

G. Vikram Kumar vs State Bank Of Hyderabad on 2 May, 2023

Author: M. R. Shah

Bench: C.T. Ravikumar, M. R. Shah

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.3152-3153 of 2023
(@ SLP (Civil) Nos.5973-5974 of 2018)

G. VIKRAM KUMAR

...Appellant(s)

Versus

STATE BANK OF HYDERABAD
& ORS.

...Respondent(s)

JUDGMENT

M. R. Shah, J.

1. Feeling aggrieved and dissatisfied with the Civil Appeal Nos. 3152□3153 of 2023 08.09.2017 passed by the High Court of Judicature at Hyderabad for the State of Telangana and Andhra Pradesh passed in Writ Petition No.31098 of 2016 and the subsequent order dated 08.12.2017 passed in Review Petition No.45031 of 2017 in Writ Petition No.31098 of 2016, the appellant and the auction purchaser has preferred the present appeals.

2. The facts leading to the present appeals in nutshell are as under:

2.1 That the respondent no.3 herein – builder had taken loan from respondent no.2 – Bank for the development of the multi□storey housing project. That the respondent no.3 (hereinafter referred to as the borrower) was not able to Civil Appeal Nos. 3152□3153 of 2023 repay the security interest to the Bank, the Bank initiated proceedings against the borrower under Section 13 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as ‘the SARFAESI Act, 2002). The Bank attached the properties of the borrower under Section 13(4) of the SARFAESI Act. Against the measures taken by the Bank under Section 13(4) of the SARFAESI Act, the borrower filed S.A. No.253 of 2012

before the Debt Recovery Tribunal (DRT), Hyderabad.

S.A. No.253 of 2012 was listed before the DRT on 19.02.2016, when the borrower was given liberty to file a list of intending buyers of the property and bring forth with the buyers so as Civil Appeal Nos. 3152□3153 of 2023 to enable the Tribunal to consider the same for the repayment of the dues of the Bank. On 25.02.2016, the DRT passed an order permitting the Bank to go ahead with the sale as proposed excluding flat to be identified and communicated by the borrower to the Bank by 29.02.2016 with full details of all purchasers to the bank officials on affidavit so as to enable the bank officer to exclude those flats, provided the remaining flats are sufficient for recovery of the dues. The Tribunal directed that the bank may proceed with the sale but shall not confirm the sale till the next date of hearing. At this stage it is required to be noted that the aforesaid order was passed by the Tribunal in view of the submissions made by the borrower Civil Appeal Nos. 3152□3153 of 2023 that he had sold seven flats out of 37 flats which were to be sold by the Bank to some third persons. Flat No.6401 – flat in question was not amongst the said seven flats. 2.2 A Memorandum of Understanding (MoU) was entered into between the respondent no.1 and the borrower with respect to the sale of Flat No.6401 on 10.04.2016 for a lumpsum consideration of Forty□five lakhs. It is pertinent to note that in the MoU itself there was a reference to some proceedings going on before the DRT and that the Bank and the borrower will obtain clearance in order to process the agreement to sale. That an agreement to sale was executed between the bank and the borrower for a sale of Flat No.6401 on Civil Appeal Nos. 3152□3153 of 2023 16.06.2016. At this stage, it is required to be noted that the said agreement to sale was executed by the borrower without informing/obtaining any consent from the DRT as well as the Bank and the permission, if any, given to the borrower earlier obtained only to the seven flats which were already recognized by the DRT on 25.02.2016.

2.3 That thereafter the Bank issued a public notice on 28.07.2016 for auctioning the properties of the borrower. The said notice was published in the newspaper on 29.07.2016. The property in question, i.e. Flat No.6401 was also subjected to auction. It was placed in Lot No.1 for which the e□ auction was proposed on 30.08.2016. Civil Appeal Nos. 3152□3153 of 2023 2.4 The borrower filed an application before the DRT praying for stay on all proceedings of the Bank pursuant to the auction notice dated 28.07.2016. On 24.08.2016 the DRT was pleased to reject the application for stay filed by the borrower. While rejecting the stay application and refusing to grant the stay as prayed, the DRT observed as under:

“...Pending the decision, this Tribunal has directed to sell the property and the Applicant now has entered into an agreement to be sold for some other flats. This is utter violation of the SARFAESI action as also the direction of the Tribunal.” “7. As stated hereinabove, it is also question of great concern that the Applicant has entered into an agreement with third party in respect of few other flats i.e. Flat No.3202, 6401, 7101, 7202 and 3201 without the permission of the Respondent Bank or this Tribunal. Hence, any such transaction is declared as void.” Civil Appeal Nos. 3152□3153 of 2023 2.5 That thereafter e□ auction was conducted by the Bank on 31.08.2016 in which the appellant also participated. The appellant was declared as a successful bidder with respect to Flat No.6401 in Lot No.1. Accordingly, he made a payment of

25% of the bid amount i.e. Rs.6,45,250/□ The Bank also issued a confirmation receipt to the appellant on 31.08.2016.

2.6 That thereafter the respondent no.1 filed a Writ Petition No.31098 of 2016 before the High Court on 14.09.2016 challenging the e□uction notice dated 28.07.2016 to the extent it concerns Flat No.6401. The said writ petition was filed much after the auction was complete and the appellant was declared as a successful Civil Appeal Nos. 3152□3153 of 2023 bidder. The respondent no.1 did not disclose in the writ petition that the auction has already taken place. The appellant herein was also not made party. By impugned judgment and order dated 15.09.2016 the High Court stayed the auction qua Flat No.6401 as notified under the e□uction sale notice subject to respondent no.1 (original wit petitioner) paying to the bank not less than 25.81 lakhs before the scheduled date and time of the auction, failing which, the Bank shall be free to proceed with the auction.

The Bank issued a letter to the appellant dated 20.09.2016 stating that the High Court has stayed the auction proceedings with respect to Flat No.6401 and that the respondent no.1 Civil Appeal Nos. 3152□3153 of 2023 herein has paid the amount to the Bank as directed by the High Court.

2.7 On becoming aware of the pending proceedings in Writ Petition No.31098 of 2016 the appellant herein filed an application for getting impleaded in the said writ petition and filed the counter affidavit. In the counter affidavit it was specifically stated that the DRT has declared the agreement of sale executed between the respondent no.1 and the borrower as void and that the appellant is the successful auction purchaser and that the respondent no.1 had not disclosed the complete and correct facts of the case. It was also stated that the right, if any, available to the respondent no.1 (original writ petitioner) would have been under Section Civil Appeal Nos. 3152□3153 of 2023 17 of the SARFAESI Act and not the writ petition filed by him. It was also stated that the respondent no.1 had not informed the Court that the auction proceedings were already over at the time when the stay order was passed. The Bank also filed the counter affidavit in the writ petition seeking dismissal of the writ petition primarily on the ground that an alternative remedy under Section 17 of the SARFAESI Act was available. The High Court allowed the impleadment application. Despite the above, by the impugned judgment and order the High Court has allowed the writ petition filed by respondent no.1 herein. That thereafter the appellant herein the auction purchaser filed the review petition which has Civil Appeal Nos. 3152□3153 of 2023 been dismissed by the High Court. Hence, against the final decision of the High Court in the main writ petition allowing the same in favour of the respondent no.1 herein and rejecting the review application filed by the appellant, the appellant – successful auction purchaser has preferred the present appeals.

3. Shri A. Sirajudeen, learned Senior Advocate has appeared on behalf of the appellant. Shri Buddy A. Ranganadhan, learned counsel has appeared on behalf of respondent no.1 – original writ petitioner and Shri Ananga Bhattacharyya, learned counsel has appeared on behalf of respondent no.3.

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4. Shri A. Sirajudeen, learned Senior counsel appearing on behalf of the appellant has made the following submissions:

(i) That the High Court has materially erred in entertaining the writ petition filed by respondent no.1 which was against the steps taken by the Bank under Section 13(4) of the SARFAESI Act namely against e-auction notice;

(ii) That the respondent no.1 being the agreement to sale holder had no right title in the flat in question and therefore could not have filed the writ petition challenging e-auction notice on the basis of the agreement to sale in his favour;

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(iii) Even if the respondent no.1 had any right, if any, in that case also he had alternative efficacious statutory remedy available under Section 17 of the SARFAESI Act challenging the e-auction notice;

(iv) That there was suppression of material facts on the part of respondent no.1 which was specifically pointed out by the appellant in the counter affidavit that at the time when the writ petition was filed and the interim relief was obtained the auction had taken place in which the appellant was declared the successful bidder;

(v) That in fact the DRT in the earlier order dated 24.08.2016 declared the sale Civil Appeal Nos. 3152-3153 of 2023 agreement in favour of the respondent no.1 by the borrower as void as the same was entered into without prior permission of the DRT or even the Bank; and

(vi) The High Court has materially erred in relying upon Section 13(8) of the SARFAESI Act.

4.1 It is further submitted by learned counsel appearing on behalf of the appellant that the High Court has not properly appreciated the fact that a sale agreement holder cannot seek redemption of a property under Section 91 of the Transfer of Property Act, 1882 and cannot be treated at par with an auction-sale purchaser under Section 54 of the Transfer of Property Act makes it clear that no interest Civil Appeal Nos. 3152-3153 of 2023 /charge is created upon a property only by way of sale-agreement. It is stated that in fact the impugned judgment passed by the High Court that the respondent no.1 be able to seek redemption of the subject property which was attached by the Bank. It is submitted that the bank attached the property as against the borrower and the respondent No.1 was only the sale-agreement holder. It is submitted that as such by virtue of the impugned judgment and order, the High Court has granted the decree for specific performance of the agreement to sale which is not permissible while exercising the powers under Article 226 of the Constitution of India.

Civil Appeal Nos. 3152-3153 of 2023 4.2 It is further submitted by learned counsel appearing on behalf of the appellant that the High Court has materially erred in observing that the equity would be in favour of respondent no. 1 as he has deposited the entire amount as directed. It is submitted that the High Court has materially erred in observing that if the sale is confirmed the respondent

no.1 will suffer greater hardship and if the sale is not confirmed at the most, the appellant may lose interest on Rs.6,45,250/□

4.3 It is further submitted that as such there is no clarity in the impugned judgment and order passed by the High Court on what exact relief the High Court has granted except observing that the writ petition is allowed. Civil Appeal Nos. 3152□3153 of 2023

5. While opposing the present appeal learned counsel appearing on behalf of the respondent no.1 has vehemently submitted that in the present case Section 13(8) of the SARFAESI Act shall be applicable and therefore when the respondent no.1 being the agreement to sale holder of the flat in question agreed to pay/deposit the entire sale consideration the High Court has not committed any error in entertaining the writ petition under Article 226 of the Constitution of India challenging the e□auction notice.

5.1 It is submitted that as soon as respondent no.1 came to know that the flat in question which was agreed to be sold in favour of respondent no.1 for which part consideration was paid is Civil Appeal Nos. 3152□3153 of 2023 put to auction, immediately he filed the writ petition showing his inclination to deposit the entire amount of sale consideration which is permissible under Section 13(8) of the SARFAESI Act. It is submitted that the object and purpose of Section 13(8) of the SARFAESI Act is to save the property from auction in case the borrower and/or the person interested in the property agrees to clear the dues. 5.2 It is submitted that in the present case at the relevant time there was no concluded sale in favour of the appellant, as at the relevant time the appellant deposited only 25% of the auction sale consideration. It is submitted that as per the catena of decisions unless the full sale consideration is paid; the sale deed is executed Civil Appeal Nos. 3152□3153 of 2023 and/or the sale certificate is issued in favour of the auction purchaser there is no concluded sale. It is submitted that if the sale is not concluded, Section 13(8) of the SARFAESI Act shall be applicable and/or can be invoked. In support of his submissions, he has relied upon the decisions of this Court in the case of Mathew Varghese v. M. Amritha Kumar, (2014) 5 SCC 610 (para 38); Narandas Karsondas vs. S.A. Kamtam, (1977) 3 SCC 247; B. Arvind Kumar vs. Govt. of India & Ors., (2007) 5 SCC 745 (para 12). He has also relied upon the decision of the Punjab and Haryana High Court in the case of Pal Alloys & Metal India Pvt. Ltd. & Ors. vs. Civil Appeal Nos. 3152□3153 of 2023 Allahabad Bank & Ors., 2021 SCC OnLine P&H 2733 as well as the decision of the Andhra Pradesh High Court in the case of M/s India Finlease Securities Ltd. vs. Prasad Indian Overseas Bank, 2012 SCC OnLine AP

205. 5.3 It is further submitted by learned counsel appearing on behalf of the respondent no.1 that the respondent no.1 has subsequently died and his heirs including the widow are residing in the flat in question since long and that they have paid/deposited the entire sale consideration and therefore if now the appeal is allowed in that case, they have to vacate the premises which will not be equitable. Civil Appeal Nos. 3152□3153 of 2023 Therefore, it is prayed to dismiss the present appeal.

6. Learned counsel appearing on behalf of the Bank has though opposed the writ petition before the High Court, has stated that whatever the decision, the Bank shall abide by the same.

7. Heard learned counsel appearing on behalf of the respective parties at length.

8. At the outset, it is required to be noted that what was challenged before the High Court by respondent no.1 in a writ petition under Article 226 of the Constitution of India was the e-auction notice which was pursuant to the action initiated by the Bank in exercise of powers under Section 13(4) of the SARFAESI Act. At this stage it is required to be noted that Civil Appeal Nos. 3152-3153 of 2023 e-auction was held/conducted on 31.08.2016 in which the appellant participated and was declared as a successful bidder and he made a payment of 25% of the bid amount on the very day i.e., on 31.08.2016. However, thereafter the respondent no.1 filed the writ petition before the High Court challenging the e-auction notice dated 28.07.2016 on 14.09.2016 that is after conducting of the auction. It is required to be noted that against any steps taken by the Bank under Section 13(4) of the SARFAESI Act the aggrieved party has a remedy under the SARFAESI Act by way of appeal under Section 17 of the SARFAESI Act to approach the DRT. Therefore, in view of the availability of the alternative statutory remedy available by way of Civil Appeal Nos. 3152-3153 of 2023 proceedings/appeal under Section 17 of the SARFAESI Act, the High Court ought not to have entertained the writ petition under Article 226 of the Constitution of India in which the e-auction notice was under challenge. Therefore, the High Court has committed a very serious error in entertaining the writ petition under Article 226 of the Constitution of India challenging the e-auction notice issued by the Bank in exercise of power under Section 13(4) of the SARFAESI Act.

8.1 Even otherwise it is required to be noted that the respondent no.1 – original writ petitioner filed the writ petition as agreement to sale holder of the flat in question. At this stage it is required to be noted that earlier against the Civil Appeal Nos. 3152-3153 of 2023 measures taken by the Bank under Section 13(4) of the SARFAESI Act the borrower filed S.A.No.253 of 2012 before the DRT, Hyderabad.

The DRT, Hyderabad by order dated 19.12.2016 gave the liberty to the borrower to file the list of intending buyers of the property and to bring forth with the buyers so as to enable the Tribunal to consider the same for repayment of the dues of the Bank. That thereafter on 25.02.2016 the DRT passed the following order:

"The Bank is directed to go ahead with the sale as proposed excluding the Flat to be identified and communicated by the Applicant to the Respondent Bank by 29.02.2016 with full detailed of all the Purchasers to the Bank Officers on affidavit so as to enable the Bank Officer to exclude those Flats, provided the remaining Flats are sufficient for recovery of the dues. The Bank may proceed with Civil Appeal Nos. 3152-3153 of 2023 the sale but shall not confirm the same till the next date of hearing."

8.2 At this stage it is required to be noted that the flat in question namely Flat No.6401 was not the seven flats identified by the borrower to be kept out of the auction proceedings. At the relevant time the flat in question was not sold amongst the seven flats mentioned before the Tribunal. That thereafter during the pendency of the S.A. No.253 of 2012 and without obtaining prior approval and/or intimation to the DRT and even the bank, the borrower entered into the sale agreement with

the respondent no.1 on 16.06.2016. At this stage, it is required to be noted that in the MoU dated 10.04.2016 between the borrower and the respondent no.1 in Clause No.4 it was Civil Appeal Nos. 3152 of 2023 specifically provided that first the party should obtain clearance of sale from DRT/SBH so that they can process with further agreement to sale. Thus, as such respondent no.1 at the relevant time was aware about the pending DRT proceedings. Still the respondent no.1 entered into the agreement to sale with the borrower on 16.06.2016. At this stage, it is pertinent to note that thereafter when the Bank issued a public notice on 28.07.2016 for auctioning the properties of the borrower. Before the date of auction, on 24.08.2016 the borrower filed an application before the DRT praying for stay of all proceedings of the Bank pursuant to the auction notice dated 28.07.2016. The DRT was pleased to reject the Civil Appeal Nos. 3152 of 2023 said application for stay vide the order dated 24.08.2016 by observing that the sale of the flat in question without the permission of the Bank or the Tribunal is void. The order dated 24.08.2016 is reproduced hereinabove. Thus, as such the transaction in favour of the respondent no.1 with respect to Flat no.6401 was already held to be void by the DRT. That thereafter, after the borrower having failed to obtain any order, the respondent no.1 had straightway filed the writ petition challenging the e-auction notice which the borrower failed to get any relief before the DRT. If the respondent no.1 would have approached the DRT against the e-auction notice he would have been non-suited in view of the earlier Civil Appeal Nos. 3152 of 2023 order passed by the DRT dated 24.08.2016.

Therefore, calculatively the respondent no.1 filed the writ petition before the High Court challenging the e-auction notice and that too after conducting of the e-auction on 31.08.2016 and the sale in favour of the appellant was confirmed. The aforesaid facts were pointed out before the High Court and despite the same the High Court has allowed the writ petition which is not sustainable at all. By the impugned order the respondent no.1 has got the relief which as such the borrower failed to get from the DRT. On the aforesaid grounds the impugned judgment and order passed by the High Court is unsustainable. Civil Appeal Nos. 3152 of 2023 8.3 Even otherwise it is very debatable whether Section 13(8) of the SARFAESI Act shall be applicable in favour of a person who is only an agreement to sale holder or Section 13(8) of the SARFAESI Act shall be applicable only in case of the borrower who is ready and willing to pay the entire debt. In the present case the borrower failed to get any relief from the DRT. The borrower did not apply and/or invoke Section 13(8) and did not agree to clear the entire dues. Therefore, also the High Court has materially erred in allowing the writ petition. 8.4 Even otherwise it is required to be noted that as such what exact relief is granted by the High Court is not clear. The High Court has simply stated that the writ petition is allowed. Civil Appeal Nos. 3152 of 2023 However, it is required to be noted that what was challenged before the High Court was the e-auction notice dated 28.07.2016 which was already conducted on 31.08.2016. Therefore, the writ petition was filed much after conducting the e-auction on 31.08.2016. No consequential relief has been granted by the High Court. Therefore, also the impugned judgment and order passed by the High Court is unsustainable.

8.5 Now so far as the submission on behalf of the respondent no.1 that the respondent no.1 has paid/deposited the amount of sale consideration and now the respondent no.1 has died his heirs will have to vacate the flat in question and on the other hand the appellant Civil Appeal Nos. 3152 of 2023 shall be entitled to return the amount of Rs.6,45,250/- deposited at the relevant time being 25% of the auction sale consideration with interest is concerned, at the outset it is required to be

noted that as such the transaction between the respondent no.1 and the borrower pursuant to the agreement to sale dated 16.06.2016 was absolutely illegal and behind the back of the Tribunal as well as the Bank and during the pendency of the proceedings before the Tribunal. In order dated 24.08.2016 the Tribunal had in fact already held the sale transaction as void. As observed hereinabove even at the time when the respondent no.1 entered into the agreement to sale/MoU he was aware about the Civil Appeal Nos. 3152-3153 of 2023 proceedings pending before the DRT which is apparent from Clause 4 of the MoU referred to hereinabove. Therefore, respondent no.1 and/or his heirs cannot be permitted to get the benefit of his own wrong and cannot be permitted to get the benefit of a void transaction.

9. In view of the above and for the reasons stated above, the impugned judgment and order passed by the High Court is hereby quashed and set aside. It is directed that on the full payment of the auction sale consideration by the appellant (after deducting the 25% of the amount already deposited earlier) with 9% interest from the date of auction till the actual amount is paid, to be paid within a period of Civil Appeal Nos. 3152-3153 of 2023 four weeks from today, the sale certificate be issued in favour of the appellant with respect to Flat No.6401. Whatever the amount is already deposited by the respondent no.1/his heirs shall be returned to the respondent no.1 (now his heirs) with the interest at 9% from the date of such deposit till the actual date of return which shall be returned within a period of four weeks from today. The heirs of original respondent no.1 are granted three months' time to vacate the flat in question and are directed to hand over the peaceful and vacant possession of the Flat No.6401 to the appellant within a period of three months from today as ordered above.

Civil Appeal Nos. 3152-3153 of 2023 Present appeals are allowed. However, in the facts and circumstances of the case there shall be no order as to costs.

.....J. (M. R. SHAH)J. (C.T. RAVIKUMAR) New Delhi, May 2,
2023 Civil Appeal Nos. 3152-3153 of 2023