IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 11 OF 2018

L. Natwarlal And Co. & Ors. … Petitioners

Versus

Dena Bank & Anr. ... Respondents

Mr. Vishal Kanade a/w Sapna Rachure i/b T.N. Tripathi & Co. for the Petitioners.
Mr. Iliyas Nasikwala a/w Chandrika Prajapati i/b M.V. Kini & Co. for Respondent No.1.
Mr. Prateek Seksaria a/w Mr. Shubhabrata Chakraborti a/w Aniruddh Gambhir a/w Sameer Bindra i/b Juris Corp for Respondent No.2.

CORAM : A.A. SAYED &
R.I. CHAGLA, JJ.

RESERVED ON : 2ND MAY, 2019.

PRONOUNCED ON : 29th MARCH, 2022.

ORAL JUDGMENT (Per R.I. CHAGLA, J.) :

1) By the present Petition filed under Article 226 of the Institution of India, the Petitioners are challenging the orders passed by the DRT on 19.04.2011 and DRAT on 22.08.2017 and seeking quashing and setting aside of the impugned orders and the impugned auction sale.

2 A brief description of facts is being given :

The Petitioners had availed of certain loan facility from Respondent No.1. The Petitioners committed defaults and were unable to repay the loan and as a result of which the Respondent No.1 classified the account of Petitioner No.1 as N.P.A. The Respondent No.1 issued notice to Petitioner No.1 under Section 13(2) of SARFAESI Act, 2002. Respondent No.1 also took symbolic possession of flat Nos.801-802, Neelam Apartment, Mount Merry Road, Bandra (W), Mumbai (hereinafter referred to as “the subject property”). This was challenged by the Petitioners by filing S.A. No.6 of 2008 in the DRT.

3 In the DRT proceedings, the Petitioners failed to obtain any interim protection with regard to the subject property. The S.A. No.6 of 2008 was dismissed by the DRT. The Petitioners challenged the order of the DRT dated 22.04.2009 before the DRAT. The Petitioners had not made the requisite deposit in the DRAT and extension was declined and accordingly the Appeal was dismissed for non-compliance of deposit. This Court had in Writ Petition No.1603 of 2009 filed by the Petitioners granted extension to make the requisite deposit.

4 The Respondent No.1 had issued possession notice under Section 13(4) of the SARFAESI Act, 2002. This resulted in four sale

notices being issued. The first three sales notices did not result in the auction being held and it was only by virtue of the fourth notice that the auction proceedings were held. The Petitioners had tendered payment but which was not acceptable to Respondent No.1. Respondent No.2 was declared as the successful bidder pursuant to the auction held by Respondent No.1.

5 The Petitioners had filed S.A. No.233 of 2010 challenging possession notice as well as the first Respondent's refusal to accept the tender of payment. The main challenge before the DRT in SA No.233 of 2010 was to the sale notice of the subject property being non-compliant with Rule 8(6) of the Security Interest (Enforcement) Rules 2002 ("the said Rules"). The other challenge was with regard to the valuation of the subject property absent there being any supportive material for such valuation.

6 The S.A. No.233 of 2010 came to be rejected by the DRT by its order dated 19.04.2011. The Petitioners filed Appeal No.111 of 2011 challenging the order of the DRT. The DRAT dismissed the Appeal by upholding the order passed by the DRT. Being aggrieved by the impugned orders of the DRT and DRAT, the present Writ Petition has been filed.

7 Mr. Vishal Kanade, the learned Counsel appearing for the Petitioners, has relied upon the decision of the Supreme Court in *Vasu P. Shetty vs. M/s. Hotel Vandana Palace and others*[1], in support of his contention that any sale of the secured assets without complying with Rules 8 and 9 of the said Rules, would render the subject sale null and void. The mandatory provisions of 30 days notice of sale is required to be complied with and non-compliance thereof results in the sale being voided. He has also relied upon the decision of the Supreme Court in *Mathew Varghese vs. M. Amritha Kumar and Others*[2], in support of his argument that Rule 8(6) of the said Rules mandates such clear 30 days notice for sale of the secured asset and non-compliance thereof would render such sale null and void. He has submitted that in the present case it has been expressly admitted by the Respondent No.1 that Rule 8(6) notice was not served on the Petitioners on the ground that it was not necessary. The Rule 8(6) Notice was misconstrued as a sale notice under Rule 9 (1) of the said Rules in the impugned orders.

8 Mr. Kanade has also submitted that the valuation of the subject property was not properly done as there was no supporting material. He has submitted that the DRT as well as the DRAT should have

1 AIR 2014 SC 1947

2 AIR 2015 SC 50

not confirmed the sale at an undervalue. They should have considered that there was no opportunity given to other bidders to come and participate. The Petitioners had also sought to deposit the sale price which was unjustly refused by the Tribunal. He has accordingly submitted that the impugned orders have not given proper consideration to the issues raised by the Petitioners and accordingly, required to be set aside.

9 Mr. Prateek Seksaria, learned Counsel appearing for Respondent No.2 - auction purchaser and Mr. Nasikwala, learned Counsel appearing for Respondent No.1 – Bank have vehemently opposed the Petition. They have contended that the mandatory 30 days notice under Rules 8(6) and 9(1) to the borrower regarding the secured creditor's intention to sell the secured asset has been given in the present case. They have submitted that there is a concurrent finding of fact by the DRT and DRAT that there was clear 30 days notice of the intention of Respondent No.1 - secured creditor to Petitioners - borrowers of their intention to sell the secured asset namely the subject property. He has relied upon the decision of the Supreme Court in *Canara Bank vs. M. Amarender Reddy and Another*[3] which has held that there is no requirement to give separate individual notice to the borrower prior to deciding on the mode of sale of the secured asset. It is permissible to

3 (2017) 4 SCC 735

simultaneously issue notice to the borrower about the intention to sell the secured assets and also to issue a public notice for sale of said secured assets by inviting tenders from the public or by holding public auction. The only restriction being to give 30 days time gap between such notice and the date of sale of the secured asset. In the present case, the said 30 days notice was given as the date of publication of notice is to be read together with date of publication of original corrigendum with reference to the date that was finally fixed for sale. The bank had issued notice fixing sale on 25.09.2010 which was published on 27.08.2010 and, thereafter, corrigendum was published changing the date of sale from 25.09.2010 to 29.09.2010 which was published on the very next date i.e. on 28.08.2010 and in fact the sale was ultimately held on 05.10.2010. Thus, the mandatory 30 days under Rules 8(6) and 9(1) were clearly complied with. The learned Counsel for Respondent Nos.1 and 2 respectively have further contended that there is no merit in the challenge to the auction sale. The challenge to the valuation of the subject property, is without any basis as held by the DRAT as there was no material provided by the Petitioners to challenge such valuation. They have further relied upon the decision of the Supreme Court in *M/s. Kayjay Industries (P) Ltd. vs. Asnew Drums (P) Ltd.* which has clearly held that a bonafide auction sale cannot be disturbed on the meritless attacks on the valuation and reserve price when the procedure is duly followed. They have accordingly submitted that there is no merit in the challenge to the impugned orders and thus, the present Petition is required to be dismissed.

10 Having considered the rival submissions, there appears to be concurrent findings of fact arrived at by the DRT and DRAT as to the mandatory 30 days notice being issued by the Respondent No.1 – secured creditor to the Petitioners - borrowers regarding their intention to sell the secured asset – subject property by public notice for sale. The DRAT in the order dated 22.08.2017 has rejected the main argument of the learned Advocate for the Appellants therein which was with regard to non-compliance of Rule 8 (6) of the said Rules. The DRAT has upheld the finding of the DRT that there were clear 30 days notice given by the Respondent No.1 to the Petitioners prior to the sale of the subject property. The Bank had initially issued notice fixing sale on 25.09.2010 which had been published on 27.08.2010. Thereafter, considering that there was no clear 30 days notice, a corrigendum was published by Respondent No.1-Bank changing the date of sale from 25.09.2010 to 29.09.2010 which was published on the very next day i.e. on 28.08.2010. The sale was ultimately held on 05.10.2010. Thus, there was a clear 30 days notice in compliance with Rule 8(6) of the said Rules. The decisions

of the Supreme Court in *Vasu P. Shetty vs. M/s. Hotel Vandana Palace* (supra) and *Mathew Varghese vs. M. Amritha Kumar* (supra) have held that 30 days notice of the secured creditor's intention to sell the secured asset shall be issued to the borrowers is a well settled principle laid down. In the facts of the present case the 30 days mandatory notice has in fact been complied with. The 3-Judge Bench of the Supreme Court in *Canara Bank vs. M. Amarender Reddy* (supra) has held that it is permissible to simultaneously issue notice to the borrower about the intention to sell the secured assets and also to issue a public notice for sale of such secured asset by inviting tenders from the public or by holding public auction. The only restriction is to give 30 days time gap between such notice and the date of sale of the immovable secured asset. It has been held that there is no requirement to give a separate individual notice to the borrower prior to deciding on the mode of sale of the secured asset. The notice of intention to sell is required to be given to the borrower in terms of Rule 9(1) read with Rule 8(6) of the said Rules. This has been complied with by Respondent No.1 – Bank in the present case. Thus, there is no substance in the challenge of the Petitioners to the auction sale conducted by the Respondent No.1-Bank.

11 The issue with regard to the valuation which has been raised by the Petitioners before the DRT and DRAT and non-consideration of the

offer by the Petitioners of a higher amount has been dealt with by the DRAT. The Respondent No.1-Bank had considered the offer of the Appellants of a higher amount of Rs.5.25 crores and found that there was no supporting material to show that the Petitioners were having liquid cash of Rs.5.25 crores as on the date of offer i.e. November 2010 and thus Respondent No.1-Bank refused to receive it. Further, the contention that valuation of the property was not properly done, was found to be not substantiated with any material. The DRT and DRAT have arrived at conclusion that the Respondent No.1-Bank had rightly proceeded with the auction sale in favour of Respondent No.2 as the successful bidder.

12 In *Vasu P. Shetty (Supra)*, the Supreme Court considered the issue as to whether it can be held that the borrower had waived the mandatory provisions of Rule 8 and 9 of the said Rules. It has been held that waiver is an intentional relinquishment of a right. There can be no waiver unless the person who is said to have waived, is fully informed of his rights and with full knowledge of the same he intentionally abandons them. It is been held that mandatory provision of 30 days notice under RuleS 8 and 9 of the said Rules, can be waived by the borrower and in such an eventuality the sale cannot be voided.

13 In the present case the 30 days notice was given to the Petitioners by Respondent No.1 of its intention to sell the secured asset-subject property. In any event, presuming that the mandatory 30 days notice under Rule 8(6) of the said Rules, was not served on the Petitioners, the Petitioners knowing fully well of the requirement of 30 days notice of sale, participated in the sale and had requested for extension of time of confirmation of the sale. Further, the Petitioners were directed to deposit the sale price for the subject property. However, the Petitioners did not comply with the said direction. Their subsequent offer of a higher amount of 5.25 crores was refused by Respondent No.1-Bank as no supporting material was placed by the Petitioners to show that the Petitioners were having liquid cash of Rs.5.25 crores as on the date of offer i.e. November 2010 much after the sale of the subject property on 05.10.2010. Thus, the Petitioners cannot now have any grievance as to the procedure of auction sale of Respondent No.1-Bank or that notice of such sale was not served on the Petitioners. The Petitioners having themselves participated in the sale have waived any right to object to the requirements of the sale not being complied with.

14 We are of the considered view that there is no merit in the challenge to the impugned orders passed by the DRT and DRAT. Thus, the present Petition is dismissed. There shall be no orders as to costs.

15 After pronouncement of the judgment, learned Counsel for the Petitioners has prayed for continuation of the ad-interim order dated 09.11.2017 directing that no third party right be created in respect of the secured asset.

16 This prayer is opposed by the learned Counsel for the Respondent Nos.1 and 2.

17 We are inclined to accede to the request of the learned Counsel for the Petitioners and accordingly direct that the aforesaid ad-interim order dated 09.11.2017 shall continue to operate for a period of six weeks from the date of this order.

(R.I. CHAGLA, J.) **(A.A. SAYED, J.)**