

Sheeba Philominal Merlin, and anr. Vs. the Repatriates Co-op Finance and Development Bank Ltd., and ors.

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Court : Chennai

Decided On : Aug-10-2010

Judge : F.M.Ibrahim Kalifulla; N.Kirubakaran, Jj.

Acts : Constitution Of India - Article 226

Appeal No. : W.P.No.15272 of 2009

Appellant : Sheeba Philominal Merlin, and anr.

Respondent : The Repatriates Co-op Finance and Development Bank Ltd., and ors.

Advocate for Def. : Mr.Yashood Varthan; Mr.K.M.Vijayan, Adv.

Advocate for Pet/Ap. : Mr.G.Rajagopalan, Adv.

Judgement :

1. "ABUSE", "MISUSE" Meaning of the above words is the facts of this case.
2. The object of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 is to regulate Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest and for matters connected therewith or incidental thereto and the Act came into force on 17-12-2002. The Act aims at speedy recovery of defaulting loans and to reduce

the mounting levels of non-performing assets of banks and financial institutions. The Act has been passed based on the recommendations of Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms and to consider the need for changes in the legal system in respect of these areas. The provisions of the would enable the banks and financial institutions to realise long-term assets, manage problems of liquidity and asset liability mismatches and to improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction.

3. For getting a decree in usual course before a Civil Court litigants including Banks have to file the suit before a civil court. After service of notice, written statement and trial, the suit would be decided by passing a decree. The decree would possibly be challenged by way of appeal upto Supreme Court and it would take about 5 to 15 years to attain finality. There would be possibility of dismissal of suit on various grounds. After the decree is passed by the competent civil court, the same would be put to execution by filing E.P. The Execution Court after service of notice would bring the property of the debtor/guarantor for sale through auction. To reach this stage, lot of money, especially very long time have to be spent. The above process is dispensed with by the Special Act "SARFAESI ACT" which is meant only for the financial institutions. As per the Act, the first step would be to issue notice U/s. 13(2) by the authorised officer who is deemed to be armed with a money decree which attained finality. By the statute the authorised officer, is clothed with powers of trial court and execution court and the code of Civil Procedure which governs the civil proceedings is no more necessary. To put it otherwise, by the Special Act, the authorized officer acts like a Civil Court clothed with powers hitherto exercised by it.

4. What the Honourable Supreme Court held in Mardia Chemicals Ltd., -Vs- Union of India reported in A.I.R. 2004 S.C.2371:(2004) 4 S.C.C.311, while upholding the validity of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002(54 of 2002) is as follows:

The financial institutions, namely the lenders owe a duty to act fairly and in good faith. There has to be a fair dealing between the parties and the financing companies/institutions are not free to ignore performance of their of the obligation as a party to the contract. They cannot be free from it. Irrespective of the fact as to whatever may have been held in decisions of some American Courts, in view of the facts and circumstances and the terms of the contracts and other details relating to those matters, that may or may not strictly apply, nonetheless, even in absence of any such decisions or legislation, it is incumbent upon such financial institutions to act fairly and in good faith complying with their part of obligations under the contract. This is also the basic principle of concept of lender's liability. It cannot be a one-sided affair shutting out all possible and reasonable remedies to the other party, namely, borrowers and assume all drastic powers for speedier recovery of NPAs. Possessing more drastic powers calls for exercise of higher degree of good faith and fair play. The borrowers cannot be left remediless in case they have been wronged against or subjected to unfair treatment violating the terms and conditions of the contract. They can always plead in defence deficiencies on the part of the banks and financial institutions. The Supreme Court in *Central Bank of India vs. State of Kerala and others* reported in 2009 (4) SCC 94 restated the object of the Act as follows:

"44. Simultaneously, the jurisdiction of the civil courts was barred and all pending matters were transferred to the Tribunals from the date of their establishment. For some years, the new dispensation of adjudication worked well. However, with the passage of time, proceedings before the Debts Recovery Tribunals also started getting bogged down due to invoking of technicalities by the borrowers. Faced with this situation, the Government again asked the Narasimham Committee to suggest measures for expediting recovery of debts, etc. due to banks and financial institutions.

45. In its Second Report, the Narasimham Committee observed that the non-performing assets of most of the public sector banks were abnormally high and the existing mechanism for recovery of the same was wholly insufficient. In Chapter VIII of the Report, the Committee observed that the evaluation of legal framework has not kept pace with the changing commercial practice and financial sector

reforms and as a result of this the economy has not been able to reap full benefits of the reform process.

46. By way of illustration, the Committee referred to the scheme of mortgage under the Transfer of Property Act and suggested that the existing laws should be changed not only for facilitating speedy recovery of the dues of banks, etc. but also for quick resolution of disputes arising out of the action taken for recovery of such dues.

47. The Andhyarujina Committee constituted by the Central Government for examining banking sector reforms also considered the need for changes in the legal system. Both the Narasimham and Andhyarujina Committees suggested enactment of new legislation for securitisation and empowering the banks and financial institutions to take possession of the securities and sell them without intervention of the court. "

5. The aforesaid Act clothes the authorized officer of the bank with enormous powers to deal with the secured assets to recover the outstanding amounts. Once the power is given, the Courts have held that the same has to be exercised in the way it is to be done and not otherwise. Here is a case where the first respondent/bank, contrary to the Act acted in whimsical and capricious manner and brought the property of the petitioners and sold the same to the fourth respondent in an ill-devised manner which is unknown to law.

6. The facts of the case are as follows:

It is the case of the petitioners that the first petitioner's husband died on 06.09.2005. The first petitioner, due to some misunderstanding with her husband got separated and has been living with the second petitioner who is their daughter. After the demise of S.Jayakumar, the husband of the first petitioner, petitioners came to know about the advertisement in newspapers about the sale of their property bearing Door No.41, State Bank Colony, Sembium, Perambur, Chennai-600 011, for the alleged collateral security offered by the said S.Jayakumar for the loan transaction of M/s. Path Finders Technology Private Limited. The property measures about 3168> Sq.ft located in Ayanavaram, Chennai and is stated to be

worth more than Rs.1.5 Crores. On coming to know about the advertisement, the first petitioner through her brother and father informed the first respondent bank about the death of her husband S.Jayakumar and also handed over copies of the death certificate as well as the legal heir certificate.

7. The petitioners contend that no notice as contemplated under Section 13(2) of the Securities and Reconstruction of Financial Assets and Enforcement of Security Interest Act(SARFAESI)2002 and under Section 13(4) was issued. Pursuant to the advertisement, the first petitioner issued an Advocate Notice dated 30.09.2008 to give the details regarding the auction. A reply dated 17-10-2008 was received informing that the auction was conducted on 24.06.2008. A rejoinder dated 03-12-2008 was issued by the first petitioner, for which a reply dated 12.12.2008 was received from the first respondent bank without disclosing the details regarding the sale including the purchaser's name.

8. The petitioners came to know about the purchase of property by the fourth respondent for a sum of Rs.33,50,000/-. The petitioners have approached this Court challenging the auction and the Sale Deed dated 13-09-2008 and for a direction to restore the possession as the sale of property was vitiated by fraud and not following the procedure contemplated under the Act.

9. The respondents 1 to 3 herein filed a counter affidavit contending that the property was given by way of deposit of title deeds by S.Jayakumar for the loan to M/s. Path Finders Technologies Limited to the tune of Rs.14,00,000/- on 04-06-1998. As the borrower failed to repay the amount, respondent bank proceeded under the SARFAESI Act, by issuing Section 13(2)notice on 02-01-2008 and Possession notice dated 26-04-2008 and conducted Auction Sale on 28-07-2008 which was preceded by a sale notice dated 18-06-2008.

10. The respondent bank further contended that on 28-07-2008 one Mr.S.P.Ravindrakumar and Mr.E.Ravichandran, representatives of S.Jayakumar(first petitioner's husband and second petitioner's father) offered to settle the loan amount by one time settlement and to stop the auction and remitted a sum of Rs.35,00,000/- to the respondent bank. As the settlement could not be reached, the said amount was refunded on 12-08-2008 to the aforesaid persons.

Thereafter by publishing notice through newspaper, the sale was conducted on 11-08-2008 and the fourth respondent being the highest bidder to the tune of Rs.33,50,000/- the sale was confirmed in his favour. The Sale Certificate dated 13-09-2008 was also issued.

11. It is further submitted by the respondent bank that they have no records pertaining to the demise of S.Jayakumar and also about the particulars of legal heirs. The exchange of notices between the petitioners and the bank, was only after the completion of sale on 11-08-2008. Apart from that, the bank took a stand as regards the jurisdiction of this Court contending that the validity of the auction of the respondent bank could be raised only before the Debts Recovery Tribunal under Section 17 of the SARFAESI Act and therefore, the petitioners could not maintain the writ petition before this court under Article 226 of the Constitution of India.

12. Additional counters were also filed on behalf of the bank on 09-11-2009 and on 17-11-2009. In the counter affidavit filed on 09-11-2009, it has been stated in paragraph '4' that the respondent bank was unable to find out the whereabouts of S.Jayakumar, inspite of the best efforts by the Recovery Officers of the bank. In paragraph '6' of the counter affidavit, it is stated that on 28-07-2008, one E.Ravichandran and S.P.Ravindrakumar, who are the representatives of S.Jayakumar, remitted a sum of Rs.35,00,000/-. In paragraph '12' of the counter it has been stated, "Ms.Jayakumar was absconding and that notice was served on M/s.SJK Charitable Trust and one Mr.P.Md.Thahir " In paragraph '15', it is stated, "after adjusting the sale consideration of Rs.33,50,000/- on 13-09-2008, the outstanding total liability in the said loan account as on 31-10-2009 is Rs.12,46,521/-".

13. In para 8 of the additional counter affidavit, dated 17.11.2009, it is alleged by the respondent bank that a demand notice dated 02-01-2008 was issued to the borrower in writing, to the effect that S.Jayakumar absconded and the said notice was duly served on the authorized agent, one Md.Thahir. Moreover, the aforesaid notice was also served on M/s. S.J.K.Charitable Trust which was in possession of the secured asset.

14. A reply was filed on behalf of the petitioners on 11-11-2009, reiterating their stand that no notice was issued to the petitioners who are the legal heirs of S.Jayakumar. They further state that in the auction sale notice dated 18-06-2008, it was stated that the liability was only Rs.19,11,184/- whereas in the additional counter affidavit filed by the bank, it is stated that after adjusting the sale consideration of Rs.33,50,000/-, still a sum of Rs.12,46,521/- is due as on 31-10-2009. In paragraph '7', it is stated that the petitioners never authorized the said Ravichandran or any other person to negotiate with the bank and the petitioners denied that the second petitioner was a Trustee of M/s.S.J.K Charitable Trust as she was a college student during the period 2003-2007. They further stated that the bank fraudulently permitted one Mohammed Tahir who is claiming to be the agent of said S.Jayakumar who died in the year 2005 to participate in the auction held on 28.7.2008.

15. Mr.G.Rajagopalan, learned Senior Counsel appearing for the petitioners submitted the following:

a) S.Jayakumar died as early as on 06-09-2005 and notice was issued against the dead person.

b) Demand notice dated 02-01-2008 under Section 13(2) and Possession notice under Section 13(4) of the Act, dated 26-04-2008, were not served on the petitioners, they being the legal heirs of S.Jayakumar, Guarantor.

c)The bank indulged in fraudulent acts by permitting one S.P.Ravindrakumar and E.Ravichandran to deposit certain amount and to withdraw the same from the bank clandestinely without ascertaining whether they represented S.Jayakumar or not.

d)The Sale notice dated 18-06-2008 stated the liability as Rs.19,11,184/- whereas in the additional counter affidavit it is stated that after adjustment of sale proceeds viz. Rs.33,50,000/- still a sum of Rs.12,46,521/- is due.

e) The bank did not ascertain the facts regarding the alleged authorisation letter of S.Jayakumar and acted upon the said letter.

f) As there are some statutory violations were made in bringing the property for auction, the entire sale has to be set aside and the possession to be restored to the petitioners.

16. The learned Senior Counsel submitted that notice issued against dead person, is not valid. In support of that, he relied upon the judgment of the Honourable Supreme Court in Kamal Krishan Rastogi and Others -Vs- State of Bihar and another reported in 2008 (15) SCC 105. He further submitted that the sale is vitiated by "fraud" as the bank refused to give the advertisement details regarding the sale dated 11.08.2008 in spite of the petitioners' notice and the property worth about more than Rs.1.5 Crores was sold at a very low price of Rs.33,50,000/-. He relied upon the judgment of the Honourable Supreme Court in Express Newspapers Pvt Ltd., and others -Vs-Union of India and others reported in AIR 1986 SC 872.

17. With regard to the proceedings taken by the Bank, the learned Senior Counsel submitted that there is a violation of principles of natural justice as no notice was served on the legal heirs of the deceased S.Jayakumar and therefore, the entire proceedings are vitiated for violation of principles of the natural justice. In this regard he relied upon the judgment in Nawabkhan Abbaskhan -Vs- State of Gujarat reported in AIR 1974 SC 1471 and the judgment in Smt. Maneka Gandhi - Vs- Union of India and another reported in AIR 1978 SC 597.

18. The learned Counsel further contended that the contention of the bank with regard to the alternative remedy is not sustainable as the auction by the bank violates the principles of natural justice and violates fundamental rights and therefore alternative remedy is not a bar for maintaining the writ. To that effect he relied upon the judgments in Whirlpool Corporation -Vs- Registrar of Trade Marks, Mumbai and others reported in AIR 1999 SC 22, and judgment in Mariamma Roy - Vs- Indian Bank and others reported in 2009 AIR SCW 654 in State of Uttar Pradesh -Vs- Mohammad Nooh reported in AIR 1958 SC 86 and in K.Raamaselvam and two others -Vs- Indian Overseas Bank rep by its Chief Manager and Authorised Officer, Aminjikarai Branch, Chennai-30 and others reported in 2009-5-LW 127.

19. The learned Senior Counsel further submitted that where there is limitation for filing an appeal before the Tribunal under Section 17 of SARFAESI Act to approach the Tribunal against the measures taken by the bank there is no specific provision in the Act for condoning the delay. As the petitioners belatedly came to know about the action of the bank, the limitation already expired and therefore, the petitioners have rightly approached this Court. The learned Counsel relied upon the judgment in Commissioner of Customs and Central Excise -Vs- Hongo India Private Limited and another reported in 2009 (5) SCC 791 with respect to limitation.

20. On the other hand, Mr. Yashod Vardhan, learned Senior Counsel appearing for the respondents 1 to 3, submitted that the bankers followed the procedure as per the Act and brought the property for sale as there was a default in repayment of loan. He submitted that as S.Jayakumar, the guarantor, was absconding, notice was duly served upon the authorized representatives of S.Jayakumar. and thereafter only the property was sold. Therefore, no motive could be attributed to the action of the bank. He contended that the auction was conducted as per due process of law and relied upon a judgment of the Honourable Supreme Court in Janatha Textiles and others -Vs- Tax Recovery Officer and another reported in (2008) 12 SCC 582, wherein for recovery of Income Tax, notices were served on individual partners of partnership firm and a ground was raised contending that notice was issued in the individual capacity and the same was rejected by the Honourable Supreme Court stating that no prejudice of any kind was caused and notices were received by the individual partners. Moreover, in paragraph '18' of the judgment, it was held that a third party auction -purchaser's interest continues to be protected, even if the sale is set aside.

21. The learned Senior Counsel relied upon a Division Bench judgment of this Court in G.S.Gopalakrishnan and others -Vs- Government of Tamil Nadu rep.by its Secretary, Industries Department, Chennai and others reported in (2006) 4 MLJ 65 and in that case the owner of land died long prior to Section 4(1) notification of the land acquisition. The factum of death was not brought to the notice at the appropriate stage and therefore, this Court held that notification cannot be a nullity. He also relied upon the judgment in Industrial Development Bank of India

Limited by Deputy General Manager & the Authorised Officer, Chennai-15 -Vs- M/s. Kamaldeep Synthetics Limited rep. by its Managing Director, Chennai -17 reported in 2007 (3) LW 834 and a judgment in Bombay Dyeing & Manufacturing Co Ltd., -Vs- Bombay Environmental Action Group and others reported in 2006 (3) SCC 434 and a judgment in Haryana Financial Corporation and another -Vs- Kailash Chandra Ahuja reported in 2008 (9) SCC 31. The learned Senior Counsel, in fine, submitted that due procedures were properly followed for auctioning the property and bona fide auction purchaser's rights should be safeguarded.

22. Mr.K.M.Vijayan, learned Senior Counsel appearing for the fourth respondent namely, the auction purchaser, submitted that the fourth respondent is totally a stranger and he might not be in a position to know about the alleged violations. As per the auction notice, he took part in the auction and he was the highest bidder and paid the necessary sale consideration. He also got Sale Certificate and took possession of the property. Therefore the bona fide purchaser's rights should be safeguarded irrespective of the alleged violations. The learned Senior Counsel relied upon the judgment of the Honourable Supreme Court in Janatha Textiles and others -Vs- Tax Recovery Officer and another reported in (2008) 12 SCC 582. In that case, it is held that the third party auction purchaser's interest in the auctioned property continues to be protected, notwithstanding that the underlying decree is subsequently set aside or otherwise. He relied on a judgment of this court in PNL Depositors' Welfare Association, Pondicherry rep.by Secretary -Vs- Union of India by Secretary to Government, Ministry of Finance, New Delhi-110 001 and others reported in 2005 (4) CTC 469, wherein it is held that any person aggrieved by the measures taken under Section 13(4)of SARFAESI Act, can file an appeal before the Tribunal and therefore the writ petition is not maintainable. The learned Senior Counsel relied upon a judgment of the Honourable Supreme Court in Commissioner of Customs & Central Excise -Vs- Hongo India (P) Ltd., reported in 2009 (236) E.L.T.417(S.C) wherein In that case, it was held that when a time limit is prescribed under the Act this Court cannot extend the time under Section 5 of the Limitation Act. Hence, he submitted that the writ petition is liable to be dismissed.

23. The learned Senior Counsel further submitted that there can not be any attempt by the legal heirs to challenge the notices issued under Section 13(2) and 13(4) when the petitioners are aware of the same and that the fourth respondent also made payment to the tune of Rs.15,00,000/- apart from the sale consideration. Finally, he submitted that since there was latches/delay on the part of the petitioners in approaching this Court, the petition is liable to be dismissed.

24. This court considered the submissions made by the parties and perused the materials available on records.

25. For invoking the SARFAESI Act, the first step is issuance of notice under Section 13(2) of the SARFAESI Act . Section 13 of the Act is extracted as follows:

" 13. Enforcement of Security interest--(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1982 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act. (2) Where any borrower, who is under a liability to a secured creditor under a security agreement makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

(3A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one weeks of receipt of such representation or objection the

Non-Service of notices u/s 13(2) & 13 (4)

27. In paragraph '11' of the counter, it is stated as follows:

The Authorized Officer issued sale notice dated 18-06-2008 fixing the Tender/Public Auction Sale on 28.07.2008. Since S.Jayakumar was absconding and his authorized agent, Md.Thahir was not available, in spite of our best efforts he could not be traced, as prescribed in the Rules sale notice was duly affixed on the conspicuous part of the property and also published in two newspapers one in Tamil and another in English on 24.06.2008. In paragraph '12' in the same counter affidavit dated 09-11-2009, it is stated as follows:

When the said S.Jayakumar absconded the possession of the secured asset was in the hands of M/s. SJK Charitable Trust and one P.Md.Thahir was occupying the same. The said person produced a Letter of Authorisation from S.Jayakumar to the Bank and claimed himself to be the agent of S.Jayakumar

28. In the counter affidavit filed on 17-11-2009 in paragraph '9' it is stated that the said S.Jayakumar was absconding and the said notice was duly delivered to the authorized agent, one Md.Thahir. The aforesaid contradictory and inconsistent stand of the Bank would prove that the notice under Sections 13(2) and 13(4) of the Act was not served on S.Jayakumar or the legal heirs.

29. How the notice under the act is required to be served? Rule 3 of the Security Interest (Enforcement) Rules 2002 speaks about the "Demand Notice." The said Rule 3 of the Act usefully is extracted as follows:

Demand notice-(1) The service of demand notice as referred to in sub-section(2) of Section 13 of the Act shall be made by delivering or transmitting at the place where the borrower or his agent, empowered to accept the notice or documents on behalf of the borrower, actually and voluntarily resides or carries on business or personally works for gain, by registered post with acknowledgment due, addressed to the borrower or his agent empowered to accept the service or by Speed Post or by Courier or by any other means of transmission of documents like fax message or electronic mail service. Provided that where authorized officer has reason to believe that the borrower or his agent is avoiding the service of the notice or that for any other reason, the service cannot be made as aforesaid, the service shall be effected by affixing a copy of the demand notice on the outer door or some other conspicuous part of the house or building in which the borrower or his agent

ordinarily resides or carries on business or personally works for gain and also by publishing the contents of the demand notice in two leading newspapers, one in vernacular language, having sufficient circulation in that locality. (2)Where the borrower is a body corporate, the demand notice shall be served on the registered office or any of the branches of such body corporate as specified under sub-rule(1)

(3)Any other notice in writing to be served on the borrower or his agent by authorized officer, shall be served in the same manner as provided in this rule.

(4)Where there are more than one borrower, the demand notice shall be served on each borrower.

30. As per Rule 3 of the Security Interest (Enforcement) Rules, 2002, a demand notice under Section 13(2) shall be sent by Registered Post with Acknowledgment due or by Speed post or by Courier or by transmission of document, like fax message or electronic mail service. In this case, no such step was taken by the bank through any of the modes. To a query in this regard, it is admitted that the demand notice was not sent as per Rule 3 on S.Jayakumar or his legal heirs. Even otherwise, the records prove the absence of service of notice as per rule. Though a copy of S 13(2) notice dated 2.1.2008 allegedly issued by the respondent bank was produced, no postal receipt or acknowledgment card is produced before this court. However, it is admitted that the notice was not sent by RPAD. STATUTORY VIOLATION

31. The Security Interest (Enforcement) Rules, 2002, have been framed under the powers conferred by sub-section (i) and clause (b)(ii) of sub-section(2) of Section 38 read with Sub-Sections (4),(10) and (12) of Section 13 of the SARFAESI Act 2002 and therefore, the said rules are subordinate legislation and they have force on the statute. It has been held by the Apex Court inTamilnadu Electricity vs. Status Spinning Mills Ltd. Reported in 2008 (7) SCC 353 that subordinate legislation validly made may have to be read in the same manner as if it is part of the Act.

32. It is very rudimentary rather elementary that for an action under the SARFAESI Act issuance and service of notice under Section 13(2) and 13(4) is mandatory.

The Bank, which is armed with enormous power under the Act to deal with secured asset, should have gone by the Act and not in contravention of the Act.

33. It is the basic principle of law if the power is given to do certain thing in a certain way, the thing must be done in that way or not at all. The following judgments which laid down the above dictum are in Taylor -vs- Tailor reported in 1876 1 Ch.D426, and the judgment in Nazir Ahmad -Vs- Emperor reported in AIR 1936 Privy Council 253(1), in State of Uttar Pradesh -Vs- Singhara Singh and others reported in AIR 1964 SC 358 Babu Verghese -Vs- Bar Council of Kerala and others reported in 1999 (3) SCC 422, in Ramchandra Murarilal Bhattad and others -Vs- State of Maharashtra and others reported in 2007 (2) SCC 588 and in Indian Banks' Association, Bombay and others -Vs- Devkala Consultancy Service and others reported in (2004) 11 SC 1, in Chandrakishore Jha vs. Mahavir Prasad reported in AIR 1999 SC 3558 and Gujarat Urija Vikash Nigam Ltd. vs. Essar Power Ltd. reported in 2008 (4) SCC 755.

34. As rightly pointed out by Mr.G.Rajagopalan, learned Senior Counsel that the guarantor S.Jayakumar died on 08.09.2005 and the demand notice was issued only on 02.01.2008 i.e. about three years after his death, even if it is assumed that the death of S.Jayakumar was not known to the Bank officials, a notice by simple "registered post with acknowledgment due" to the said S.Jayakumar would have revealed the aforesaid fact. Records produced prove the absence of service of notice. As the Bank miserably failed to issue notice as per the Act, this Court has to necessarily declare any other notice purported to have been issued under Section 13(2) and 13(4) as invalid as they were issued against the dead person. In view of the settled position of law and in the absence of notices as per Section 13(2) and 13(4) and in the absence of service as per Rule 3 of the Security Interest (Enforcement) Rules, 2002, the entire proceedings initiated by the bank under the Act and the Rules made thereunder are vitiated and invalid.

ALTERNATIVE REMEDY

35. With regard to alternative remedy, it is seen that there is a statutory violation by not issuing notice under Section 13(2) and 13(4) as per the Rule 3 of the Security Interest(Enforcement) Rules 2002. There is contravention of statute and

violation of principles of natural justice and also violation of constitutional right to hold property as per Article 300A of the Constitution of India. It has been held by the Honourable Supreme Court in Vimala Ben Ajith Bhai Patel -Vs- Vatsala Ben Ashok Bhai Patel reported in 2008 (4) SCC 649 that the right to property can be taken away only as per law and right to hold the property has been glorified as "Human Right".

36. That apart, it is well settled law that availability of an alternative remedy is not an absolute bar for exercising the writ jurisdiction and it is only a self-imposed restraint on its power. This has been held so in the judgment in State of Uttar Pradesh -Vs- Mohammad Nooh reported in AIR 1958 SC 86, in Whirlpool Corporation -Vs- Registrar of Trade Marks, Mumbai and others reported in AIR 1999 SC 22, and in Mariamma Roy -Vs- Indian Bank and others reported in 2009 AIR SCW 654. Therefore the plea of availability of alternate remedy miserably fails. The petitioners cannot approach the Tribunal, as the measures taken by the Bank were belatedly known to the petitioners and by that time the time prescribed under the Act was over. The Judgement in Hongo India (P) Ltd relied upon by Mr.K.M.Vijayan, in fact, justifies the contention of the petitioners. As per the judgement, Courts cannot extend the time limit prescribed by the Statute. As such the only remedy for the petitioners is to file a writ petition which has been rightly done by them.

37. The Tribunal is not competent to look into violation of fundamental rights and constitutional rights and this Court being a custodian of Constitutional rights is entitled to examine the matter. A Constitution Bench of the Honourable Supreme Court in its judgment in State of West Bengal and others -Vs- The Committee For Protection of Democratic Rights, West Bengal and others reported in 2010(2) Scale 467 held that Article 226 of the Constitution of India can be exercised for enforcing any legal right conferred by a statute and it is further held that under Article 226 of the Constitution of India, the High Court has got more wider power than the Honourable Supreme Court. In Secretary Cannanore Muslim Educational Association, Kanpur vs. State of Kerala reported in 2010 (5) SCALE 184, the Apex Court held that the High Court is conferred with wide power to "reach injustice whenever it is found". Therefore as injustice is writ large and glaring, necessarily

the judicial arm of this court has to reach there and it cannot be prevented by plea of availability of alternative remedy.

38. Authorisation:-

The contentions of the Bank with regard to service of notice as noted earlier are inconsistent and contradictory in many aspects. In one place the bank submitted that the notices were served as per the Act and in other place, it is contended that the service was effected on the authorized representative through personal service as S.Jayakumar was absconding. No details are given by the Bank as to what were all the steps taken by the bank to serve notice on him before coming to the conclusion that he was absconding. Without even verifying the authenticity of the authorisation letter dated 15.7.2005 the bank should not have given notice on the alleged authorized agent. Moreover, personal service is not contemplated under Rule 3 of the Security Interest (Enforcement) Rules, 2002. The service of notice on the authorised agent was made in 2008 whereas Jayakumar died on 6.9.2005. Even if there was any authorisation that could be only during the life time of the principal. This would suggest that both Bank and Md.Thahir, played fraud by collusion.

39. A comparison of the signatures of S.Jayakumar found in the mortgage deed executed in favour of Bank and the letter of authorisation dated 15-07-2005 alleged to have been executed by S.Jayakumar in favour of P.Md.Thahir, would reveal a lot of difference between the two and it is very apparent and crystal clear to the naked eye. The difference in signatures suggests every possibility of fabrication of the letter of authorisation dated 15-07-2005 allegedly given by Jayakumar and every possibility of collusion between P.Md.Thahir and bank officials and the same could not be ruled out. The suspicion gets strengthened because the bank alleges the P.Md. Thahir as authorised agent of Jayakumar and it effected personal service of notice on the alleged authorised person. The said authorisation letter states as if Jayakumar borrowed Rs.10,00,000/- from the respondent bank, where as the borrower is the M/s.Path finders and Jayakukumar was only a guarantor and the loan amount was Rs.14 lakhs and not Rs.10 lakhs as alleged in the authorisation letter. Apart from that the letter speaks about

Jayakumar's liability of Rs.6,50,000/- to Mr.P.Mohammed Thabir. The above statement in an authorization letter is unbelievable and this court doubts the said document authorisation letter. The capacity and status of P.Mohammed Tahir is required to be investigated. Therefore the matter requires high level enquiry. This case would illustrate as to how the bank officials with malafide intention used provisions of SARFAESI Act, which was enacted by the Parliament with an object of speedy recovery of money to the banks and financial institutions to achieve some evil designs. The Bank is directed to entrust the case to an investigation agency preferably CB-CID which can go into the matter in detail and based on the investigation report, suitable action can be taken against all persons concerned.

40. The contention with regard to the second petitioner becoming the trustee in S.J.K.Charitable Trust, cannot be accepted as the said Trust only wrote to the second petitioner about the nomination to the Trust and no proof regarding the consent by the second petitioner is produced. In fact it is contended by the petitioner that no consent was given by the second petitioner. Moreover, the Bank without verifying as to whether the second petitioner became the Trustee of the Trust and without any proof, allowed the trust to participate in the auction and it is also required to be investigated.

41. Very strangely, the bank allowed S.P.Ravindrakumar and E.Ravichandran as alleged representatives of borrowers/guarantors and allowed them to deposit a sum of Rs.35,00,000/- into Bank on 28.7.2008 and refunded the same on 12.08.2008. This was also done based on the letter dated 28-07-2008 written by E.Ravichandran. It is not clear as to how the Bank without any authorisation, allowed the third parties to deposit the amount towards the loan account of M/s.Path Finders Technologies Limited, on 28.07.2008 and allowed them to take back the money on 12.08.2008. The Banker's action in this regard also raises serious doubt and the same is also required to be investigated. Auction vitiated by fraud.

42. The respondents bank pursuant to the auction notice dated 18-06-2008 and 24-06-2008, conducted the auction on 11-08-2008 and Sale Certificate was also issued on 13-09-2008. A scrutiny of the bids received from various parties, would

reveal that there were tampering of bid amounts and the fourth respondent's bid was Rs.33,50,000/-. As stated above, the bids were tampered as detailed below:

a) The bid submitted by E.Ravichandran for a sum of Rs.38,00,000/-, was struck off and Rs.30,00,000/- was entered into.

b) The bid of A.Malaisamy Rs.41,00,000/- was tampered with and entered as Rs.29,00,000/-.

c) A bid of Rs.35,90,000/- was altered and Rs. 28,90,000/- was inserted.

d) Similarly, P.Saravanakumar's bid of Rs.36,33,000/- was changed into 28,00,000/-. The aforesaid tampering of bid amounts raises doubts about the integrity, bonafiders and motives of the bank officials who were involved in the transaction. It is very clear that the tampering was deliberately done to make 4th respondent's bid as higher one and to benefit the third party purchaser which is not in the interest of the bank or guarantor. The bank cannot throw the guarantor's rights to the wind under the guise of proceedings under SARFAESI Act. Therefore, the investigation should cover the above aspect also.

43. In this context it will be worthwhile to refer to a recent decision of the Hon'ble Supreme Court in Eureka Forbes Ltd. vs. Allahabad Bank reported in 2010(6) SCC 193 in which the Apex Court decried about the need for greater responsibility on the part of the Bank officials and held in paragraphs 76,78,79 and 82 as follows: "76. The legislative object of expeditious recovery of all public dues and due protection of security available with the Bank to ensure prepayments of debts cannot be achieved when the officers/officials of the Bank act in such a callous manner. There is a public duty upon all such officers/officials to act fairly, transparently and with a sense of responsibility to ensure recovery of public dues. Even, an inaction on the part of the public servant can lead to a failure of public duty and can jeopardise the interest of the State or its instrumentality.

78. The concept of public accountability and performance is applicable to the present case as well. These are instrumentality of the State and thus all administrative norms and principles of fair performance are applicable to them with

equal force as they are to the government department, if not with a greater rigour. The well-established precepts of public trust and public accountability are fully applicable to the functions which emerge from the public servants or even the persons holding public office. In *State of Bihar v. Subhas Singh*, this Court, in exercise of the powers of judicial review stated that, the doctrine of full faith and credit applies to the acts done by officers in the hierarchy of the State. They have to faithfully discharge their duties to elongate public purpose.

79. In action, arbitrary action or irresponsible action would normally result in dual hardship. Firstly, it jeopardises the interest of the Bank and public funds are wasted and secondly, it even affects the borrower's interest adversely provided such person was acting bonafide. Both these adverse consequences can easily be avoided by the authorities concerned by timely and coordinated action. The authorities are required to have a more practical and pragmatic approach to provide solution to such matters. The concept of public accountability and performance of functions takes in its ambit proper and timely action in accordance with law. Public duty and public obligation both are essentials of good administration whether by the State instrumentalities and/or by the financial institutions.

82. Principle of public accountability is applicable to such officers/officials with all its vigour. Greater the power to decide, higher is the responsibility to be just and fair. The dimensions of administrative law permit judicial intervention in decisions, though of administrative nature, but are ex facie discriminatory. The adverse impact of lack of probity in discharge of public duties can result in varied defects not only in the decision-making process but in the decision as well. Every public officer is accountable for its decision and actions to the public in the larger interest and to the State administration in its governance."

Claim as Bonafide Purchaser

44. With regard to the contention of Mr.K.M.Vijayan, learned Senior counsel that the fourth respondent is a bona fide purchaser, it cannot be true in view of fraudulent alteration, modification and tampering of the bid amounts of other bidders to suit the offer of the fourth respondent. The violations which were

deliberately made by design and fraud by the Bank go to the very root of the matter and therefore, no protection or immunity could be available to the fourth respondent. Hence fourth respondent's plea relying upon judgement of the Hon'ble Supreme Court in Janata Textiles case that third party-auction purchaser's right in the auctioned property, continued to be protected, has to be rejected. Therefore, the benefit/right accrued to the fourth respondent through auction sale cannot be sustained. In any event irrespective of as to whether the fourth respondent is bona fide purchaser or not the sale in favour of the fourth respondent should vanish at once when the entire procedure resulting in auction sale is found to be vitiated on so many grounds including "fraud". It is well settled law that "fraud" vitiates every action.

45. As far as the allegations with regard to improvement made by the 4th respondent as stated in paragraph '4' of the counter affidavit filed by the fourth respondent, it cannot be accepted as no material details were given with regard to the alleged negotiations with SJK Charitable Trust for getting vacant possession of the premises and with regard to payment of substantial amount to the Trust for improvements. If at all, the fourth respondent is entitled to return of auction sale consideration from the respondent bank he is at liberty to take steps in this regard.

DIRECTION AND RELIEF

46. In this case the action of the bank officials resulted in loss to bank as well as to the guarantor, as the property ex-facie was allegedly sold for a very low price. It is common knowledge that it is very difficult to get a ground in and around Chennai for a price lesser than Rs.50 lakhs where as in this case a property measuring about 3168 > sq. ft. in Ayanavaram was allegedly sold palpably at a very low price of Rs.33,50,000/-. As stated above, this Court orders high level inquiry to go into every aspect about the transaction involving bank officials, P.Md. Thahir and the bidders. Given facts and circumstances of the case, this court is prima facie convinced that violations were made with the connivance of Bank Officials the Bidders and P.Md.Thahir son of Sheik Mohammed, 309 "D" Block, East Cemetery Road, Chennai-600 021. Therefore this Court directs the respondent Bank to entrust the matter to an investigation agency preferably CB-CID who can investigate and proceed as per law.

47. For non-compliance of mandatory provisions of the Act, fraud, lack of fair play, bonafides etc., the entire proceedings initiated by respondent bank in favour of the fourth respondent gets vitiated and is hereby set aside. In view of the same, the fourth respondent is directed to hand over the possession of the property to the petitioner within 15 days from the date of receipt of a copy of this order.

48. There will be an order of exemplary cost of Rs.50,000/- (Rupees fifty Thousand only) payable by the respondents bank 1 to 3 to the petitioners within 15 days from the date of the receipt of a copy of this order. Consequently, connected M.P.No.1 of 2009 is closed.

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