IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5479 OF 2015

Parshwanath Co-op. Bank Ltd.,
Kolhapur & Anr. .... Petitioners

Versus

M/s. Koral Builders & Ors. .... Respondents

ALONG WITH
WRIT PETITION NO.2525 OF 2015

Anand Ramchandra Patil .... Petitioner

Versus

M/s. Koral Builders & Ors. .... Respondents

Mr. Surel Shah, *Advocate for Petitioner in WP/5479/2015.*

Mr. Sanjiv Punalekar a/w. Mr. Ashish Kanojia i/b. PRS, *Advocates for Petitioner in WP/2525 of 2015 and for Respondent No.6 in WP/5479/2015.*

Mr. Drupad Patil a/w. Mr. Dheenay Patil*, Advocates for Respondent No.3 in both Petitions.*

CORAM : B. P. COLABAWALLA &
SOMASEKHAR SUNDARESAN, JJ.

DATE : JANUARY 02, 2024

P. C.

1. Writ Petition No.5479 of 2015 is filed by the Co-operative Bank whereas Writ Petition No.2525 of 2015 is filed by the Auction Purchaser. Both these Writ Petitions challenge the judgment and order dated 10th October, 2014 passed by the learned DRAT, Mumbai, which confirmed the order dated 27th April, 2010 passed by the Debt Recovery Tribunal, Pune in S.A. No.12 of 2008. The said S.A. was filed by Respondent Nos.1 to 3 herein inter-alia challenging the sale effected by the Petitioner-Bank in favour of the Auction Purchaser. There were several grounds on which the sale was challenged. One of the grounds found favour with the DRT, namely, that the mandatory procedure as set out in The Security Interest (Enforcement) Rules, 2002 [for short ***"the Rules of 2002"***] were not followed. The DRT noted that in this particular case, the public notice was issued on 10th December, 2007. Thereafter, the tenders/bids were called for till 17th December, 2007 and which were open on 18th December, 2007. The bid of the Auction Purchaser being the highest, was accepted and the said acceptance was communicated. The Auction Purchaser deposited the amount of 25% of the bid amount within two days and thereafter the balance amount was deposited and the sale was confirmed on 29th December, 2007. Subsequent to this, a Sale Deed was also executed on 23rd

January, 2008. The DRT inter-alia held that in view of Rule 9 of the Rules of 2002, the sale commences from the acceptance of the bid and completes on confirmation. In this case, the confirmation took place on 29th December, 2007 i.e. on the 19th day from the publication of notice instead of 30 days from the publication of notice as contemplated under Rule 9(1) of the Rules of 2002. Since there was an infraction of the mandatory rules, the DRT allowed the Securitization Application filed by Respondent Nos.1 to 3 and quashed and set aside the sale of the secured asset in favour of the Auction Purchaser.

2. Being aggrieved by this order, the Petitioner-Bank preferred Appeal No.123 of 2010. This appeal was finally dismissed by the DRAT, Mumbai vide its Judgment and Order dated 10th October, 2014. The DRAT for the reasons stated in the impugned order upheld the order passed by the DRT, Pune.

3. We have carefully gone through the papers and proceedings in the above Writ Petitions. We have heard Mr. Surel Shah, the learned counsel appearing on behalf of the Petitioners in Writ Petition No.5479 of 2015 and Mr. Punalekar for the Petitioner in Writ Petition No.2525 of 2015.

4. It is the case of the Petitioner Bank that on 6th May, 2006 it

had issued a notice under Rule 8(6) of the Rules of 2002. Thereafter, the Petitioner-Bank obtained a valuation report on 15th May, 2006 and issued a public notice inviting tenders from the public at large on 25th June, 2006. These Tenders/Bids were scheduled to be opened on 18th July, 2006. Being aggrieved by this action of the Bank, Respondent Nos.1 to 3 herein filed Securitization Application No.26 of 2006 challenging the measures taken by the Bank under Section 13(4) of The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [for short **"SARFAESI Act, 2002"**]. That Securitization Application was dismissed on the ground of limitation and the Appeal therefrom was also dismissed for non-compliance of the deposit order. Thereafter, the Bank obtained a fresh valuation on 20th November, 2007. Without giving any notice to Respondent Nos.1 to 3, the Petitioner-Bank issued a public notice as contemplated under Rule 9(1) inviting tenders for sale of the secured asset alongwith the construction thereon. The bids that were called for were upto 17th December, 2007. On 18th December, 2007 the bids were opened and the Auction Purchaser was declared the highest bidder. Thereafter, the sale was also confirmed in favour of the Auction Purchaser on 29th December, 2007. Once we take these facts and dates into consideration, we find that the DRT was fully justified in coming to the conclusion that the mandatory procedure as set out in Rule 8(6) read with Rule 9 of the Rules of 2002 have not been complied with. Hence, the DRT, and in our view correctly so, allowed the Securitization Application and quashed the sale conducted by the Petitioner-Bank in favour of the Auction Purchaser. We say this because we also find that after the order passed by the DRT, the Hon'ble Supreme Court in the case of ***Mathew Varghese V/s. M. Amritha Kumar & Ors. [(2014) 5 SCC 610]*** has clearly held that unless and until a clear 30 days' notice is given to the borrower, no sale or transfer can be resorted to by a secured creditor. In the event of any such sale properly notified after giving 30 days' clear notice to the borrower does not take place as scheduled for reasons which cannot be solely attributable to the borrower, the secured creditor cannot effect the sale or transfer of the secured asset on any subsequent date by relying upon the notice issued earlier. In other words, once the sale does not take place pursuant to a notice issued under Rules 8 and 9, read along with Section 13(8), and for which the entire blame cannot be thrown on the borrower, it is imperative that for effecting the sale, the procedure prescribed in Rules 8 and 9 would have to be followed afresh, as the notice issued earlier would lapse. The relevant portion of the aforesaid decision reads thus :-

> *"**53 :** We, therefore, hold that unless and until a clear 30 days' notice is given to the borrower, no sale or transfer can be resorted to by a secured*

creditor. In the event of any such sale properly notified after giving 30 days' clear notice to the borrower did not take place as scheduled for reasons which cannot be solely attributable to the borrower, the secured creditor cannot effect the sale or transfer of the secured asset on any subsequent date by relying upon the notification issued earlier. In other words, once the sale does not take place pursuant to a notice issued under Rules 8 and 9, read along with Section 13(8) for which the entire blame cannot be thrown on the borrower, it is imperative that for effecting the sale, the procedure prescribed above will have to be followed a fresh, as the notice issued earlier would lapse. In that respect, the only other provision to be noted is sub-rule (8) of Rule 8 as per which sale by any method other than public auction or public tender can be on such terms as may be settled between the parties in writing. As far as sub-rule (8) is concerned, the parties referred to can only relate to the secured creditor and the borrower. It is, therefore, imperative that for the sale to be effected under Section 13(8), the procedure prescribed under Rule 8 read along with Rule 9(1) has to be necessarily followed, inasmuch as that is the prescription of the law for effecting the sale as has been explained in detail by us in the earlier paragraphs by referring to Sections 13(1), 13(8) and 37, read along with Section 29 and Rule 15. In our considered view any other construction will be doing violence to the provisions of the SARFAESI Act, in particular Sections 13(1) and (8) of the said Act."

5. Mr. Shah and Mr. Punalekar sought to distinguish this decision on the basis that the aforesaid ratio would apply only when the sale is postponed for reasons which are not wholly attributable to the borrower. They submitted that, in the facts of the present case, since the borrower had initially obtained a stay from the DRT and thereafter also the DRAT [in the earlier round of litigation], the sale

could not take effect for the reasons that are entirely attributable to the borrower. We are unimpressed with this argument. Firstly, whether the sale could not take place for reasons that are attributable to the borrower is a question of fact. This question of fact was never argued before the Lower Court and in fact is not even raised as a ground in the present Petitions. This is being canvassed for the first time across the bar by Mr. Shah and Mr. Punalekar. Once this is the case, we are unable to take cognizance of this argument to justify interfering with the orders passed by the DRT as well as the DRAT. Once the Supreme Court in ***Mathew Varghese (supra)*** has categorically stated that if a sale is postponed beyond the period of 30 days, then a fresh 30 days notice would have to be given, not only to the borrower individually, but also a fresh public notice would have to be issued, we find that there is absolutely no infirmity in the orders passed, either by the DRT, Pune or the DRAT, Mumbai. We, therefore, find no merit in the above Writ Petitions and the same are accordingly dismissed. However, there shall be no order as to costs.

6. We make it clear that the dismissal of these Writ Petitions shall not in any way preclude the Bank from initiating the procedure for sale once again by strictly following the rules as set out in the Rules of 2002.

7. Before concluding we must mention that the impugned order directed that possession of the secured asset would be handed over to Respondent Nos.1 to 3 on them depositing a sum of Rs.1 Crore within four months from the date of the order passed by the DRAT on 10th October, 2014. The learned counsel appearing on behalf of Respondent Nos.1 to 3 has fairly stated that they have not deposited any amount and hence, they are not even seeking possession of the secured asset. The same is duly noted.

8. This order will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

[SOMASEKHAR SUNDARESAN, J.] **[B.P. COLABAWALLA, J.]**