S V Ramaswamy & Ors. Vs M/S H And M Infrastructures (Partnership Firm) & Ors

Court: Karnataka High Court At Bengaluru

Date of Decision: Feb. 3, 2025

Acts Referred: Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 â€" Section 13, 14, 15, 16, 17
Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Rules, 2002 â€" Rule 8, 8(8), 9, 9(2), 9(3), 9(4)

Hon'ble Judges: Krishna S Dixit, J; G Basavaraja, J

Bench: Division Bench

Advocate: K Kasturi, R Ashok Kumar, D R Ravishankar, Ganapathy Kuppuswamy, Dhyan Chinnappa, Arjun Rao, Sudhir B S

Final Decision: Allowed

Judgement

Krishna S Dixit, J

1. Petitioners being the guarantors to the 2003 loan availed by the 4th respondent herein are knocking at the doors of Writ Court for assailing the Debt

Recovery Appellate TribunalÃ¢â‚¬â„¢s order dated 18.07.2024, whereby appeal in S.A.No.4/2016 filed by the Respondent Nos.1 & 2 herein came to be

allowed by setting aside Debt Recovery TribunalÃ¢â‚¬â„¢s order dated 28.4.2023 entered in S.A.No.146/2020. The DRT-II having favoured

petitionersÃ¢â‚¬â„¢ said S.A., had set aside the Sale Certificate with a direction to refund the sale consideration with interest to the purchasers.

2. FOUNDATIONAL FACTS OF THE CASE:

2.1 4th respondent vide loan transaction dated 16.06.2003 had borrowed a certain sum of Rs.3,22,00,000/- (Rupees Three Crore & Twenty Two

Lakh) only, in the form of Packaging Credit and Guarantees (Inland and Foreign), from the Bank of India. Petitioners happen to be the guarantors and

had provided their property by way of mortgage for securing the repayment of loan. Because of failure of debt servicing, Sale Notice qua

petitionersÃ¢â‚¬â„¢ property came to be issued on 5.12.2015. Petitioners filed S.A.No.4/2016 challenging the same and had obtained a conditional interim

order to the effect that the auction sale as scheduled would go on short of confirmation. The e-auction was conducted on 12.1.2016 by the 3rd

respondent herein and the sale in favour of respondent Nos.1 & 2 came to be confirmed on 15.3.2016, since highest bidder failed to confirm with the

conditions.

2.2 PetitionersÃ¢â‚¬â„¢ S.A.No.4/2016 in which Sale Notice was challenged came to be dismissed on 18.5.2016. They challenged dismissal order in

AIR(SA)105/2017 and the DRAT, Chennai, granted a conditional interim order. When this was the position, BanksÃ¢â‚¬â„¢ O.A.No.242/2006, later

renumbered as T.A.No.109/2017 inter alia against the petitioners came to be dismissed and their obligation as guarantors was held discharged vide

order dated 31.7.2017. As a consequence, petitioners withdrew AIR(SA) 105/2017. However, in Banks R.A.No.162/2017, the DRAT vide order

dated 30.8.2017 reversed DRTÃ¢â‚¬â„¢s order and thereby, decreed BanksÃ¢â‚¬â„¢ O.A.No.242/2006. Petitioners had filed W.P.No.20318/2018 challenging

the DRAT order and the Coordinate Bench granted ad interim order dated 17.5.2018 restraining sale of the subject property. Subsequently, this

petition came to be dismissed on 25.2.2020. The respondent Nos.1 & 2 had paid the balance of 75% of sale price on 19.6.2020, the 25% having been

paid earlier itself on the date of auction. Despite more than four years delay in payment, the 3rd respondent issued the Sale Certificate in their favour

inter alia on account of auction dated 12.1.2016 in which they were not the highest bidders.

2.3 Petitioners filed S.A.No.146/2020 challenging the Sale Certificate dated 17.8.2020. DRAT allowed the same on 28.4.2023 and set aside the Sale

Certificate with a direction to the 3rd respondent to refund the sale consideration together with interest to the purchasers and to proceed further in

accordance with law. Respondent Nos.1 & 2 filed RA(SA) No.37/2023 challenging the DRT order. During the pendency of appeal, the 3rd

respondent vide order dated 21.11.2023 cancelled the Sale Certificate that was issued to these respondents and further refunded to them

Rs.14,47,19,570/- (Rupees Fourteen Crore Forty Seven Lakh Nineteen Thousand Five Hundred Seventy) only, which included interest.

2.4 The 3rd respondent being the Principal Borrower offered One Time Settlement of Rs.21,00,00,000/-(Rupees Twenty One crore) only, vide letter

dated 2.3.2024. The 3rd respondent vide letter dated 3.7.2024 accepted the OTS subject to the condition that the petitioners should pay the remaining

amount of Rs.16,00,00,000/- (Rupees Sixteen crore) only, within thirty days, Rs.5,00,00,000/- (Rupees Five crore) only, having already been paid along

with their OTS proposal.

2.5 When this was the position, the DRAT vide order dated 18.7.2024 favoured RA (SA)No.37/2023 and thereby, set aside DRAT order with a

direction to respondent Nos.1 & 2 to pay back the money to the 3rd respondent within fifteen days. A further direction was also issued to re-issue

Sale Certificate within a period of thirty days. This has been put now in challenge before us.

3. Learned Sr. Advocates Sri.K Kasturi & Sri.D.R. Ravishankar, appearing for the petitioners argued that under the scheme envisagedi nter alia in

Rules 8 & 9 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Rules, 2002, once the highest bidder

fails to comply with the condition, his initial deposit should be forfeited and the property should be put to fresh auction; that being the position of law,

the negotiated sale in favour of respondent Nos.1 & 2 who happened to be bidders next below the highest, is unsustainable. The learned counsel on

record appearing for the petitioners on being asked as to what should happen to the interest of the buyers, came forward of course, on the instruction

of his client to pay Rs.1,00,00,000/- (Rupees One crore) only, by way of solatium and to that effect, filed a Memo in the open court,. He also pointed

out that the respondent Nos.1 & 2 also have committed default in not remitting the remainder of the amount within the stipulated thirty days and

therefore, sale made in their favour needs to be invalidated. In support of this submission, they pressed into service certain Rulings.

4. Learned Sr. Advocate Mr.Dhyan Chinnappa appearing for the Respondent - property buyers per contra contended that there is no prohibition for

negotiating sale with the bidders second in order under the statutory scheme; even otherwise, petitioners W.P.No.20318/2018 challenging the earlier

proceedings having been negatived, the present petition cannot be maintained. The learned Panel Counsel representing the Bank/Assignee sought to

justify the One Time Settlement subject to the condition that the petitioners should make remainder of the OTS amount, forthwith.

5. Having heard the learned counsel for the parties and having perused the Petition Papers, we are inclined to grant indulgence in the matter as under

and for the following reasons:

5.1 Shorn of thickness of the paper books and the lengthy arguments at the Bar (more of it from the side of petitioners), the short question that arises

for consideration in this case is:

Ã¢â‚¬Ëœ On the failure of the highest bidder to comply with the conditions of auction sale, whether the bank can negotiate a private sale

transaction with the bidders next below in order without putting the property to fresh auction..?Ã¢â‚¬â„¢

Our answer to the above question is in the negative for the following reasons.

5.2 SARFAESI Act, 2002 was enacted by the parliament to strengthen the Indian banking system by way of efficient & rapid recovery of non-

performing assets of the banks and financial institutions which allows them to auction security properties when loan is not repaid or serviced in terms

of agreed arrangement. The object of the Act is to achieve speedier recovery of the dues declared as NPAs and better availability of capital liquidity

and resources to help in growth of the economy of the country and welfare of the people in general which would subserve the public interest, vide

MARDIA CHEMICALS LTD., v. UNION OF IND (I2A004) 4 SCC 311. However, enforcement of security is regulated inter alia by Sections 13

to 17 of 2002 Act read with Rules 8 & 9. Dr. M.Sunil Sastry in his acclaimed work (A Handbook On Coercive Loan Recovery Under the

SARFAESI ACT, 2002 At pg 16) has rightly said that the object of the Act is not to put a bombshell on the borrower/guarantor. Due process should

animate any action under the Act. Since all this has been well established by a catena of decisions, much discussion need not be repeated. Suffice it to

refer to Rule 9(3) which reads as under:

Ã¢â‚¬Å“On every sale of immovable property, the purchaser shall immediately, i.e. on the same day or not later than next working day, as the

case may be, pay a deposit of twenty five per cent. of the amount of the sale price, which is inclusive of earnest money deposited, if any, to

the authorized officer conducting the sale and in default of such deposit, the property shall be sold again.Ã¢â‚¬â€‹

(emphasis is ours)

5.3 Largely the above question is no longer res integra. The observations of the Apex Court in MATHEW VARGHESE vs. M.AMRITHA KUMAR

(2014) 5 SCC 610 at para 53, throw abundant light on the question raised. The same runs as under:

Ã¢â‚¬Å“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 afresh, 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 Ã¢â‚¬Â¦. 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.Ã¢â‚¬â€‹

(emphasis is ours)

5.4 A Division Bench of Orissa High Court in ULLASH CHANDRA SAHOO vs. BANK OF INDIA, BHUBANESWAR 2007 (1) BankersÃ¢â‚¬â„¢ Journal

54 having construed inter alia the provisions of Rule 9 of 2002 Rules at paragraphs 14, 15 & 16 has observed as under:

Ã¢â‚¬Å“A bare reading of the above rule would go to show that the prescription in Sub-rule (3) is that on every sale of immovable property, the

purchaser is required to deposit 25% of the amount of the sale price with the authorized officer immediately. It further prescribes that in

default of such deposit, the property shall be forthwith sold again. In our view, therefore, the phrase ""sold again"" cannot mean that on

failure of the highest bidder depositing 25% of the sale price, the property should be sold to the second highest bidder rather as it is a

mandate in Sub-rule (2) quoted above that the sale shall be confirmed in favour of the purchaser who offered the highest sale price in his

bid or tender or quotation or offer. Hence, if a harmonious interpretation of Sub-rule (2) and Sub-rule (3) of Rule 9 of the Rules is made,

the inevitable conclusion would be that if the highest bidder fails to deposit 25% of the sale price immediately, the entire process of sale by

public auction as prescribed in the proviso to Sub-rule (6) of Rule 8 shall have to be followed forthwith.

In view of our above conclusion, we are unable to accept the contention raised by Mr. Mohanty, learned Counsel appearing for the

petitioner that on the opposite party No. 4 having failed to deposit 25% of the sale price immediately, the property in question should have

been sold to the petitioner who was the second highest bidder.Ã¢â‚¬â€‹

(emphasis is ours)

We are in complete agreement with the view of the HonÃ¢â‚¬â„¢ble the Orissa High Court.

5.5 The vehement contention of Mr.Dhyan Chinnappa that Rule 8(8) of 2002 Rules empower the bank to enter into a sale transaction by any method

other than public auction and therefore, the same having been done with his clients, the order of the DRAT is perfectly accords with law, is difficult to

countenance. Let us examine the text of Rule 8(8) which arguably looks like an island provision.

The same reads as under:

Ã¢â‚¬Å“Sale by any methods other than public auction or public tender, shall be on such terms as may be settled between the secured creditors

and the proposed purchaser in writing.Ã¢â‚¬â€‹

This Rule becomes invocable at any stage beforethe matter moves to the point of Rule 9 in general and Rule 9(2) & (3) in particular. An argument to

the contrary would not fit into the statutory scheme.

5.6 The next contention of Mr.Dhyan that upsetting auction sale would not augur well to the public interest and the impugned order of the DRAT

having been animated with this inarticulate premise, should be allowed to stand, is again difficult to agree with. Firstly, in a given set of facts, what

should happen is perfectly regulated by Rule 9(3). Secondly, acceding to such a position would vest unbridled power in the bank to negotiate sale with

others even at times prejudicially keeping the borrowers/guarantors in darkness. That offends the rules of principles of natural justice. Added, that

would fall short of fairness standards. Thirdly, even these respondents failed to pay 75% of the agreed amount for more than four years when Rule

9(4) prescribes thirty days. Mr.DhyanÃ¢â‚¬â„¢s submission that the petitioners W.P.No.20318/2018 was pending and there was an interim order issued by

the Coordinate Bench, is a poor justification for the long delay brooked. The interim order reads: Ã¢â‚¬It is directed that there shall be no sale of the

property in question till next date of hearing.Ã¢â‚¬ Thus, it did not by any logic interdict payment of remainder of the sale amount. Therefore, it is not

that the contesting respondents had no culpability in their conduct. Added, the contesting respondents have got the money refunded to them, that too

with interest approximately at the rate of 7.5% per annum. Thus, no prejudice is being caused to these respondents if DRAT order is set at naught.

5.7 The contesting respondents had struck the deal for a sum of Rs.11,00,00,000/- (Rupees Eleven crore) only, when the highest bid was Rs.12.88

crore. Now the petitioners being the guarantors seek to retain the security property by concluding OTS arrangement for a sum of Rs.21,00,00,000/-

(Rupees Twenty One crore) only whereunder they had paid Rs.5,00,00,000/- (Rupees Five crore) only along with the proposal itself and subsequently,

Rs.10,00,00,000/- (Rupees Ten crore) only. They are ready & willing to pay the remainder within a reasonable time. Of course, during the said period

also, they are liable to pay interest at the agreed rate of the original loan. This apart, to mitigate any arguable loss to the respondent Nos.1 & 2,

petitioners have undertaken to pay a sum of Rs.1,00,00,000/- (Rupees One crore) only, by way of solatioum to these respondents. They have filed a

Memo dated 31.01.2025 which reads as under:

Ã¢â‚¬Å“The Petitioners undertakes to compensate the Respondent No.1 and 2 by paying a sum of Rs.1,00,00,000/- (Rupees one crore), only

within a reasonable time in the interest of justice and equity.Ã¢â‚¬â€‹

5.8 The whole arrangement as is deviced by us thus would do justice to all the stakeholders. The guarantors would retain their property by paying

remainder of OTS amount to the Bank that too with agreed rate of interest on the original loan; the Bank will get much higher amount than what it

would have got had the highest bid was realized and much more than what the contesting respondents have concluded the transaction for; thirdly,

apart from getting their amount back along with interest at the rate of about 7.5%, these respondents are also getting a lumpsum of Rs.1,00,00,000/- by

way of solatium. In a way, it is a win-win situation for all the concerned. All this accords with rules of equity & justice which conventionally govern

the exercise of writ jurisdiction. Courts in general and the Constitutional Courts in particular cannot turn back justice deserving litigant empty handed

by quoting jurisprudential theories and legal doctrines. Turning them away would shake the confidence of right thinking people in the judicial process

yielding scope for extra-judicial remedies, which would not augur well to the public interest.

In the above circumstances, we make the following:

ORDER

[i] Writ Petition is allowed;

[ii] Writ of Certiorari issues quashing the impugned orders of the DRAT, Chennai and DRT-II, Bangalore.

[iii] Petitioners shall pay Rs.6,00,00,000/- (Rupees Six crore) only, under the OTS arrangement with 18% interest on the delayed payment of this sum

within four weeks and the 3rd respondent shall accept the said payment towards fruition of the subject OTS arrangement.

[iv] Petitioners shall pay Rs.1,00,00,000/- (Rupees One crore) only to respondent Nos.1 & 2 collectively within three weeks, failing which the petition

shall be treated as having been dismissed, and as a consequence, the order of the DRAT would be given effect to, forthwith.

Costs made easy.