THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO
And
THE HONOURABLE SRI JUSTICE K. LAKSHMAN

WRIT PETITION No.17702 of 2019

ORDER: *(Per Hon'ble Sri Justice M.S. Ramachandra Rao)*

This Writ Petition is directed against the order dt.01-08-2019 in S.A.No.567 of 2017 of the Debts Recovery Tribunal-II, Hyderabad dismissing application under Section 17(1) Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002 (for short 'the Act') filed by the petitioners for quashing the auction sale notice dt.25-02-2015 and sale certificate dt.15-04-2015 issued by the 2nd respondent Bank.

2. Petitioner No.3 is a proprietary concern and for its business, it had approached the 2nd respondent for grant of a term loan. The 2nd respondent sanctioned three different term loans aggregating to a sum of Rs.26.00 lakhs which were secured by property bearing Municipal No.12-3-39 located at Sai Nagar, Anantapur belonging to the 4th petitioner. Thereafter the 3rd petitioner committed default in repayment of loan and the term loan amount was classified as 'NPA'.

3. The 2nd respondent Bank then invoked the provisions of the Act. It issued a notice under Section 13(2) of the Act bearing date 15-11-2012 and another notice under Section 13(4) of the Act on 05-12-2012. In both these notices, house bearing Municipal number

was mentioned as ‘12-3-393’ instead of ‘12-3-39’. These notices were not served on the petitioners, according to the petitioners.

4. Petitioners allege that these two notices were sent to the wrong address bearing Municipal No.‘12-3-393’ and they cannot be taken as having been served on the petitioners, whose premises was Municipal No.‘12-3-39’ and this vitiates the actions taken by the 2nd respondent under the Act.

5. Petitioners challenged these notices before the Debts Recovery Tribunal-II at Hyderabad vide SAIR No.467/13, which was filed with a delay of 257 days. The said delay petition was dismissed by the Tribunal on 12-12-2014.

6. Thereafter the 2nd respondent Bank issued e.auction notice and placed it on their website on 25-02-2015 seeking auction of the mortgaged property on 28-03-2015. In the said auction, the 3rd respondent became the highest bidder for a sum of Rs.64,23,000/-.

7. On 26-03-2015, the 3rd respondent deposited Rs.5,54,000/- towards 10% advance as a deposit and on 28-03-2018, he deposited Rs.10,51,750/- equivalent to 15% of consideration and the balance 75% amounting of Rs.48,17,250/- was to be deposited by 11-04-2015. Admittedly, he deposited the same on 15-04-2015. Thus he did not comply with Rule 9(4) of the Security Interest Enforcement Rules, 2002.

8. Petitioners therefore filed S.A.No.211 of 2015 before the Debts Recovery Tribunal-II at Hyderabad under Section 17(1) of the Act for quashing the auction notice dt.25-02-2015 and sale notice dt.15-04-2015 issued by the 2nd respondent-Bank. This was transferred to the Debts Recovery Tribunal-II at Hyderabad and renumbered as S.A.No.567 of 2017.

9. By order dt.01-08-2019, S.A.No.567 of 2017 was dismissed by the said Tribunal. As regards the wrong mentioning of Municipal Number, the Tribunal held that earlier SAIR No.467/2013 filed by petitioners was dismissed on 12-12-2014 and the said issue therefore cannot be reopened.

10. Regarding the defect in the notice of sale under Rule 8(6) also containing same wrong Municipal number, which was also urged by the petitioners before the Tribunal, the Tribunal held that the applicants themselves filed copy of it along with securitization application and therefore they cannot contend non-service of sale notice on them. It held that any ambiguity in the municipal number would have to be complained of by the participants in the auction sale, but the petitioners cannot complain of it since the property was capable of identification notwithstanding the incorrect Municipal number mentioned in e.auction sale notice as house bearing Municipal No.12-3-393. It therefore refused to interfere with the actions of the 2nd respondent Bank with regard to the e.auction sale notice

dt.25-02-2015 and sale certificate dt.15-04-2015 issued by 2nd respondent Bank.

11. Assailing the same, this Writ Petition is filed.

12. Heard learned counsel for petitioners, Sri M.Srikanth Reddy, learned counsel appearing for 2nd respondent Bank and Sri N. Harinath, learned counsel for 3rd respondent.

13. It is contended by the counsel for respondents that the sale certificate was also issued on 15-04-2015 mentioning the incorrect Municipal number, but later a rectification deed was executed on 21-04-2015 mentioning the correct Municipal Number and on 23-11-2018, the 3rd respondent-auction purchaser was delivered possession of the property.

14. The respondents contended that in these circumstances, this Court should not interfere with the order passed by the Tribunal.

15. It is settled law that merely because power is vested in a secured creditor to realize its dues from a defaulting borrower by taking recourse to the measures provided under the Act, it does not dilute the fact that such a secured creditor owes a fiduciary duty to protect the interest of such borrower, while putting his properties to sale (**Pochiraju Industries Ltd., Tamilnadu Vs. Punjab National Bank, New Delhi and others**[1]).

[1] 2018(2) ALD 543 (DB)

16. In **Rajiv Subramaniyan Vs. Pandiyas**[2], the Supreme Court held that the secured creditor, as a trustee of the secured asset, cannot deal with the same in any manner likes and such asset can be disposed of only in the manner prescribed in the Act. It observed that the creditor should ensure that the borrower was clearly put on notice of the date and time by which either the sale or transfer will be effected in order to provide the required opportunity to the borrower to take all possible steps for retrieving his property, and such notice is also necessary to ensure that the process of sale will ensure that the secured assets will be sold to provide maximum benefit to the borrowers. It held that the notice is also necessary to ensure that the secured creditor or anyone on its behalf is not allowed to exploit the situation by virtue of proceedings initiated under the Act. It declared and emphasized that the secured creditors are expected to take *bona fide* measures to ensure that there is maximum yield from such secured assets for the borrower.

17. This legal position is not disputed by the respondents.

18. When the correct Municipal number is 12-3-39 of the secured asset, it cannot be said that the 2nd respondent had discharged its fiduciary duty by mentioning the Municipal Number as '12-3-393' in the notice issued under Section 13(2) of Act, notice issued under Section 13(4) of the Act and notice issued under Section 8(6) of the Act. If the purpose of sale is to ensure not only that the

[2] (2014) 5 SCC 651

2nd respondent to recover its dues, but also that the borrower gets maximum benefit from the sale, particulars relating to property being sold ought to be correctly mentioned. When the sale notice issued under Section 8(6) of the Act also mentions incorrect Municipal number of the property, and the sale certificate is also issued on 15-04-2015 mentioning wrong Municipal number, by merely executing a rectification document correcting the sale certificate on 21-04-2015, the sale cannot get sanctified.

19. More importantly, the question of service of notice under Section 13(2) as well as 13(4) of the Act is seriously disputed by petitioners because it is admitted in para-39 to the reply affidavit filed by the 2nd respondent before the Debts Recovery Tribunal-II, Hyderabad that notices were sent to the wrong Municipal No. '12-3-393' and not to the correct Municipal No.'12-3-39', and it is also admitted that they were returned unserved on the petitioners. This is also a serious infirmity in the process initiated by 2nd respondent against the petitioners.

20. Even if SAIR No.467/13 was dismissed on 12-12-2014, it is the duty of the 2nd respondent Bank to ensure that there is proper compliance with Rule 9(4) of the Rules and the 3rd respondent auction-purchaser pays the bid amount within the time stipulated in the said provision.

21. In the instant case, admittedly the payment of 75% balance amount by 3rd respondent was on 15-04-2015, but he ought to have paid it by 11-04-2015, which was the 15th day from the date of sale of the subject property.

22. In fact respondent Nos.2 and 3 have suppressed about these defects in the counter-affidavit filed by them and only when this Court asked for these details, these facts came out.

23. We are deeply disappointed at this conduct of the 2nd respondent Bank in not adhering to the provisions of the Security Enforcement Rules, 2002 and suppressing the non-payment of balance dues by the 3rd respondent within the time stipulated in Rule 9(4). It has failed in acting as fiduciary.

24. For all these reasons, the Writ Petition is allowed; the order dt.01-08-2019 in S.A.No.567 of 2017 of the Debts Recovery Tribunal-II, Hyderabad is set aside; all proceedings while commenced from the stage of Section 13(2) notice till issuance of sale certificate on 15-04-2015, rectification of sale certificate on 21-04-2015 as well as delivery of possession on 23-11-2018 to the 3rd respondent by 2nd respondent Bank, are set aside; the 3rd respondent shall restore possession of the property to the 2nd respondent within one week; and the 2nd respondent shall restore possession of the property to the 4th petitioner within one week thereafter. The 2nd respondent Bank is

directed to be more careful in discharging its statutory obligations under the Act in future. No costs.

25. Consequently, miscellaneous petitions pending, if any, shall stand closed.

JUSTI`CE M.S.RAMACHANDRA RAO

JUSTICE K. LAKSHMAN

Date: 20-11-2019
Note :- Issue C.C. by 27-11-2019.
B/o.
Vsv