

THE HON'BLE SRI JUSTICE UJJAL BHUYAN
AND
THE HON'BLE DR. JUSTICE CHILLAKUR SUMALATHA

W.P.Nos.23804, 23805 & 25432 OF 2018

COMMON JUDGMENT AND ORDER:

(Per Hon'ble Sri Justice Ujjal Bhuyan)

All the above three writ petitions were heard together and are being disposed of by this common judgment and order.

2 We have heard Sri R.Sushanth Reddy, learned counsel and Sri Vivek Jain, learned counsel for the petitioners in W.P.No.23804 of 2018 and W.P.No.23805 of 2018; Sri Ashwin Kumar Jaiswal, learned counsel for the petitioners in W.P.No.25432 of 2018; and Sri Sharad Sanghi, learned counsel for the respondents in all the writ petitions.

W.P.No.23804 of 2018:

3 This writ petition has been filed by G.Anil Chand and G.Ramesh Kumar assailing the legality and validity of the order dated 02.05.2018 passed by the Debts Recovery Appellate Tribunal, Kolkata, in Appeal No.207/2017/532-534, confirming the order dated 23.05.2017 passed by the Debts Recovery Tribunal-II at Hyderabad (Tribunal) in S.A.No.651 of 2017.

4 Petitioners are the auction purchasers who had purchased the schedule property through auction sale. They are aggrieved by the order of the Tribunal setting aside the auction sale which order has been affirmed by the Debts Recovery Appellate Tribunal, Kolkata (Appellate Tribunal) in appeal filed by the petitioners.

5 Facts leading to filing of the present writ petition are, briefly, narrated hereunder.

6 Petitioners had purchased the schedule property bearing open plot No.66 in Sy.Nos.56, 63, 64 and 66, admeasuring 240 Sq.Yards situated at Ward No.4, Miyapur village, Boduppall Gram Panchayat under Ghatkesar Mandal in auction proceedings dated 13.11.2014. The auction proceedings were conducted to realize the loan amounts in respect of the loan account of respondent Nos.2 and 3 i.e. Y.Kiran Kumar and Smt. Aarthi Devi Mukhya, who had defaulted in repayment of the loan availed of from respondent No.4 – Manipal Housing Finance Syndicate Limited for which the loan account was classified as Non-Performing Asset (NPA) by respondent No.4. In the auction which was held on 13.11.2014 petitioners were the successful bidders. They had earlier paid an amount of Rs.2,16,000-00 equivalent to 10% of the reserve price on 24.09.2014 to respondent No.4 and paid a further amount of Rs.3,25,000-00 on 13.11.2014; thus paying an amount equivalent to 25% of the auction sale amount as on the date of the auction.

7 By letter dated 25.11.2014 petitioners sought additional time from respondent No.4 for payment of the balance sale consideration on the ground that they were processing a housing loan from Canara Bank. This was accepted by respondent No.4, whereafter authorized officer of respondent No.4 i.e. respondent No.1 informed the petitioners vide letter

dated 26.11.2014 that additional time was granted for availing loan from Canara Bank to pay the balance 75%.

8 On 10.12.2014 petitioners paid the balance 75% of the sale consideration to respondent No.4 by way of a cheque which was directly issued by Canara Bank in favour of respondent No.4. On such payment, a sale certificate was issued by respondent No.4 in favour of the petitioners on the same day i.e. on 10.12.2014.

9 Petitioners have stated that after purchasing the aforesaid property which was an empty land, they had obtained building permission from the competent authority and constructed a house thereon. The construction was completed in the year 2015.

10 Respondent Nos.2 and 3 i.e. the borrowers challenged the auction proceedings before the Tribunal belatedly contending that the auction proceedings came to their knowledge only on 05.01.2015 when they found some unknown persons on the schedule property. On various grounds, the auction sale was challenged by respondent Nos.2 and 3 before the Tribunal by filing securitization application under Section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (briefly, 'the SARFAESI Act' hereinafter). The same was registered as S.A.No.485 of 2015 before the Debts Recovery Tribunal-I, Hyderabad which was subsequently renumbered before the

Tribunal as S.A.No.651 of 2017. Respondent No.4 contested the said securitization application by filing reply statement. Likewise, petitioners who were arrayed as respondent Nos.2 and 3 before the Tribunal also filed reply statement opposing the securitization application. After hearing the parties and on due consideration, Tribunal held that respondent No.4 had violated Rule 8 (1) of the Security Interest (Enforcement) Rules, 2002 (referred to hereinafter as 'the SARFAESI Rules'). Tribunal further held that there was violation of Rule 9 (4) of the SARFAESI Rules in carrying out the auction sale. Resultantly, the securitization application was allowed by quashing the possession notice, auction sale held on 13.11.2014 and the consequential sale certificate. Respondent No.4 was directed to restore possession of respondent Nos.2 and 3 over the schedule property as well as to refund the amount deposited by the petitioners with simple interest at the rate of 6% p.a. from the date of deposit till the date of payment.

11 Petitioners challenged the aforesaid order of the Tribunal dated 23.05.2017 before the Appellate Tribunal by filing appeal under Section 18 of the SARFAESI Rules, which was registered as Appeal No.208/2017/532-534. Respondent No.4 also preferred appeal before the Appellate Tribunal against the said order of the Tribunal which was registered as Appeal No.207/2017/532-534. By the order dated 02.05.2018, Appellate Tribunal took the view that there was no error in the

impugned order of the Tribunal. Therefore, the appeal preferred by the petitioners was dismissed. By separate order passed on the same day, Appellate Tribunal also dismissed the appeal of respondent No.4. Aggrieved, the present writ petition has been filed.

12 Respondent Nos.2 and 3 (borrowers) have filed counter affidavit. It is submitted that writ petition is not maintainable as the order dated 02.05.2018 is a consent order. Respondents Nos.2 and 3 have denied the submissions made by the petitioners. Therefore, they seek dismissal of the writ petition.

W.P.No.23805 of 2018:

13 Petitioners of W.P.No.23804 of 2018 have filed the present writ petition seeking the same reliefs as in W.P.No.23804 of 2018. It is not understood as to why the petitioners have filed the present (second) writ petition seeking the same reliefs as in W.P.No.23804 of 2018 when the said writ petition was pending. In fact, there is no mention about why filing of the second writ petition was necessitated. It may, therefore, be not necessary for us to refer to the pleadings in W.P.No.23805 of 2018. Be it stated that respondent No.2 i.e. Y.Kiran Kumar has filed counter affidavit, which is identical to the one filed in W.P.No.23804 of 2018.

W.P.No.25432 of 2018:

14 This writ petition has been filed by Manipal Housing Finance Syndicate Limited as the petitioner challenging the appellate order dated 02.05.2018 dismissing its appeal. In this writ petition the borrowers i.e. Y. Kiran Kumar and Smt. Aarthi Devi Mukhya have been arrayed as respondent Nos.1 and 2, whereas the auction purchasers who are the petitioners in W.P.No.23804 of 2018 and W.P.No.23805 of 2018 have been arrayed as respondent Nos.3 and 4.

15 Facts narrated by the petitioner Manipal Housing Finance Syndicate Limited (for short, 'Manipal Housing' hereinafter) may be briefly adverted to.

16 It is stated that Manipal Housing is a financial institution within the meaning of Section 2 (zb) of the SARFAESI Act. Ministry of Finance, Government of India, vide notification dated 10.11.2003 has recognized the petitioner Manipal Housing as a financial institution authorized to take action under the SARFAESI Act.

17 Respondent Nos.1 and 2 (borrowers) had applied for housing loan from Manipal Housing which was sanctioned on 31.05.2010 for an amount of Rs.18.00 lakhs. For the purpose of the housing loan, respondent Nos.1 and 2 deposited the original title deeds of the schedule property in favour of Manipal Housing on 03.06.2010 as primary security for the housing loan sanctioned to them.

18 Respondents Nos.1 and 2 defaulted in repayment of the loan. Consequently their loan account became irregular from 30.11.2011. Following the laid down norms, the loan account of respondent Nos.1 and 2 was declared as Non Performing Asset (NPA) on 30.07.2012.

19 Notice under Section 13 (2) of the SARFAESI Act was issued by Manipal Housing to respondent Nos.1 and 2 on their last known address on 31.07.2012. However, the said notice was returned unserved with the postal remark that there was no such person. It is stated that the address of respondent Nos.1 and 2 mentioned in the Section 13 (2) notice is the same as the one furnished by the said respondents themselves in their securitization application filed before the Tribunal under Section 17 of the SARFAESI Act.

20 Be that as it may, since the said notice was returned unserved, the same was published in the newspapers – Financial Express in English and Andhra Prabha in Telugu language. There was no response to such notice as published in the newspapers.

21 Manipal Housing issued further notice dated 15.03.2013 under Section 13 (4) (ia) of the SARFAESI Act to the borrowers, which was also published in the newspapers – Financial Express in English and Andhra Prabha in Telugu language on 20.03.2013. The said notice was affixed at the boundary wall of

the said property as well. Thus it is stated that there was full compliance to the requirements of Rules 8 (1) and 8 (2) of the SARFAESI Rules.

22 Thereafter, notice for sale under Rule 8 (6) of the SARFAESI Rules was issued on 25.09.2014. The same was dispatched to respondent Nos.1 and 2 in their last known address by registered post with acknowledgement due, which was the same as the address disclosed by respondent Nos.1 and 2 themselves in their securitization application. The said notice for sale was also published in Financial Express and Andhra Prabha on 10.12.2014 (sic, 10.10.2014), besides being affixed at the boundary wall of the said plot of land.

23 In terms of the sale notice, auction was conducted on 13.11.2014. Following the auction, respondent Nos.3 and 4 (petitioners in writ petition Nos.23804 of 2018 and 23805 of 2018) were declared as the successful bidders. 25% of the bid amount was deposited by them in favour of Manipal Housing on 13.11.2014 itself. Auction purchasers had applied for enhancement of credit limits from their banker i.e. Canara Bank to finance their purchase, which was allowed. Thereafter, 75% of the sale consideration was paid by the auction purchasers to Manipal Housing on 10.12.2014, which was accepted beyond 15 days from the date of payment of the initial deposit. On such payment, sale certificate was issued by Manipal Housing to the auction purchasers on 10.12.2014.

24 On 12.01.2015 respondent Nos.1 and 2 challenged the auction sale by filing securitization application under Section 17 of the SARFAESI Act. The same was contested by Manipal Housing as well as by the auction purchasers. However, by the order dated 23.05.2017, the said securitization application was allowed by the Tribunal by setting aside the auction sale dated 13.11.2014 as well as the consequential sale certificate dated 10.12.2014. Further Manipal Housing was directed to refund the sale price to the auction purchasers with simple interest at the rate of 6% p.a. from the date of deposit till the date of payment besides restoring possession of the schedule property to the borrowers i.e. respondent Nos.1 and 2.

25 Against the aforesaid order dated 23.05.2017 passed in S.A.No.651 of 2017, Manipal Housing preferred appeal before the Appellate Tribunal which was registered as Appeal No.207/2017. However, by the order dated 02.05.2018, the appeal was dismissed.

26 Aggrieved, the present writ petition has been filed.

27 This Court by order dated 01.08.2018 had issued notice before admission and directed maintenance of *status-quo* in all respects relating to the property which was the subject matter of S.A.No.651 of 2017 before the Tribunal.

28 Both learned counsel for the petitioners have assailed the order of the Tribunal dated 23.05.2017 as unsustainable in law

as well as on facts. It is submitted that possession notice was issued by Manipal Housing under Section 13 (4) of the SARFAESI Act on 15.03.2013. This was followed by notice for sale issued on 25.09.2014 whereafter the auction was conducted on 13.11.2014. However, the borrowers had filed securitization application under Section 17 of the SARFAESI Act only on 12.01.2015, which was much beyond the limitation period of 45 days from the date of issuance of possession notice. This fact was overlooked by the Tribunal as well as by the Appellate Tribunal.

29 Tribunal had held that possession notice was not affixed at a conspicuous place of the secured asset; no proof of affixation was placed on record. Thus it was held that the secured creditor had violated Rule 8(1) of the SARFAESI Rules. Submission is that possession notice was affixed at the boundary pillar of the secured asset. However, the photographs to this effect were misplaced. Tribunal did not provide any opportunity to the secured creditor to produce proof of affixation of the possession notice on the secured asset. Photographs were placed before the Appellate Tribunal which unfairly declined to consider the same. Therefore, it is asserted that there was full compliance to the requirements of Rules 8 (1) and 8 (2) of the SARFAESI Rules.

30 On the finding of the Tribunal that Rule 9 (4) of the SARFAESI Rules was violated, it is submitted that the auction

purchasers had sought for extension of time of 15 days which was granted so as to enable the auction purchasers to avail a loan from the Canara bank. It is submitted that Tribunal had failed to appreciate that Rule 9 (4) of the SARFAESI Rules was amended in the interregnum which took effect from 04.11.2016. As per the amendment, the words “between the parties” were substituted by the words “between the secured creditor and the auction purchaser”. This amendment being clarificatory would be applicable in the instant case. In any case, Rule 9 (4) comes into play at a stage pursuant to the auction. That apart, the said provision is for the benefit of the secured creditor and not for the benefit of the borrower. At that stage role of the borrower is minimal when he had already exhausted his right of redemption. Secured creditor is free to deal with the property in the manner in which he chooses.

31 Tribunal had also failed to take into consideration the fact that the auction purchasers after purchase of the property had constructed a house on the schedule property by availing loan from Canara bank, which is being regularly repaid by the auction purchasers.

32 In any view of the matter, the direction of the Tribunal to handover the secured asset back to the borrowers without any redemption is totally unjustified.

33 Appellate Tribunal completely overlooked the above aspects, thereby leading to miscarriage of justice.

34 Learned counsel for the petitioners has placed reliance on the following decisions:

- i. **Commissioner of Income Tax Vs. Gold Coin Health Food Private Limited**¹;
- ii. **Central Bank of India Vs. C.L.Vimla**²

35 On the other hand, learned counsel for the borrowers i.e. respondent Nos.2 and 3 in W.P.No.23804 of 2018 has supported the order of the Tribunal as affirmed by the Appellate Tribunal. He has referred to Rules 57 and 58 of Schedule II to the Income Tax Act, 1962 and submits that the said provisions are mandatory. Authorised Officer had no jurisdiction to extend the time for payment of the sale price. Further, reference has been made to Rule 9 (4) of the SARFAESI Rules and submits that there can be no waiver of the mandatory conditions. Failure of the auction purchasers to pay the balance amount of 75% within 15 days of the sale has vitiated the sale for which the same was rightly set aside by the Tribunal and affirmed by the Appellate Tribunal.

36 Insofar amendment to Rule 9 (4) of the SARFAESI Rules is concerned, it is submitted that the said amendment is prospective in nature and could not have been applied in the present case.

¹ (2008) 9 SCC 622

² (2015) 7 SCC 337

37 Learned counsel for respondent Nos.2 and 3 has submitted a compilation of judgments in support of his contentions and submits that no case for interference is made out. Therefore, all the writ petitions should be dismissed.

38 Submissions made by learned counsel for the parties have received the due consideration of the Court.

39 As noticed above, the borrowers i.e. Y. Kiran Kumar and his wife Smt. Aarthi Devi Mukhya, had filed the securitization application before the Tribunal on 12.01.2015 to declare the measures taken by Manipal Housing under Section 13 (4) of the SARFAESI Act as illegal, arbitrary and null and void; to declare the sale certificate dated 10.12.2014 as null and void; to deliver vacant physical possession of the schedule property (secured asset) to them by making demolition of the structures raised thereon etc. In the securitization application the borrowers admitted that they had availed a housing loan of Rs.18.00 lakhs from Manipal Housing which was required to be repaid in 180 equated monthly installments at the rate of Rs.20,016-00 with interest at the rate of Rs.10.25% p.a. The borrowers admitted that they had defaulted in payment of some of the installments towards later part of the year 2014 for various reasons. It is stated that when they had visited the schedule property on 01.01.2015, they came to know that the schedule property was sold by Manipal Housing whereafter sale certificate was issued. Amongst various grounds taken in the securitization application,

the borrowers contended that Manipal Housing had not affixed the sale notice as required under Rule 8 (1) of the SARFAESI Rules on any conspicuous place of the schedule property. Further ground taken was that the balance 75% of the sale price was not paid by the auction purchasers within 15 days from the date of sale. It was stated that as per the sale certificate the details of payment were as under:-

24.09.2014	Earnest money of Rs.2,16,000-00 paid
13.11.2014	Rs.3,25,000-00 paid
10.12.2014	Rs.16,24,000-00 paid

40 Thus it was contended that there was violation of Rules 57 and 58 of the Income Tax Rules, 1962.

41 Be it stated that in the said securitization application, the borrowers disclosed their address as follows:-

“R/o 8-3-228/1280/450&455,
Jawahar Nagar, Yusufguda, Hyderabad.”

42 That apart, the borrowers paid court fee valuing the securitization application at Rs.22,57,911-46 which was alleged to be the outstanding dues as on 30.11.2014.

43 Manipal Housing in the reply statement, amongst others, stated that despite issuance of demand notice dated 31.07.2012 under Section 13 (2) of the SARFAESI Act, the borrowers failed to repay the loan amount. Thereafter Manipal Housing took over symbolic possession of the schedule property vide possession notice dated 15.03.2013 issued under Section 13 (4) of the

SARFAESI Act, which was also published on 20.03.2013 in Financial Express, a daily newspaper in English and in Andhra Prabha, a daily newspaper in Telugu language. It was stated that since the schedule property was an open plot, the notice was affixed at a conspicuous place surrounded by the property. It was further stated that the sale notice dated 25.09.2014 fixing auction sale on 13.11.2014 was sent to the borrowers by registered post with acknowledgement due in the last known address of the borrowers. But it was returned unserved with the endorsement "addressee left". The said notice was thereafter published in the newspapers Financial Express in English and Andhra Prabha in Telugu language. It was stated that the notices were sent in the same address as given by the borrowers in the securitization application. Thus, it was contended that Manipal Housing had followed the due procedure laid down under the SARFAESI Act and the SARFAESI Rules. Open auction was conducted on 13.11.2014 in which the auction purchasers became the successful bidders. Auction purchasers had paid earnest money of Rs.2,16,000-00 earlier i.e., on 24.09.2014 to enable them to participate in the auction in terms of the sale notice. In the auction held on 13.11.2014 they became the successful bidders and paid Rs.3,25,000-00 on the same date. Both the amounts together made 25% of the sale price, whereafter Manipal Housing confirmed the sale in favour of the auction purchasers while directing them to pay the balance 75% of the sale consideration within 15 days. In the

meanwhile, the auction purchasers submitted a letter dated 25.11.2014 requesting some more time for payment of the balance amount; it was mentioned that they were in the process of availing loan from Canara bank. On due consideration, Manipal Housing granted time to the auction purchasers for payment of the balance sale consideration. This was communicated by letter dated 26.11.2014. Canara bank sanctioned the loan to the auction purchasers whereafter issued demand draft on 10.12.2014 for the balance sale consideration amount of Rs.16,24,000-00 directly in favour of Manipal Housing. On receipt of such amount, Manipal Housing executed sale certificate in respect of the schedule property in favour of auction purchasers. It was further contended that as against the market value of the schedule property of Rs.18,00,000-00, secured asset was sold for an amount of Rs.21,65,000-00. That being the position, Manipal Housing sought for dismissal of the securitization application.

44 Auction purchasers had also filed reply statement, which was more or less similar to the one filed by Manipal Housing. Additionally, it was stated that after having purchased the schedule property through auction sale by availing loan from Canara bank they were in peaceful possession of the schedule property.

45 Tribunal, by the order dated 23.05.2017 recorded the fact that as on 30.11.2014 the outstanding dues of the borrowers

stood at Rs.22,57,911-46. After referring to the rival pleadings and submissions, Tribunal framed the following issue for consideration:-

“Whether the applicants (borrowers) had made out any valid ground to declare the measures taken by Manipal Housing in respect of the schedule property under Section 13 (4) of the SARFAESI Act as illegal, arbitrary and null and void.”

46 While adjudicating the said issue, Tribunal recorded the fact that the applicants (borrowers) did not dispute availing of loan of Rs.18.00 lakhs from Manipal Housing by mortgaging the schedule property as security for the said loan. Tribunal further referred to the demand notice issued under Section 13 (2) of the SARFAESI Act on 31.07.2012 and found that the said notice was issued to the applicants in the same address as mentioned in the securitization application by the applicants themselves. It was held that it was not the case of the applicants that the demand notice was issued to wrong address. That apart, the said demand notice was issued by way of newspaper publication as well. Therefore, it was held that there was no flaw in the demand notice issued under Section 13 (2) of the SARFAESI Act.

47 Regarding possession notice dated 15.03.2013 issued under Section 13 (4) of the SARFAESI Act, Tribunal noted that the same was published in the daily newspapers Financial Express and Andhra Prabha on 20.03.2013. Insofar affixation of the said notice at a conspicuous place of the secured asset was concerned, according to the Tribunal, the applicants had taken a specific plea that Manipal Housing had not complied with Rule

8 (1), *qua*, affixture of the possession notice at a conspicuous place of the schedule property. It was mentioned that though Manipal Housing had pleaded in the reply statement that the possession notice was affixed at a conspicuous place of the schedule property, no proof was placed on record. Therefore, Tribunal took the view that Manipal Housing had violated Rule 8(1) of the SARFAESI Rules.

48 On the plea of the borrowers that auction purchasers had not paid the balance 75% of the sale price within 15 days of confirmation of sale for which the sale and the consequential sale certificate were liable to be set aside, Tribunal referred to the provisions of Rule 9 (4) of the SARFAESI Rules as it existed on the date of auction i.e. on 13.11.2014 since the said provision was amended with effect from 03.11.2016. As per the unamended provision, the balance amount of purchase price should be paid by the purchaser on or before the 15th day of confirmation of sale of the immovable property or within such extended period as may be agreed upon in writing between the parties. Referring to the decision of the Supreme Court in **Sri Siddeshwara Co-operative Bank Ltd. Vs. Ikbali**³ wherein it was held that the expression “between the parties” would mean between the secured creditor, borrower and auction purchaser, Tribunal held that Manipal Housing had not consulted the applicants (borrowers) while extending the time to the auction purchasers for depositing the balance 75% of the sale price. On

³ (2013) 10 SCC 83

that basis it was held that extension of time to deposit the balance 75% of the sale price by Manipal Housing to the auction purchasers was not in accordance with Rule 9 (4) of the SARFAESI Rules and, therefore, the sale was not valid. Consequently it was held that the sale certificate issued by Manipal Housing to the auction purchasers was liable to be set aside.

49 In view of above, Tribunal set aside the possession notice dated 15.03.2013 as well as the auction sale of the schedule property conducted on 13.11.2014 and the consequential sale notice. Further, Manipal Housing was directed to restore possession of the schedule property to the applicants (borrowers) after expiry of the appeal period with a further direction to refund the amount deposited by the auction purchasers towards sale consideration with simple interest @ 6% p.a. from the date of deposit till the date of payment.

50 Against the aforesaid order of the Tribunal dated 23.05.2017, Manipal Housing filed appeal before the Appellate Tribunal being Appeal No.207/2017. Likewise, the auction purchasers had also filed appeal being Appeal No.208/2017. Both the appeals were dismissed by separate orders on 02.05.2018 by the Appellate Tribunal. In the appeal filed by Manipal Housing, it is seen that learned counsel for the appellant Manipal Housing had submitted before the Appellate Tribunal that insofar setting aside of the sale held on

13.11.2014 due to non-compliance of Rule 9(4) of the SARFAESI Rules is concerned, the appellant i.e. Manipal Housing had no case. Therefore, learned counsel representing the appellant Manipal Housing confined her arguments to setting aside of the possession notice for non-compliance of Rule 8 (1) of the SARFAESI Rules. Referring to the memorandum of appeal, it was submitted that the sale notice was affixed at the boundary pillar of the schedule property as would appear from the annexed photographs. However, taking the view that at a belated stage, appellant Manipal Housing contended that the possession notice was affixed at a conspicuous place of the schedule property, Appellate Tribunal held that such photograph(s) could not be looked into. Further, the Appellate Tribunal held that there was no valid reason as to why the photograph(s) filed before the Appellate Tribunal could not be filed before the Tribunal. That apart, the veracity of the photograph(s) was also doubted. Therefore, Appellate Tribunal did not interfere with the finding recorded by the Tribunal and consequently dismissed the appeal.

51 Insofar the appeal filed by the auction purchasers is concerned, we find that learned counsel appearing for the appellants (auction purchasers) submitted that in view of the law laid down by the Supreme Court in **Sri Siddeshwara Co-operative Bank Ltd** (supra), he might not be able to assail the view taken by the Tribunal while setting aside the sale held on

13.11.2014. Therefore, following the decision rendered in the appeal filed by Manipal Housing, Appellate Tribunal dismissed the appeal of the auction purchasers holding that the appeal had no substance.

52 From a reading of the two appellate orders, it is seen that there was concession on the part of learned counsel appearing for both the appellants as to setting aside of the sale by the Tribunal for non-compliance of Rule 9(4) of the SARFAESI Rules in view of the decision of the Supreme Court in **Sri Siddeshwara Co-operative Bank Ltd** (supra). If that be the position, it would not be open to the petitioners to assail the findings of the Tribunal as affirmed by the Appellate Tribunal, *vis-à-vis* non-compliance to the provisions of the Rule 9 (4) of the SARFAESI Rules. Therefore, the only question which would arise for consideration is the alleged non-compliance of Rule 8(1) of the SARFAESI Rules.

53 Rule 8 of the SARFAESI Rules deals with sale of immovable secured asset. Sub-Rule (1) says that where the secured asset is an immovable property, the authorized officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix IV to the SARFAESI Rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property. As per Sub-Rule (2), the possession notice

as referred to in Sub-Rule (1), shall also be published in two leading newspapers.

54 As we have already noticed, Tribunal did not find any flaw in the demand notice issued by Manipal Housing to the borrowers under Section 13 (2) of the SARFAESI Act. Tribunal further recorded that Manipal Housing had issued possession notice under Section 13 (4) of the SARFAESI Act to the borrowers on 15.03.2013 and also published the same in Financial Express and Andhra Prabha daily newspapers on 20.03.2013. However, Tribunal found fault with the affixture of possession notice under Rule 8 (1) of the SARFAESI Rules. Tribunal noted that the applicants (borrowers) had taken a specific plea that Manipal Housing had not complied with Rule 8 (1) insofar affixture of possession notice at a conspicuous place of the schedule property was concerned. Tribunal further noted that though Manipal Housing had pleaded in its reply statement that possession notice was affixed at a conspicuous place of the schedule property, no proof was placed on record to substantiate such claim. Therefore, Tribunal took the view that Manipal Housing had violated Rule 8 (1) of the SARFAESI Rules.

55 This brings us to the findings of the Appellate Tribunal on this issue. Before the Appellate Tribunal Manipal Housing urged a ground that possession notice was affixed at the boundary pillar of the schedule property and in support of such ground photograph was annexed to the memorandum of appeal.

Further, it was argued before the Appellate Tribunal that the Tribunal at no point of time had called upon Manipal Housing to produce proof of affixation of possession notice at a conspicuous place on the secured asset. Learned Appellate Tribunal however held as follows:

“In the S.A. it has been specifically averred that possession notice has not been affixed at a conspicuous place. The said averment has been replied in paragraph 7 (iii) of the Reply Statement wherein it is stated that the schedule property is an open plot, the said Notice was affixed at the conspicuous places surrounded by the property. No evidence or photograph which has been annexed along with the Memorandum of Appeal, has been annexed. In the reply the borrower in paragraph 12 has categorically denied the averment and further submitted that the appellants are put to strict proof of the same.

Despite such averment in the reply the appellant failed to file photographs. There appears to be no valid reason that why photographs, which have been filed here, could not be filed before the DRT. If it is the case of the appellant that affixation was made at a conspicuous place burden lies upon the Financial Institution to prove. Further it is doubtful whether the photograph is of the relevant date, there is nothing to show that it is of relevant date. The Tribunal recorded categorical finding that no evidence in this regard has been filed by the appellant.”

56 From a perusal of the above, we are of the view that Appellate Tribunal ought to have given an opportunity to Manipal Housing to prove the genuineness and veracity of the photograph as proof of affixture of possession notice at a conspicuous place on the secured asset. In view of the assertion of the appellant, the said photograph certainly was a relevant document, having relevancy to the issue in hand. If the Appellate Tribunal felt that it was not proper at the appellate stage to allow additional evidence, it ought to have remanded the matter back to the Tribunal for a fresh consideration on this aspect. After all, this photograph had a clear bearing on the

issue as to whether there was compliance to Rule 8(1) of the SARFAESI Rules by Manipal Housing *vis-à-vis* affixture of notice at a conspicuous place on the secured asset. Both the Tribunal and Appellate Tribunal failed to appreciate that the SARFAESI Act is primarily meant to protect the interest of the secured creditor. Therefore, due opportunity should have been granted to the secured creditor to prove its claim of compliance to the procedural requirements. That being the position, we are of the view that it would be in the interest of justice if the matter is remanded back to the Tribunal for a fresh consideration.

57 Since we are of the view that the matter should be remanded back to the Tribunal, we are of the further view that all issues and contentions should be kept open for adjudication on remand including on the point of limitation as well as the issue relating to Rule 9(4) of the SARFAESI Rules.

58 First we take up the issue relating to Rule 9 (4) of the SARFAESI Rules. Learned counsel for the appellants before the Appellate Tribunal did not press this issue; rather conceded on this issue. Therefore we have held that the said issue cannot be agitated at the instance of the petitioners (appellants). Nonetheless, the same having been brought to our notice, we are constrained to make the following observations.

59 Rule 9 of SARFAESI Rules deals with time of sale, issue of sale certificate and delivery of possession. Sub-Rule (1) says that no sale of immovable property shall take place before the expiry

of 30 days from the date of the sale notice. As per the proviso, in case of subsequent sale, the period of 30 days is reduced to 15 days. Sub-Rule (2) mandates that the sale shall be confirmed in favour of the purchaser offering the highest sale price. As per Sub-Rule (3), the purchaser shall immediately on sale pay a deposit of 25% of the sale price, which is inclusive of the earnest money deposited to the authorized officer conducting the sale. This brings us to Sub-Rule (4), which is relevant. Therefore, we shall deal with the same a little more in detail. A part of Sub-Rule (4) was amended with effect from 04.11.2016. Prior to its amendment, it read as follows:

“The balance amount of purchase price payable shall be paid by the purchaser to the authorized officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the parties.”

60 Thus as per the unamended Sub-Rule (4), the balance amount of 75% of the sale price should be paid by the purchaser to the authorized officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period *as may be agreed upon in writing between the parties*. After the amendment, Sub-Rule (4) now says that the balance amount of purchase price shall be paid by the purchaser to the authorized officer on or before the fifteenth day of confirmation of sale or such extended period as may be agreed upon in writing between the purchaser and the secured creditor, in any case not exceeding three months. Sub-Rule (4) of Rule 9 as it stands now is as under:

“(4) The balance amount of purchase price payable shall be paid by the purchaser to the authorized officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the purchaser and the secured creditor, in any case not exceeding three months.”

61 The unamended provision of Sub-Rule (4) of Rule 9 came up for consideration before the Supreme Court in **Sri Siddeshwara Co-operative Bank Ltd** (supra). It was held as follows:

18. A reading of sub-rule (1) of Rule 9 makes it manifest that the provision is mandatory. The plain language of Rule 9(1) suggests this. Similarly, Rule 9(3) which provides that the purchaser shall pay a deposit of 25% of the amount of the sale price on the sale of immovable property also indicates that the said provision is mandatory in nature. As regards balance amount of purchase price, sub-rule (4) provides that the said amount shall be paid by the purchaser on or before the fifteenth day of confirmation of sale of immovable property or such extended period as may be agreed upon in writing between the parties.

The period of fifteen days in Rule 9(4) is not that sacrosanct and it is extendable if there is a written agreement between the parties for such extension. What is the meaning of the expression “written agreement between the parties” in Rule 9(4)? The 2002 Rules do not prescribe any particular form for such agreement except that it must be in writing. The use of the term “written agreement” means a mutual understanding or an arrangement about relative rights and duties by the parties. For the purposes of Rule 9(4), the expression “written agreement” means nothing more than a manifestation of mutual assent in writing. The word “parties” for the purposes of Rule 9(4) we think must mean the secured creditor, borrower and auction-purchaser.

62 Thus, Supreme Court had held that the period of 15 days in Rule 9 (4) is not sacrosanct. It could be extended provided there is a written agreement between the parties. According to the Supreme Court, the word “parties” in the context of Rule 9 (4) would mean the secured creditor, borrower and auction purchaser. On that basis, Tribunal held that Manipal Housing had not consulted the applicants (borrowers) in extending the time to the auction purchasers for depositing the balance 75% of the sale price. Therefore, it was held that extension of time granted by Manipal Housing to the auction purchasers to

deposit balance 75% of the sale price was not in accordance with Rule 9 (4) of the SARFAESI Rules. *Prima facie*, the conclusion reached by the Tribunal does not appear to be sound. It could not have been the intention of the Supreme Court to mandate that before the secured creditor could grant extension of time to the auction purchaser there should be written agreement with the borrower as well. This is because post auction purchase the right of the borrower is minimal and extension of time for payment of the balance 75% amount is primarily a matter between the secured creditor and the auction purchaser being a post auction consideration with discretion vested on the secured creditor. This position has been made clear by the amendment brought to Rule 9 (4) with effect from 04.11.2016, which makes it specifically clear that such extension of time would be dependent upon written agreement between purchaser and the secured creditor. But such extended period should not in any case exceed three months.

63 Since the matter is being sent back on remand, we are, therefore, of the view that this aspect should also be looked into afresh by the Tribunal. There is one more reason why we have taken such a view. The borrowers had not made any statement either before the Tribunal or before the Appellate Tribunal or before this Court that they are willing and ready to pay the outstanding dues. Though they may have disputed the quantum of the outstanding dues, they have still not stated that

whatever be the outstanding dues as per their calculation that would be paid by them to the secured creditor. In such a scenario, when the defaulter does not come forward to pay the outstanding amount, it would be against all canons of justice and equity to direct the secured creditor to handover possession of the secured asset to such defaulter when the auction purchaser had paid the entire sale consideration and has made constructions thereon. In this connection, it would be apt to refer to the decision of the Supreme Court in **Central Bank of India Vs. C.L.Vimla** (supra), relevant portion of which is extracted hereunder:

21. It appears to us that the High Court did not consider the said facts and further it has escaped from the mind of the High Court that the auction-purchaser has purchased the auctioned property for sale consideration of Rs 3.27 crores and 25% of the sale consideration was duly paid on 5-10-2006 and furthermore on 19-10-2006, the balance amount of sale consideration was duly paid by the auction-purchaser. We have further noted that the sale was confirmed on 15-11-2006. The sale certificate was also issued in favour of the auction-purchaser after paying the requisite stamp duty and registration fees which, as pointed out to us on behalf of the auction-purchaser, is to the tune of Rs 30,73,800. It is also not in dispute that the auction-purchaser was put in possession of the property and is still in possession of the property since the sale certificate was issued and registration was made in his favour. It is submitted on behalf of the auction-purchaser that he has purchased the property by availing private borrowing for the said property and he is paying nearly Rs 5 lakhs per month as interest. Therefore, in our opinion, equity and good conscience also have to play a role in the matter in question on the given facts and after considering the conduct of the respondents (C.L. Vimla and others) in the matter.

22. In these circumstances, we feel that it would not be proper for us at this stage to set aside the sale, as has been done by the High Court without taking into consideration all these facts. Further, the High Court has failed to appreciate these facts and wrongly held that the auction-purchaser is a party to the negligence of the Recovery Officer and, accordingly, the sale was set aside. In our opinion, the auction-purchaser had nothing to do in holding the auction. Rather he deposited the money after bona fide participating in the auction and, in fact, suffered for a long time to pay a price by participating in the auction proceedings.

23. In these circumstances, we further noticed that the principal debtors were not prepared to pay back the amount to the Bank and did not choose to defend themselves properly. The conduct of the principal debtors also cannot be overlooked by us.

24. Accordingly, we set aside the order passed by the High Court and hold that since the auction-purchaser has already paid the full amount of

sale consideration and is in possession of the property in question for more than about 8 years, for equity and good conscience, we do not intend to interfere with his possession and we, therefore, set aside the order passed by the High Court, and allow these appeals.

64 Before parting with the record we may refer to Section 17 (1) of the SARFAESI Act which says that any person including a borrower who is aggrieved by any of the measures referred to in Sub-Section (4) of Section 13 taken by the secured creditor or by the authorized officer may make an application to the jurisdictional Debts Recovery Tribunal within 45 days from the date on which such measure had been taken. Insofar the securitization application of the borrowers is concerned, the same was filed on 12.01.2015. The prayer made was to declare the measures taken under Section 13 (4) of the SARFAESI Act as illegal, arbitrary and null and void. The possession notice under Section 13 (4) of the SARFAESI Act was issued by Manipal Housing on 15.03.2013. It was sent to the same address of the borrowers which they had furnished in their securitization application. The said notice was also published in two newspapers, Financial Express in English and Andhra Prabha in Telugu on 20.03.2013. This part of the action of the secured creditor i.e. Manipal Housing was not faulted by the Tribunal. What was faulted was regarding affixture of the possession notice at a conspicuous place of the schedule property as is the requirement of Rule 8 (1) of the SARFAESI Rules. If that be the position, *prima facie*, the securitization application was not filed by the borrowers within the stipulated period of 45 days as is required under Section 17 (1) of the SARFAESI Act.

65 From the order of the Tribunal it is not discernible as to whether any application for condonation of delay was filed or how the Tribunal dealt with the belated approach of the borrowers. This is also an aspect which is required to be examined by the Tribunal on remand.

66 Thus, on a thorough consideration of all aspects of the matter, we are of the view that the impugned orders are required to be set aside and the matter is required to be remanded back to the Tribunal for a fresh decision.

67 Consequently, we set aside the order of the Tribunal dated 23.05.2017 and that of the Appellate Tribunal dated 02.05.2018. Matter is remanded back to the Tribunal for a fresh decision in accordance with law. As we have already stated, all contentions are kept open. It would be open to the parties to adduce additional evidence with right of cross-examination to the other side.

68 In the *interregnum*, the auction purchasers who had purchased the schedule property shall continue to enjoy the fruits of their purchase by maintaining their possession over the schedule property and structures constructed thereon. However, the same shall be subject to outcome of S.A.No.651 of 2017, which now stands revived by virtue of the present judgment and order.

69 Writ petitions are accordingly allowed (though there was no necessity for filing writ petition No.23805 of 2018) in the manner indicated above. No order as to costs.

70 Miscellaneous petitions, if any, pending in these writ petitions, shall stand closed.

UJJAL BHUYAN, J

Dr. CHILLAKUR SUMALATHA, J

Date:18.01.2022.

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