil Court, Hyderabad.

25. In **Anita International v. Tungabhadra Sugar Workers Mazdoor Sangh**[2], it was held that when an order passed by a Court subsists, the same is liable to be complied with, till it is set aside. The Supreme Court observed that it is not open either to the parties to a *lis or to any third parties* to determine that an order passed by a Court is valid or void. A party to the *lis* or a *third party* who considers an order passed by a Court as void or *non est*, must approach a Court of competent jurisdiction to have the said order set aside on such grounds as may be available in law. Till an order passed by a competent Court is set aside, the same would

[1] 2016(6) ALD 286
[2] (2016) 9 SCC 44

have the force of law, and any act/action carried out in violation thereof would be liable to be set aside. It observed that to conclude otherwise may have disastrous consequences and that every cantankerous and quarrelsome litigant would be entitled to canvass that in his wisdom, the judicial order detrimental to his interest was void, voidable or patently erroneous and based on such a plea, to avoid or disregard or even disobey the same, and this course can never be permitted.

26. With due respect to the learned Judge who decided **Y.Kesavulu** (1 supra), the creation of the equitable mortgage in favour of the 1st respondent is in violation of the *status quo* order granted in I.A.No.531 of 2010 on 22.03.2010 and is undisputedly a contempt of the orders passed by the Court in O.S.No.72 of 2010 because the said order was extended on 25.03.2010 until the disposal of the suit. The suit came to be decreed on 15.6.2015.

27. When a party has violated the Court order, the said party cannot be allowed to enjoy the fruits of the contempt. The Supreme Court had accepted the principle that a contemnor should not be permitted to enjoy and/or keep the fruits of his contempt in **Delhi Development Authority Vs. Skipper Construction Company Private Limited**[3].

28. Therefore, the benefit the 2nd respondent got by creating the mortgage in favor of the 1st respondent cannot be allowed to be enjoyed by it.

[3] (1996) 4 SCC 622

29. It is not in dispute that the bank became aware of the creation of the equitable mortgage in violation of the *status quo* orders granted in O.S.No.72 of 2010 when it was informed by the 3rd respondent to it on 10.08.2013 and also in S.A.No.161 of 2018 (old S.A.No.507 of 2013) filed by the 3rd respondent before the Debts Recovery Tribunal, Hyderabad.

30. No doubt, the bank was not a party to the suit , but even a third party can be held liable for contempt if it assists in the breach of a Court order after knowing about it and thus facilitates obstruction of course of justice.

31. The Supreme Court considered the question about liability of a third party who assists a party to a litigation to violate a Court order in **Sita Ram v. Balbir**[4] and followed the principle in **Seaward v. Paterson**[5]. It held:

> *" In **Seaward v. Paterson** the landlord of the premises concerned had obtained an injunction against Paterson i.e. his tenant restraining him from doing or allowing to be done anything on the premises which would be a nuisance to the landlord and from using the premises otherwise than for the purposes of a private club. Alleging that the tenant had committed contempt of the court by allowing the premises to be used for boxing matches, the landlord applied for committal of two other persons, namely, Sheppard and Murray on the ground that they had aided and assisted the tenant in his disobedience to the injunction. The following passages from the judgment of Lindley, L.J. are quite instructive: (All ER pp. 1130 F-G & 1131 B-D)*

4 (2017) 2 SCC 456
5 (1859-99) All E R 1127

> *Now, Let us consider what jurisdiction the court has to make an order against Murray. There is no injunction against him—he is no more bound by the injunction granted against Paterson than any other member of the public. He is bound, like other members of the public, not to interfere with, and not to obstruct, the course of justice; and the case, if any, made against him must be this, not that he has technically infringed the injunction, which was not granted against him in any sense of the word, but that he has been aiding and abetting others in setting the court at defiance, and deliberately treating the order of the court as unworthy of notice. If he has so conducted himself, it is perfectly idle to say that there is no jurisdiction to commit him for contempt as distinguished from a breach of the injunction, which has a technical meaning.*
>
> * * *
>
> *A motion to commit a man for breach of an injunction, which is technically wrong unless he is bound by the injunction, is one thing; and a motion to commit a man for contempt of court, not because he is bound by the injunction by being party to the cause, but because he is conducting himself so as to obstruct the course of justice, is another and a totally different thing. The difference is very marked. In the one case the party who is bound by the injunction is proceeded against for the purpose of enforcing the order of the court for the benefit of the person who got it. In the other case, the court will not allow its process to be set at naught and treated with contempt." (emphasis supplied)*

32. Admittedly, the 1st respondent Bank never filed an application in O.S.No.72 of 2010 though it became aware of the order dt.08-02-2010 in I.A.No.531 of 2010 and the undertaking given by the 2nd respondent on 25.3.2010 in IA No.532 of 2010 on 10.8.2013, when the 3rd respondent informed it about them and though the said suit was pending till 15.6.2015. Thus it's conduct was not *bona fide*.

33. By persisting in proceeding further with the auction though it was aware of the orders passed in I.A.Nos.531 of 2010 and 532 of 2010 in O.S.No.72 of 2010, the 1st respondent bank can be said to be aiding and abetting the 2nd respondent in setting the Civil Court at defiance, and deliberately treating the order of the said court as unworthy of notice. It therefore cannot avoid the charge of being itself in contempt of the Civil Court order by acting in concert with the 2nd respondent and acting to enforce the mortgage created by/for the benefit of the 2nd respondent in violation of the *status quo* order. This amounts to the 1st respondent bank obstructing the course of justice.

34. The 1st respondent bank relies on its notice dt.29.10.2018 informing the petitioner and the other auction purchasers about the cases pending in relation to the subject property, and contends that the petitioner therefore cannot claim to be lacking in knowledge about the same and that its conduct is *bona fide*.

35. It is important to note that the petitioner was never supplied by the 1st respondent bank, though it is a party to the cases mentioned in the said notice, the documents in relation to the said litigation, even though the petitioner asked for it in its letter dt.27.12.2018 as can be seen from the 1st respondent bank's reply dt.07.01.2019 where it stated that '*it is not in a position to provide the documents relating to the litigation*' sought for by the petitioner.

36. It is indeed shocking that a public financial institution, which falls within the definition of 'State' under Article 12 of the Constitution of India, should act so arbitrarily and brazenly.

37. It is also further shocking that the 1st respondent bank expected the petitioner to obtain copies of all these documents between 29.10.2018 and 31.10.2018, i.e., in a mere two days and acquaint itself with the said litigations.

38. In our opinion, the 1st respondent bank has clearly colluded with the 2nd respondent and has played fraud on the petitioner and other auction purchasers in acting in this arbitrary and highhanded manner unbecoming of a public financial institution.

39. The allegation of the 1st respondent that it is the petitioner who is colluding with the 2nd respondent or the 3rd respondent is absurd and is totally without any merit.

40. In the additional affidavit filed by the 1st respondent, it is stated that the subject property, in fact, belongs to a Director of the 2nd respondent company and not to the 2nd respondent company. How this fact has any bearing on the orders of the *status quo*/undertaking given in O.S.No.72 of 2010 is not explained. There is also reference to C.M.A. (SR) Nos.30947 of 2015 and 30913 of 2015 which were already dismissed by this Court as not maintainable.

41. Though it is stated that S.A.No.438 of 2018 filed by the 3rd respondent to stay the auction scheduled on 31.10.2018 was

dismissed by the Debts Recovery Tribunal, no copy of the order of the Debts Recovery Tribunal has been placed before this Court.

42. In any event, it is not the case of the 1st respondent bank that it was dismissed *before* 31.10.2018. Therefore, as on 31.10.2018 the said litigation in relation to the subject property was subsisting and created a cloud on the right of the 1st respondent to alienate the subject property. As a public financial institution governed by Article 14 of the Constitution of India, it was the duty of the 1st respondent bank not to proceed with the auction on 31.10.2018 till the litigation in respect of the said property ended.

43. In these circumstances, the 1st respondent is not entitled to invoke Rule 9(5) of the Security Interest (Enforcement) Rules, 2002 and forfeit the sum of Rs.4.40 crore deposited by the petitioner.

44. Accordingly, the Writ Petition is allowed with costs of Rs.20,000/- (Rupees twenty thousand only) to be paid by the 1st respondent to the petitioner and the 1st respondent is directed to refund forthwith the sum of Rs.4,40,25,000/- deposited by the petitioner with it on 26.10.2018/01.11.2018 with interest at 9% per annum till the date of repayment. The Chairman and Managing Director of the State Bank of India shall identify the officers responsible for this arbitrary action and initiate disciplinary action against them.

45. Consequently, I.A.No.2 of 2019 is dismissed.

46. Pending miscellaneous petitions, if any, shall stand closed.

M.S.RAMACHANDRA RAO, J

K.LAKSHMAN, J

29th October, 2019

Note :- Copy of the order to be marked to the Chairman and Managing Director of the State Bank of India, State Bank Bhavan, Madam Cama Road, Nariman Point, Mumbai-400021.

B/o.
Svv