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

WRIT PETITION NOS.25174 AND 34129 OF 2018

COMMON ORDER:
(Per Sri Justice M.S.Ramachandra Rao)

Heard Sri L.Ravichander, learned senior counsel for Sri G.Srinivas, learned counsel for the petitioners and Sri E.Madan Mohan Rao, learned counsel for the 1st respondent Bank in both Writ Petitions, apart from learned Government Pleader for Home and Law for the 5th respondent in W.P.No.34129 of 2018.

2. The 1st petitioner in W.P.No.25174 of 2018 is a firm involved in the manufacture of MS & GI, Welded Mesh, Chain Link Mesh, Barbed Wire, etc., and is a small scale industry. It obtained credit facility and term loan facility from Vijaya Bank from time to time for purpose of working capital and for purchase of enhanced production machinery in 2012.

3. In 2015, it could not repay the interest and loan instalments due to certain unforeseen adverse situations in their business and their account was classified as an NPA by the said Bank.

4. The Bank issued notice dt.07.03.2015 under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity, 'the Act'), which was served on the petitioners in W.P.No.25174 of 2018 on 15.03.2015. A representation was made on 07.05.2015 in response to the notice

dt.07.03.2015. Thereafter, certain representations were made by the said petitioners to the Bank for restructuring the loan amount also.

5. Possession notice under Section 13(4) of the Act dt.25.01.2018 was issued by the Bank without allegedly replying to the petitioners' plea about restructuring of the loan account.

6. An e-auction sale notice dt.08.06.2018 was issued by the Bank inviting applications from interested parties to participate in the e-auction sale putting the properties of the 3rd petitioner in W.P.No.25174 of 2018 to sale.

7. Thereafter, sale notice dt.11.06.2018 was also issued by the Bank, which was served on the petitioners on 13.06.2018.

8. The petitioners then filed W.P.No.25174 of 2018 challenging the sale notice dt.11.06.2018 and the e-auction sale notice dt.08.06.2018 issued by the Bank putting the properties of the 3rd petitioner in the e-auction.

9. The 3rd petitioner in W.P.No.25174 of 2018 also filed W.P.No.34129 of 2018 contending that she is one of the guarantors to the credit facilities granted to the 1st petitioner in W.P.No.25174 of 2018; that shop No.18 situated in Anasuya Commercial Complex, opposite Liberty theatre, Himayathnagar, Hyderabad belonging to her, was given as security to the Bank by deposit of title deeds; that sale notice under Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 (for brevity, 'the Rules') was issued for auction of the secured assets on

20.07.2018, which was challenged in W.P.No.25174 of 2018; that during the pendency of the Writ Petition, the Bank conducted the sale on 20.07.2018 and issued sale certificate to the highest bidder on 03.08.2018; that the Bank approached the Collector of Hyderabad District who is the District Magistrate invoking Section 14 of the Act; and the District Collector, Hyderabad District on 07.07.2018 passed orders directing the Tahsildar, Himayathnagar Mandal, Hyderabad District to assist the Bank in taking over physical possession of the properties of the petitioner in W.P.No.34129 of 2018.

10. According to the petitioner in W.P.No.34129 of 2018, not only the action of the Bank in putting the properties to sale but also the manner of conduct of sale is contrary to the Act because there is no 30 day gap between the notice under Rule 8(6) and the notice under Rule 9 of the Rules.

11. It is also contended that the extent of the property was not correctly mentioned in all the notices because though the extent of the property of the petitioner in W.P.No.34129 of 2018/guarantor is 240 sft., there is in fact only 171.5 sft., available as the extent of 68.5 sft., was acquired by the State for road widening. It is stated that though the valuer's report dt.08.08.2012 mentions the area as 171.5 sft., the notice dt.11.06.2018 issued under Rule 8(6) of the Rules incorrectly mentions the area as 240 sft., and this is impermissible in law.

12. It is also contended that in the affidavit filed under Section 14 of the Act before the District Collector, Hyderabad District, the matters required to be mentioned as per the proviso to Section 14(1) of the Act are not mentioned; though the said application was filed on 28.06.2018, the dues as on that date are not mentioned and therefore, the order of the District Collector, Hyderabad District passed under Section 14 of the Act on 07.07.2018 cannot be sustained.

13. Sri E.Madan Mohan Rao, learned counsel for the Bank refuted the said contentions and supported the actions of the Bank.

14. It is true that in the instant case, a notice under Rule 8(6) of the Rules was issued on 11.06.2018 fixing the date of online e-auction as 20.07.2018 mentioning the built up area as 240 sft., and even in the e-auction sale notice issued on 08.06.2018 inviting bidders for the auction on 20.07.2018, the area of the property of the 3rd petitioner in W.P.No.25174 of 2018/petitioner in W.P.No.34129 of 2018 is mentioned as 240 sft., though admittedly an extent of 68.5 sft., was acquired for road widening, leaving only an area of 171.5 sft.

15. The Supreme Court in **J. Rajiv Subramaniyan Vs. Pandiyas**[1], has held that a secured creditor owes a fiduciary duty to protect the interest of the borrower while putting his properties to sale and that the secured creditor acts as a trustee of the secured asset and cannot deal with the same in any manner as he likes and he must ensure that the

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[1] (2014) 5 SCC 651

secured asset would be sold to provide maximum benefit to the borrowers.

16. This principle has also been accepted by this Court in **Pochiraju Industries Ltd., Tamilnadu Vs. Punjab National Bank, New Delhi and others**[2].

17. Under Rule 8(6) of the Rules, it is the duty of the Bank to give correct description of the immovable property to be sold and therefore, it is the duty of the Bank to correctly give the extent of the property belonging to the petitioner in W.P.No.34129 of 2018, which is proposed to be sold by it. In the instant case, admittedly, this has not happened.

18. The learned counsel for the petitioners placed reliance on the Division Bench Judgment in **Sri Sai Annadatha Polymers, Madanapalle, Chittoor District and another Vs. Canara Bank, Madanapalle, Chittoor District**[3] to contend that there should be clear 30 day notice period under Rule 8(6) of the Rules to enable the borrower to exercise his right of redemption; and the notice under Rule 9(1) of the Rules cannot be published prior to expiry of the 30 day period after the amendment of Section 13(8) of the Act.

19. We are of the opinion that the basis for the said view of the Division Bench in that case was that Rule 8(6) of the Rules was not amended though Section 13(8) of the Act was amended. In our opinion, the unamended Section 13(8) created a right vested in the borrower to

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[2] 2018 (2) ALD 543 (DB)
[3] 2018 (5) ALD 180 (DB)

redeem all the dues *at any time before the date fixed for sale or transfer*. After the amendment made to Sec.13(8) on 01.09.2016, the borrower could redeem the property mortgaged to prevent its sale if he paid all the dues *before the date of publication of the notice for public auction or inviting quotations.*

20. Thus, the time available to a borrower to redeem the property was reduced. Rule 9(1) of the Rules was also amended. Prior to its amendment, it stated that there shall not be sale of immovable property under the Rules before the expiry of 30 days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub-rule (6) or notice of sale has been served to the borrower. But after its amendment, a proviso has been added stating that if there is any failure in conducting sale in the first attempt and it is required to conduct a sale again, the period of 30 days mentioned in sub-rule (1) of Rule 9 of the Rules would stand reduced to 15 days.

21. Merely because Rule 8(6) of the Rules, which stated that the authorized officer shall serve to the borrower a notice of 30 days for sale of the immovable secured assets under sub-rule (5), was not altered, it would not, in our opinion, make any difference.

22. In our opinion, the statute nowhere requires that there should be a 30 day gap between service of notice by the authorized officer on the borrower and the date fixed for sale of the immovable secured assets. We hold that the contrary view taken **Sri Sai Annadatha Polymers,**

Madanapalle, Chittoor District (3rd supra) does not represent the correct legal position.

23. There need not be a clear 30 day notice period between issuance of notice under Rule 8(6) *and* issuance of notice under Rule 9(1) of the Rules. It would suffice if there is 30 day gap from the date of publication of public notice in newspapers of sale *and* the date of sale.

24. In the instant case, admittedly, there is such clear 30 day gap between the notice under Rule 8(6) which was issued on 11.06.2018 and e-auction sale notice dt.08.06.2018 issued under Rule 9(1) and the date of sale i.e., 20.07.2018. Therefore, this contention of the learned counsel for the petitioners is rejected.

25. Coming to the steps taken under Section 14 of the Act by the Bank, the Bank was required to file an affidavit before the Chief Metropolitan Magistrate or District Magistrate i.e., the District Collector, Hyderabad in the instant case setting out the various matters specified in Clauses (i) to (ix) of the proviso to sub-section (1) of Section 14 of the Act. In the instant case, there is no such affidavit filed by the Bank before the District Collector, Hyderabad.

26. This Court in an order passed by it on 28.10.2019 in W.P.No.18734 of 2019 had set aside the action taken under Section 14 of the Act by the Chief Judicial Magistrate at Cyberabad when the details required by the proviso to sub-section (1) of Section 14 of the Act were not mentioned in the affidavit filed in support of its application

under Section 14(1) of the Act by the Bank observing that it is the duty of the Bank as a secured creditor to place correct facts truthfully in the affidavit filed by its representative before the said Magistrate and it cannot suppress the facts.

27. Also, the application filed by the Bank before the District Magistrate, which is supposed to mention the claim of the Bank as on the date of filing the application i.e. 28.06.2018, does not mention the said details and only mentions the amount due as on 28.02.2015.

28. It is the duty of the District Collector, Hyderabad acting as District Magistrate under sub-section (1) of Section 14 of the Act to insist that the Bank complied properly with requirements under the proviso to sub-section (1) of Section 14 of the Act. This is because the second proviso to sub-section (1) of Section 14 of the Act requires the District Magistrate to be satisfied about the contents of the affidavit filed before him to pass suitable orders for purpose of taking possession of the secured assets.

29. Also, as pointed out earlier, an extent of 68.5 sft., had been acquired for road widening out of the property which is given as security by the petitioner in W.P.No.34129 of 2018 and the balance left was only 171.5 sft. But before the District Collector, Hyderabad, the extent of property to be taken possession of was mentioned as 240 sft.

30. Accordingly,

(i) W.P.No.25174 of 2018 is allowed and; the order dt.07.07.2018 passed by the District Collector and District Magistrate, Hyderabad (the 2nd respondent in W.P.No.34129 of 2018) is set aside and the sale notice dt.11.06.2018 issued under Rule 8(6) of the Rules as well as the e-auction sale notice dt.08.06.2018 issued under Rule 9(1) of the Rules are set aside on the ground that they did not correctly mention the extent of the property of the 3rd petitioner in W.P.No.25174 of 2018/petitioner in W.P.No.34129 of 2018 .

(ii) Consequently all actions taken pursuant thereto including the order dt.07.07.2018 passed by the District Collector and District Magistrate, Hyderabad are set aside and accordingly W.P.No.34129 of 2018 is also allowed.

(iii) Liberty is given to the 1st respondent Bank to proceed with the sale of the property of the petitioner in W.P.No.34129 of 2018 by correctly mentioning the facts in the sale notice issued under Rule 8(6) as well as the e-auction notice issued under Rule 9(1) of the Rules.

(iv) Possession of the subject property shall be restored to the 3rd petitioner in W.P.No.25174 of 2018/petitioner in W.P.No.34129 of 2018 by the Bank forthwith.

(v) The Bank is also granted liberty to file an application under Section 14 of the Act by correctly mentioning the extent as well as the dues and other particulars required to be mentioned as per the first proviso to sub-section (1) of Section 14 of the Act and then proceed in accordance with law. No costs.

31. Pending miscellaneous petitions, if any, in both the Writ Petitions shall stand closed.

M.S.RAMACHANDRA RAO, J

K.LAKSHMAN, J

Date: 08-01-2020

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