Gm, Sri Siddeshwara Co-Op.Bank Ltd.& ... vs Sri Ikbal & Ors on 22 August, 2013

Equivalent citations: AIRONLINE 2013 SC 47, 2013 (10) SCC 83, (2013) 2 CLR 610, (2014) 1 CAL HN 94, (2013) 6 MAD LJ 571, (2013) 3 KER LT 124, (2014) 3 MPLJ 67, (2013) 6 ALL WC 5448, (2013) 5 BOM CR 516, (2013) 116 COR LA 110, (2013) 10 SCALE 396, (2014) 3 MAH LJ 139, (2013) 5 MAD LW 120, (2014) 122 REVDEC 424, (2013) 2 CLR 610 (SC), (2013) 5 ALL MR 969 (SC), (2013) 2 WLC (SC)CIVIL 457, 1993 BBCJ 52, (2013) 5 ALLMR 969

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Bench: Chandramauli Kr. Prasad, R.M. Lodha

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NOS. 6989-6990 OF 2013
(Arising out of SLP(C) Nos.17704-17705 of 2012)

GM, Sri Siddeshwara Co-operative Bank Ltd. & Anr. … Appellants

Versus

Sri Ikbal & Ors. … Respondents

WITH

CIVIL APPEAL NOS. 6991-6992 OF 2013
(Arising out of SLP(C) Nos.12106-12107 of 2012)

JUDGMENT

R.M. LODHA, J.

Leave granted.

2. The question to which we have to turn in these appeals, by special leave, centres around Rule 9 of the Security Interest (Enforcement) Rules, 2002 (for short, “2002 Rules”).

3. The facts are these: on 08.02.1996, the respondent no.1, Ikbal (hereinafter referred to as "borrower"), took a housing loan of Rs. 5,00,000/- from Sri Siddeshwara Co-operative Bank Ltd. (for short, "the Bank"). He mortgaged his immovable property being RS No.872, Plot No.29, Mahalbagayat situate at Bijapur. The borrower committed default in repayment of the said housing loan. Despite several reminders when the borrower failed to make payment of the loan amount, the Bank issued a notice on 16.02.2005 calling upon him to repay the outstanding loan amount of Rs.10,43,000/- with interest and costs failing which it was stated in the notice that the mortgaged property will be sold according to law.

4. The borrower failed to make payment of the outstanding loan amount as demanded in the notice dated 16.02.2005. The Bank then issued a notice to him on 30.06.2005 under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, "SARFAESI Act"). In that notice borrower was informed that if he failed to discharge the outstanding dues within 60 days, the Bank may exercise action under Section 13(4) of the SARFAESI Act and the mortgaged property shall be sold.

5. On 09.12.2005, the Bank got the mortgaged property valued which was fixed at Rs.9,00,000/-.

6. On 18.12.2005, the Bank published the auction notice in the local newspapers. The conditions of the public notice were also mentioned in the auction notice.

7. Bashir Ahmed (appellant in two appeals and respondent no.3 in the appeals of the Bank), who we shall refer to hereafter as "auction purchaser" made the payment of Rs.90,000/- towards earnest money deposit on 18.12.2005 itself. The public auction was conducted on 11.01.2006. The auction purchaser gave the bid of Rs.8,50,000/- which was accepted being the highest bid. The auction purchaser made payment of Rs.1,45,000/- towards 25% of the sale consideration. However, he did not make the payment of remaining 75% within 15 days of the confirmation of sale in his favour. He made the payment towards balance sale price in installments on various dates and the final payment was made on 13.11.2006. On 16.11.2006, the Bank issued the sale certificate in favour of the auction purchaser.

8. The proceeds from the sale of the mortgaged property fell short of the total outstanding amount against the borrower. As on 09.02.2007, Rs.2,27,000/- remained outstanding against him. The Bank moved the Joint Registrar of Co-operative Societies for recovery of the outstanding amount. In those proceedings, on 26.02.2007 an ex parte award for a sum of Rs.2,37,038/- including the interest and miscellaneous expenses was passed against the borrower.

9. The Bank levied execution of the ex parte award somewhere in 2011. It was then that the borrower challenged the sale certificate issued in favour of the auction purchaser and the notice dated 09.02.2007 in two writ petitions before the Karnataka High Court, Circuit Bench at Gulbarga.

10. The Single Judge of that Court, after hearing the parties, by his order of 12.12.2011 quashed the sale certificate issued in favour of the auction purchaser and the demand notice dated 09.02.2007. In that order the Bank was granted liberty to conduct fresh sale in accordance with the law. The

Single Judge made certain observations against the authorised officer and directed the Additional Registrar of the High Court to send a copy of the order to the Superintendent of Lokayukta Police at Bijapur for further action in accordance with law.

11. The Bank as well as the auction purchaser challenged the order of the Single Judge in intra-court appeals but without any success.

12. Both Single Judge as well as the Division Bench held that mandatory requirements of Rule 9 were not followed and, therefore, despite the remedy of appeal to the borrower provided under Section 17 of the SARFAESI Act, a case was made out for interference.

13. We have heard Mr. S.N. Bhat, learned counsel for the Bank (appellants in the appeals arising from SLP(C) No.17704-17705/2012), Mr. Raja Venkatappa Naik, learned counsel for the auction purchaser (appellants in the appeals arising from SLP(C) Nos.12106-12107/2012) and Mr. Rajesh Mahale, learned counsel for the borrower.

14. SARFAESI Act lays down the detailed and comprehensive procedure for enforcement of security interest created in favour of a secured creditor without intervention of the court or tribunal. Section 13(2) requires the secured creditor to issue notice to the borrower in writing to discharge his liabilities within 60 days from the date of the notice. Such notice must indicate that if the borrower fails to discharge his liabilities, the secured creditor shall be entitled to exercise its rights in terms of Section 13(4).

15. There is no dispute that a notice in terms of Section 13(2) was given by the Bank to the borrower on 30.06.2005. That the Bank proceeded for the enforcement of security interest in one of the modes provided under Section 13(4) is also not in dispute. The borrower in the writ petitions filed before the Karnataka High Court set up the plea that there was non- compliance of Rule 9 and that had rendered the sale in favour of the auction purchaser bad in law. The Single Judge and the Division Bench were convinced by the borrower's contention. We are required to see the correctness of that view.

16. 2002 Rules have been framed by the Central Government in exercise of the powers conferred on it by sub-section (1) and clause (b) of sub-section (2) of Section 38 read with sub-sections (4), (10) and (12) of Section 13 of the SARFAESI Act.

17. Rule 9* provides for the detailed procedure with regard to sale of immovable property including issuance of sale certificate and delivery of possession. Sub-rule (1) of Rule 9 states that no sale of immovable property shall take place before the expiry of 30 days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub-rule (6) or notice of sale has been served to the borrower. Sub-rule (2) provides that sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid. This is subject to confirmation by the secured creditor. There is a proviso appended to sub-rule (2) which provides that no sale under this rule shall be confirmed if the amount offered by sale price is less than the reserve price but this is relaxable in view of the second proviso appended to sub-rule (2). Sub-rule (3) lays down that on

every sale of immovable property, the purchaser shall immediately make the deposit of 25% of the amount of the sale price. In default of such deposit, the property shall forthwith be sold again. Sub-rule (4) provides that the balance amount of purchase price payable shall be paid by the purchaser 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. Sub-rule (5) makes a provision that if the balance amount of purchase price is not paid as required under sub-rule (4), then the deposit shall be forfeited and the property shall be resold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold. According to sub-rule (6), on confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorised officer exercising power of sale shall issue a certificate of sale of the immoveable property in favour of the purchaser in the form given in Appendix V to the 2002 Rules.

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)? 2002 Rules do not prescribe any particular form for such agreement except that it must be in writing. The use of 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.

19. On behalf of the borrower, the following non-compliances were brought forth: (i) the auction notice of sale was published on 18.12.2005 under Rule 9(1). The public auction should have been conducted not before 30 days therefrom, i.e., it must have been conducted on or after 17.01.2006 but the public auction in fact was conducted on 11.01.2006; (ii) 25% of the sale price from the auction purchaser should have been collected on the day of confirmation of sale in his favour, i.e., on 11.01.2006 but instead Rs. 90,000/- were adjusted which he deposited as earnest money deposit and a sum of Rs.1,45,000/- was only received which could not have been done, and

(iii) on or before expiry of fifteenth day from the confirmation of sale, the auction purchaser did not pay the balance amount and having not done that in terms of Rule 9(5) the deposit made by the auction purchaser should have been forfeited and property resold.

20. In response to the above allegations, the Bank relied upon the letter dated 13.11.2006 written by the borrower to the Bank giving his express consent that the auction made in favour of the auction purchaser may be accepted and sale-certificate be issued to him.

21. The letter dated 13.11.2006 sent by the borrower to the Bank reads as follows:

> "General Manager, Shri. Shiddheshwar Co-op. Bank, Bijapur.
>
> Sub. : Issue of sale certificate of auctioned my house property. I, Iqbal Balasab Mallad humbly submits in writing as under; On my request the mortgaged property to my housing loan account no.194, is sold on 11.01.2006, in public auction for Rs.8,50,000/- to my known person, Sri. Basheer Ahmed Gulam Hussain Inamdar, as he was the highest bidder. But, Sri. B.G. Inamdar could not repay the loan within one month. Today the said person is making the payment of entire balance amount of Rs.2 Lakhs and I request you to issue him the sale certificate as I have consented.
>
> I request to appropriate the sale amount of Rs.8,50,000/- to my loan account.
>
> Thanking you, Yours faithfully, Sd/-
>
> Dated : 13.11.2006 (I.B. Mallad)
>
> Signature of G.M.
> And
> Seal of the Bank.
>
> Sd/-
> General Manager
> Shri. Shiddheshwar Co-op. Bank Ltd., Bijapur"

22. Two things clearly emerge from the above letter. First, at the time of auction sale on 11.01.2006 the borrower was present. He did not object to the auction being held before expiry of 30 days from the date on which the public notice of sale was published. He also agreed that bid given by the auction purchaser for Rs.8,50,000/- which was highest bid be accepted as the auction purchaser happened to be his known person. Second, and equally important, the borrower expressly gave consent in writing that the balance sale price may be accepted from the auction purchaser now and sale certificate be issued to him. The above letter sent by the borrower to the Bank has been accepted by the Bank. Thus, there is a written agreement between the borrower and the Bank for extension of time up to 13.11.2006. The auction purchaser made the payment of the balance purchase price forthwith on that day, i.e., 13.11.2006. This indicates that he was impliedly a party to the written agreement between the Bank and the borrower. In the circumstances, there is no reason why the condition in Rule 9(4) viz. "such extended period as may be agreed upon in writing between the parties" be not treated as substantially satisfied. The learned Single Judge was clearly in error in holding that the letter dated 13.11.2006 written by the

borrower to the Bank cannot be construed as written agreement falling under Rule 9(4).

23. There is no doubt that Rule 9(1) is mandatory but this provision is definitely for the benefit of the borrower. Similarly, Rule 9(3) and Rule 9(4) are for the benefit of the secured creditor (or in any case for the benefit of the borrower). It is settled position in law that even if a provision is mandatory, it can always be waived by a party (or parties) for whose benefit such provision has been made. The provision in Rule 9(1) being for the benefit of the borrower and the provisions contained in Rule 9(3) and Rule 9(4) being for the benefit of the secured creditor (or for that matter for the benefit of the borrower), the secured creditor and the borrower can lawfully waive their right. These provisions neither expressly nor contextually indicate otherwise. Obviously, the question whether there is waiver or not depends on facts of each case and no hard and fast rule can be laid down in this regard.

24. The letter dated 13.11.2006 sent by the borrower to the Bank leaves no manner of doubt that the borrower had waived his right under Rule 9(1) or for that matter under Rule 9(3) and Rule 9(4) as well.

25. It is true that before the High Court the borrower disowned the letter dated 13.11.2006 and a plea was set up by him that on one signed blank paper the above document has been prepared but neither the learned Single Judge nor the Division Bench accepted the said version of the borrower. Rather they proceeded on the basis that the letter dated 13.11.2006 was written by the borrower to the Bank. There is no justification for us not to accept the letter dated 13.11.2006 as true and genuine.

26. In view of what we have discussed above, learned Single Judge was not justified in quashing the sale certificate dated 16.11.2006 issued in favour of the auction purchaser and the notice dated 09.02.2007. The Division Bench also committed an error in upholding the erroneous order of the learned Single Judge.

27. There is one more aspect in the matter which has troubled us.

Against the action of the Bank under Section 13(4) of the SARFAESI Act, the borrower had a remedy of appeal to the Debts Recovery Tribunal (DRT) under Section 17. The remedy provided under Section 17 is an efficacious remedy. The borrower did not avail of that remedy and further remedies from that order and instead directly approached the High Court in extraordinary jurisdiction under Article 226 of the Constitution of India.

28. The learned Single Judge brushed aside the argument of alternative remedy by holding as follows :

"16. As regards alternate remedy submitted by the learned counsel for respondents II to IV, in the decision cited supra, the Supreme Court has held that the rule of

> exhaustion of alternate remedy is a rule of discretion and not a rule of compulsion. The court has to assign reasons for entertaining writ petition without exhausting alternate remedy. The petitioner has been victimized by fraudulent acts of respondents III and IV. The III respondent had misused his official position and petitioner has been deprived of his property in the manner not known to law. There is violation of Article 21 of the Constitution of India. The petitioner has been deprived of his shelter. The right to livelihood is an integral facet of the right to life under Article 21 of the Constitution, (Narendra Kumar Vs. State of Haryana), (1994) 4 SCC 460. Therefore, the submission of learned counsel for respondents II to IV that petitioner should have availed alternate remedy cannot be accepted."

29. The learned Division Bench in this regard observed thus :

> "14. Though the petitioner could agitate these matters in an appeal filed under Section 17 of the Act, it is settled law that when a Constitutional right of an individual is affected by statutory authorities by trampling upon the mandatory requirements of law, this court cannot be a silent spectator. It becomes not only a right, but the duty of this court to interfere and strike at these illegal activities and uphold the Constitutional right of a citizen of this country. Therefore, the learned Single Judge rightly interfered with these illegal acts of statutory authorities in its jurisdiction under Article 226 and it cannot be found fault with."

30. In Satyawati Tondon[1], the Court was concerned with an argument of alternative remedy provided under Section 17 of SARFAESI Act. Dealing with this argument, the Court had observed that where an effective remedy was available to the aggrieved person, the High Court must insist that before availing the remedy under Article 226 the alternative remedies available to him under the relevant statute are exhausted. In paragraphs 43,44 and 45 (pg. no. 123) of the Report, the Court stated as follows :

> "43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

> 44. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution.
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> 45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance."

31. No doubt an alternative remedy is not an absolute bar to the exercise of extraordinary jurisdiction under Article 226 but by now it is well settled that where a statute provides efficacious and adequate remedy, the High Court will do well in not entertaining a petition under Article

226. On misplaced considerations, statutory procedures cannot be allowed to be circumvented.

32. If the facts of the present case are seen, it is apparent that the borrower had been chronic defaulter in repayment of the loan amount. Before issuance of notice under Section 13(2) on 30.06.2005 a demand notice was given by the Bank to the borrower on 16.02.2005 calling upon him to pay the outstanding loan amount but he did not comply with that notice. Thereafter, 13(2) notice was given to him on 30.06.2005 but he did not bother to pay the outstanding dues. The secured interest which was immovable property was put up for auction more than six months after the notice under Section 13(2) was given to him by the Bank but still the outstanding payment was not made. The auction was held on 11.01.2006 in his presence and he did not raise any objection about time of the auction. When the auction purchaser did not make the balance amount in time and took about 11 months in paying the balance amount, the borrower gave his written consent to the Bank that balance purchase price may be accepted from the auction purchaser and sale certificate may be issued to him. Moreover, the writ petition was filed by the borrower more than four years after the issuance of sale certificate. The above facts are eloquent and indicate that the observations made by the Single Judge that borrower was victimized and a fraud was practiced upon, have no basis. The finding by the Single Judge that the sale of secured interest had been in violation of borrower's right to livelihood and the observation of the Division Bench that non-compliance of Rule 9 has violated, the borrower's right to property are misconceived. In our view, there was no justification whatsoever for the learned Single Judge to allow the borrower to by-pass the efficacious remedy provided to him under Section 17 and invoke the extraordinary jurisdiction in his favour when he had disentitled himself for such relief by his conduct. The Single Judge was clearly in error in invoking his extraordinary jurisdiction under Article 226 in light of the peculiar facts indicated above. The Division Bench also erred in affirming the erroneous order of the Single Judge.

33. Before we close, one more fact may be noted. The auction- purchaser over and above the sale price of Rs.8,50,000/-, has discharged the entire liability of the borrower towards the bank by making further payment of more than Rs.2,37,000/-.

34. We are, thus, satisfied that impugned orders cannot be sustained. Appeals are, accordingly, allowed. The impugned orders are set aside. The writ petitions filed by the borrower before the High Court are dismissed with no order as to costs.

.....J. (R.M. Lodha) .....J. (Chandramauli Kr. Prasad) New Delhi, August 22, 2013.

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* * 9. Time of sale, Issue of sale certificate and delivery of possession, etc.-

(1) No sale of immovable property under these rules shall take place before the expiry of thirty days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub-rule (6) or notice of sale has been served to the borrower. (2) The sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid or tender or quotation or offer to the authorised officer and shall be subject to confirmation by the secured creditor:

> Provided that no sale under this rule shall be confirmed, if the amount offered by sale price is less than the reserve price, specified under sub-rule (5) of rule 9:
>
> Provided further that if the authorised officer fails to obtain a price higher than the reserve price, he may, with the consent of the borrower and the secured creditor effect the sale at such price. (3) On every sale of immovable property, the purchaser shall immediately pay a deposit of twenty five per cent of the amount of the sale price, to the authorised officer conducting the sale and in default of such deposit, the property shall forthwith be sold again. (4) The balance amount of purchase price payable shall be paid by the purchaser to the authorised 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. (5) In default of payment within the period mentioned in sub-rule (4), the deposit shall be forfeited and the property shall be resold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold. (6) On confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorised officer exercising the power of sale shall issue a certificate of sale of the immovable property in favour of the purchaser in the Form given in Appendix V to these rules.
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> (7) Where the immovable property sold is subject to any encumbrances, the authorised officer may, if he thinks fit, allow the purchaser to deposit with him the

money required to discharge the encumbrances and any interest due thereon together with such additional amount that may be sufficient to meet the contingencies or further cost, expenses and interest as may be determined by him:

Provided that if after meeting the cost of removing encumbrances and contingencies there is any surplus available out of the money deposited by the purchaser such surplus shall be paid to the purchaser within fifteen days from the date of finalisation of the sale. (8) On such deposit of money for discharge of the encumbrances, the authorised officer shall issue or cause the purchaser to issue notices to the persons interested in or entitled to the money deposited with him and take steps to make the payment accordingly. (9) The authorised officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in sub-rule (7) above.

(10) The certificate of sale issued under sub-rule (6) shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not.

[1] United Bank of India v. Satyawati Tondon and Others; (2010) 8 SCC
