Icici Bank Ltd vs Mr.P.Veerendar Chordia on 18 March, 2010

Author: M.Venugopal

Bench: M.Venugopal

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.3.2010

CORAM:

THE HONOURABLE MR.JUSTICE ELIPE DHARMARAO
AND
THE HONOURABLE MR.JUSTICE M.VENUGOPAL

Civil Revision Petition No.1844 of 2009
and
M.P.No.1 of 2009

ICICI Bank Ltd.,
CMA Group,
represented by its Deputy General Manager
N.Chidambaram,
ICICI Tower, IV Floor
Plot No.24, Ambattur Industrial Estate,
Ambattur, Chennai-600058. ... Petitioner

Vs.

Mr.P.Veerendar Chordia ... Respondent

* * *
Civil Revision Petition filed under Article 227 of the Constitution of India, praying to
* * *
For petitioner : Mr.A.L.Somayaji,
Senior Counsel for
M/s.Ramalingam & Associates

For respondent : Mr.R.Murari

* * *
O R D E R

ELIPE DHARMARAO, J.

One M/s.Adhilakshmi Oils Private Limited has availed financial assistance from the petitioner Bank by way of a term loan facility to the tune of Rs.498.76 lakhs, by creating a mortgage over the property in R.S.Nos.322/A, 322/2B, 322/3 of Thirumangalam Usalia Road, Thummakundu Village, Usilampatti Taluk, Madurai District, measuring an extent of 11.90 acres together with superstructures, factory and building by depositing the title deeds in favour of the petitioner/Bank. Thereafter, the said borrower company defaulted in repayment of the loan, leading to initiation of the proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short 'SARFAESI Act') by the Bank as against the borrower company.

2. Pursuant thereo, the petitioner Bank had brought the above said property for sale on 'as is where is and what is where is' basis by and the respondent approached the petitioner Bank by his letter dated 23.9.2008 to purchase the said property and the petitioner Bank by their letter dated 31.10.2008 has accepted the said offer of the respondent and agreed to sell the property under private treaty. The sale consideration was fixed as Rs.275 lakhs and the respondent was directed to make a payment of Rs.50 lakhs immediately and the balance amount of Rs.225 lakhs to be paid on or before December, 31, 2008. Thereupon, a Memorandum of Understanding was signed by the petitioner Bank, the respondent purchaser and the borrower on 29.12.2008, whereby the respondent has deposited the amount of Rs.50 lakhs and the same was kept in a 'No lien account'.

3. From the materials placed on record it is seen that the respondent, by their letter dated 31.12.2008, has requested extension of time till 24.1.2009, stating that the Chairman of their group has passed away. In the said letter, the respondent has stated as follows:

> "…. As per MoU signed by all the parties the payments should be completed by 31.12.2008. I have already remitted a sum of Rs.50.00 lacs out of the total sale consideration of Rs.275.00 lacs. In view of the above developments we request you to kindly give time till 24/01/2009 to make the balance amount of Rs.225.00 lacs. To ensure that we honour our commitments please find enclosed our cheque bearing no.184788 Dated 24/01/2009 for the balance amount of Rs.225.00 lacs payable by us. All the terms and conditions in the MoU are acceptable to me.
>
> I request you to kindly consider extension of time till 24/01/2009. I shall once again assure you that I shall honour the same by that date. In the event of failure bank is free to take steps which they deem fit." (emphasis supplied)

4. Pursuant to the said letter, the petitioner Bank, by their letter dated 31.12.2008 has extended the time till 24.1.2009, as has been prayed for on the part of the purchaser/respondent. However, the respondent, did not honour his commitment by 24.1.2009 and again, by their letter dated 22.1.2009 has sought extension of time till 7.2.2009. In the said letter, the respondent has stated that:

> "…. As we have unexpected development which has adversely affected our plans we seek extension of time till 07.02.2009 as a last chance. We undertake that we will not seek any extension further. We undertake to honour the commitment of remittance of balance amount of Rs.225.00 lacs on or before 07.02.2009 failing which bank is free to take the steps they deem fit. (emphasis supplied)

5. For the above request of the respondent, the petitioner Bank, by their letter dated 23.1.2009 has replied in the following terms:

> "…. As to your representation through your letter dated January 22, 2009 seeking extension of time till February 07, 2009, we hereby make it clear that your representation is considered on condition that no further extension of time will be permitted. We also make it clear that if the balance payment of Rs.225.00 lacs is not paid on or before February 07, 2009, the amount of Rs.50.00 lacs already paid will stand forfeited without any notice to you to this effect.
>
> All other terms and conditions stipulated in our letter No.CMA CHN/F11/AOPL/195/2008-2009 dated October 31, 2008 and MoU referred to above, shall remain the same."

6. Since the respondent has failed to make the payment of the balance amount within the extended time of 7.2.2009, the petitioner/Bank, waiting till 23.2.2009, by their letter in CMA CHN/AOPL/F1/262/2008-2009, dated 23.2.2009, has ordered forfeiture of the amount of Rs.50 lacs paid by the respondent and also returned the cheque for Rs.225 lacs to the respondent. But, on the same day i.e. on 23.2.2009, the respondent has addressed a letter, which seems to have been received by the petitioner Bank on 24.2.2009, requesting extension of time till 5.3.2009 for which, the petitioner Bank, by their letter dated 27.2.2009, has replied the respondent, by speed post with acknowledgement due, that they have already forfeited the amount of Rs.50 lacs and also enclosed the copy of their letter dated 23.2.2009. Thereupon, the respondent has sent a letter dated 30.3.2009, i.e. after a lapse of one month from the date of forfeiture, stating that he has been forcibly made to sign certain documents including Memorandum of Understanding. The contents of the said letter read as follows:

> "Please refer to our discussion and communication in respect of above matter, that till date you have not furnished the documents sought for proceeding further. It is also pertinent to note that statutory liabilities of the defaulting company has to be settled before payment of amount as agreed by me. It is further to be noted that I have been forcibly made to sign certain documents and it also includes alleged Memorandum of Understanding. Moreover, I have not been furnished with the copy of the alleged Memorandum of Understanding. The defaulter, the bank and myself never met simultaneously to execute the alleged Memorandum of Understanding. Kindly look into the matter and provide me all the necessary documents sought for and also ensure that statutory liabilities has (sic. have) been settled enabling me to pay the balance amount. Without complying the above you are not entitled to forfeit

> the EMD amount. It appears that the bank is inclined to forfeit the EMD amount only without completing its duties and liabilities. Moreover, the deal could not be completed in time only because of the acts of the bank."

7. The contents of this letter have been denied by the Bank, by their letter dated 16.4.2009. Aggrieved by the action of the petitioner/Bank in forfeiting the amount of Rs.50 lacs, the respondent/purchaser has filed S.A.No.66 of 2009 before the Debts Recovery Tribunal-III, Chennai, under Section 17(1) of the SARFAESI Act. The Tribunal, by its order dated 30.6.2009 has allowed the said Application, by declaring the MoU dated 19.12.2008 as unsustainable in law and directing refunding of Rs.50 lakhs held by Bank in no lien account to the purchaser against payment of Rs.25,000/= to the bank as penalty. Challenging this order passed by the DRT, the Bank has come forward to file this Civil Revision Petition.

8. Heard Mr.A.L.Somayaji, learned senior counsel appearing for the petitioner and Mr.R.Murari, learned counsel appearing for the respondent/Purchaser.

9. On the part of the learned senior counsel appearing for the petitioner Bank, it has been argued that the order passed by the Tribunal is beyond the powers of the Tribunal, since being contrary to Section 17(3) of the SARFAESI Act and the respondent has failed to avail the opportunities granted to him by the Bank and the Bank is perfectly alright in exercising the forfeiture clause in the MoU, after the lapse of the extended period. The learned senior counsel would further argue that the Tribunal has failed to consider the materials placed on record in their proper perspective and has gone beyond the scope of the Appeal and has allowed the appeal on surmises and conjectures which needs to be interfered with by this Court. On the part of the learned counsel appearing for the respondent it has been submitted that the Tribunal has assessed the facts and circumstances of the case correctly and has arrived at an unerroenous conclusion, wherein no interference of this Court is called for and prayed to dismiss this civil revision petition.

10. Since the power of the Tribunal in entertaining the Appeal filed by the respondent has very much been commented as beyond its powers and the order of the Tribunal has also been challenged on the ground that it is not at all sustainable in law, the following points would arise for consideration in this civil revision petition:

> 1.Whether the Debts Recovery Tribunal-III, Chennai has got jurisdiction and is right in entertaining the appeal filed by the respondent/purchaser under Section 17 (1) of the SARFAESI Act?
>
> 2.Whether the impugned order passed by the Debts Recovery Tribunal-III, Chennai is sustainable in law?
>
> 3.To what relief the parties are entitled?
>
> POINT No.1:

11. In the case on hand, the admitted fact is that the respondent has agreed to purchase the property, from the Bank under a private treaty and the property was the one which was mortgaged to the Bank by the borrower, who committed default in repayment of the loan, leading to initiation of the proceedings under SARFAESI Act by the Bank, bringing the property for sale.

12. The Bank in the case on hand is a secured creditor and the Bank is empowered to enforce such security interest under Section 13 of the SARFAESI Act. For better appreciation we extract hereunder Section 13 of the SARFAESI Act, which reads as follows:

"13. Enforcement of security interest. (1) Notwithstanding anything contained in Section 69 or Section 69-A of the Transfer of Property Act, 1882 (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 instalment 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.

(3-A) 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 week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

> Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under Section 17 or the Court of District Judge under Section 17-A. (4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:
>
> (a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;
>
> (b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset :

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt :

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

(5) Any payment made by any person referred to in clause (d) of sub-section (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.

(6) Any transfer of secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

(7) Where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.

(8) If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secure asset.

(9) In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be

entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors :

Provided that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of Section 529-A of the Companies Act, 1956 (1 of 1956) :

Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of Section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen s dues with the liquidator in accordance with the provisions of Section 529-A of that Act :

Provided also that liquidator referred to in the second proviso shall intimate the secured creditor the workmen s dues in accordance with the provisions of Section 529-A of the Companies Act, 1956 (1 of 1956) and in case such workmen s dues cannot be ascertained, the liquidator shall intimate the estimated amount or workmen s dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator :

Provided also that in case the secured creditor deposits the estimated amount of workmen s dues, such creditor shall be liable to pay the balance of the workmen s dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator :

Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen s dues, if any.

Explanation. For the purposes of this sub-section,

(a) record date means the date agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding on such date;

(b) amount outstanding shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

(10) Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a

competent court, as the case may be, for recovery of the balance amount from the borrower.

(11) Without prejudice to the rights conferred on the secured creditor under or by this section, the secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in clauses (a) to (d) of sub-section (4) in relating to the secured assets under this Act.

(12) The rights of a secured creditor under this Act may be exercised by one or more of his officers authorised in this behalf in such manner as may be prescribed.

(13) No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor."

13. Thus, under Section 13(4) of the SARFAESI Act, the secured creditor is empowered to take recourse to one or more of the measures mentioned therein to recover the secured debt, which includes 'sale' under Section 13(4)(a).

14. As per Rule 8(5) of the Security Interest (Enforcement) Rules, 2002, the methods of sale of the immovable secured assets include:

"(a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or

(b) by inviting tenders from the public;

(c) by holding public auction; or

(d) by private treaty."

15. Therefore, it follows that the sale of a secured asset by private treaty as provided for under Rule 8(5)(d) of the Security Interest (Enforcement) Rules, 2002 is a 'sale' within the meaning of Section 13(4) of the SARFAESI Act. In the case on hand, there is no dispute regarding the fact that the sale is a private treaty, falling within the meaning of Rule 8(5)(d) of the Security Interest (Enforcement) Rules, 2002 and under Section 13(4) of the SARFAESI Act.

16. Section 17 of the SARFAESI Act provides for appeal remedy to the aggrieved parties of any of the measures resorted to by the Bank under Section 13(4) of the SARFAESI Act. For better appreciation, Section 17 of the SARFAESI Act is extracted hereunder:

"17. Right to appeal. (1) Any person (including borrower) aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor or his authorised officer under this

chapter, may make an application along with such fee, as may be prescribed, to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken:

> Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.
>
> Explanation. For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.
>
> (2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.
>
> (3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of Section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the business to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in sub-section (4) of Section 13 taken by the secured creditors as invalid and restore the possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of Section 13.
>
> (4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of Section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of Section 13 to recover his secured debt.
>
> (5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application :

Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any part to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder."

17. Section 17(1) makes it abundantly clear that any person (including borrower) aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor or his authorised officer may make an application to the Debs Recovery Tribunal. Therefore, not only the borrower but any person who is aggrieved of the actions of the secured creditor has recourse to appeal to the Debts Recovery Tribunal under Section 17(1) of the SARFAESI Act. Since the respondent, a third party to the loan transaction, has entered into a Memorandum of Understanding with the secured creditor/Bank for the purchase of the mortgaged property and the order of forfeiture came to be passed against him by the secured creditor/Bank, after having initiated the proceedings under the SARFAESI Act and having agreed to sell the property under private treaty, it will definitely fall within the jurisdiction of Debts Recovery Tribunal being a 'sale' within the meaning of Section 13(4) of the SARFAESI Act read with Rule 8(5) of the Security Interest (Enforcement) Rules, 2002 and therefore, the respondent is completely justified in approaching the Debts Recovery Tribunal for redressal of his grievance under Section 17(1) of the SARFAESI Act. Therefore, the Debts Recovery Tribunal-III, Chennai is completely within its jurisdiction in entertaining the appeal filed by the respondent/purchaser under Section 17 (1) of the SARFAESI Act. This point is answered accordingly.

POINT No.2:

18. The main ground urged by the respondent before the Tribunal to substantiate his plea that his money has illegally been forfeited by the Bank is that he was forced to sign the MoU by the Bank and that the details of various liabilities of the borrower company have not been revealed to him, and therefore, he cannot be compelled to complete the sale by the Bank.

19. The various communications exchanged between the parties, extracted supra, pursuant to the Memorandum of Understanding, would make it clear that the respondent has never taken up the

plea that he has been kept in dark about the various liabilities fastened on the borrower. Instead, in all the communications, the respondent has pleaded for extension of time, further emphasising that 'all the terms and conditions in the MoU are acceptable to him' and that he will honour his commitments and in case of default, the Bank is at liberty to to take the steps that they may deem fit.

20. Clause No.5 of the Memorandum of Understanding, to which the respondent is also a signatory, reads that "The PURCHASER shall co-ordinate with the BORROWER for settlement of all the statutory dues that are payable by the BORROWER towards all the statutory liabilities including PF, workmen dues and bills payable to electricity board etc. arising out of the secured assets. Any further liability arising out of the statutory dues after the date of sale is to be borne by the PURCHASER and the BORROWER shall extend necessary cooperation in this regard."

21. At this stage, it is to be remembered that it is a sale on private treaty and the cooperation of the borrower has very much been emphasized by the Bank and the borrower also, with a view to resolve the matter amicably, approached the Bank and consented to sell the secured assets. The respondent, being the purchaser, must be aware of all these things and he cannot throw blame on the Bank that he is bereft of information. Further more, under proviso to Rule 8(6) of the Security Interest (Enforcement) Rules, 2002, in case the sale of a secured asset is either by inviting tenders from the public or by holding public auction, the secured creditor has been fastened with the responsibility of causing a public notice in two leading newspapers one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, containing the (a) the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor; (b) the secured debt for recovery of which the property is to be sold; (c) reserve price, below which the property may not be sold; (d) time and place of public auction or the time after which sale by any other mode shall be completed; (e) depositing earnest money as may be stipulated by the secured creditor and (f) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property and as per Rule 8(8), sale by any method other than public auction or public tender, shall be on such terms as may be settled between the parties in writing. In the case on hand, MoU has been entered into between the parties and it is an acted upon and concluded contract between the parties, since in due compliance of the terms of the MoU, the respondent, not once but twice, has admitted his obligations and sought time from the Bank to honour his commitments. Had it been the case of 'forcible signing of the MoU' by the respondent, as has been falsely alleged by him, he would have mentioned it in his earlier communications. Therefore, since being a sale by private treaty, no obligation has been created on the Bank to disclose the information sought for by the respondent. From the materials placed on record, we are also not in a position to say that the Bank has wantonly avoided furnishing such information to the respondent since it is not a sale by public auction or by inviting tenders but by private treaty, wherein the role of the borrower also involved and further there is no material to show that the Bank is in possession of such information and it avoided furnishing the same to the respondent. Therefore, the parties are bound by the terms under MoU and being a 'sale by any method' as has been referred to in Rule 8(8) of the Security Interest (Enforcement) Rules, 2002, not being a public auction or public tender, the sale shall be on the terms settled between the parties in writing, in this case on the terms of the MoU. Hence, the 'doctrine of frustration' laid down under Section 54 of the Indian Contract Act, pressed into service by the Tribunal, has no application to the

case. Because of all the above reasons and applying the well established principle of 'purchaser beware' this argument advanced on the part of the respondent cannot be appreciated. Further more, when the respondent has not showed any material to show that he insisted such an information either from the Bank or from the borrower, it goes without saying that this contention has been raised on the part of the respondent only for the purpose of this case.

22. Coming to the aspect of forfeiture, in clause No.6 of the Memorandum of Understanding, it has been mentioned in no uncertain terms that:

> "In the event of the PURCHASER committing a default in the payment of balance of Sale Consideration of Rs.225.00 lacs within the period referred to in para 2 above the entire arrangement shall stand automatically cancelled on the expiry of the said period without any further reference to the PURCHASER/BORROWER. Further in the event of the Non-Payment of the balance of the sale consideration as agreed to by the PURCHASER within the stipulated period the amount of Rs.50,00,000/- already paid by the PURCHAER shall be forfeited by the Bank without any reference to the PURCHASER. In that case BANK will be at liberty to proceed against the secured assets of the BORROWER under the SARFAESI Act with the consent of the BORROWER."

23. The communications exchanged between the parties, extracted supra, reveal that the Bank has granted time twice to the respondent, at his request from 31.12.2008 to 24.1.2009 and thereafter till 7.2.2009. However, in spite of the same, the respondent did not honour his commitment as a result, the Bank was left with no option but to invoke clause (6) of the MoU, wherein we cannot find fault with the Bank since due opportunities have already been given to the respondent., which he has failed to make use of.

24. When the Bank has communicated the order of forfeiture by their communication dated 23.2.2009 by registered post with acknowledgement due, the respondent has addressed the letter dated 30.3.2009 to the Bank making allegations that he has been forced to sign certain documents including the Memorandum of Understanding. On the previous occasions, nowhere the respondent has stated that he has been forced to sign the Memorandum of Understanding. Rather, he emphasised that all the terms and conditions in the MoU are acceptable to him and in case of his default, the Bank is at liberty to take any action they deem fit and proper. From this it is clear that the latter contention that he has been forced to sign the Memorandum of Understanding is an afterthought of the respondent, invented for the purpose of the case, which cannot be given any weightage. Nowhere the respondent has explained as to why he should be 'forced to sign the MoU' by the Bank and in what way the Bank is inimical to him when the material on record speak contra to the effect that the Bank is so generous to grant extension of time to the respondent twice, considering the requests of the respondent.

25. The other thing we want to point out is that before the Tribunal, the prayer of the respondent is to issue a direction to the petitioner/Bank to refund the amount of Rs.50 lakhs. But, he has not challenged the Memorandum of Understanding, dated 29.12.2008. However, by the impugned

order, the Tribunal has gone upto the extent of holding the entire MoU as unsustainable in law and has granted the relief prayed for by the purchaser, after deducting a penalty of Rs.25,000/= from the said amount. When from the communications of the respondent itself it is clear that he never questioned the contents of MoU, the Tribunal has committed a legal error in going upto the extent of holding the entire MoU as unsustainable in law, which is completely out of its jurisdiction, since the MoU is a completed and concluded contract between the parties.

26. For all the above reasons, we hold that the order of the Tribunal is erroneous, unsustainable and bereft of jurisdiction, insofar as it concluding the MoU as unsustainable in law. Therefore, the said order passed by the Tribunal is liable only to be set aside. This point is thus answered in favour of the petitioner Bank and against the respondent.

POINT No.3:

In the result, this Civil Revision Petition filed by the Bank is allowed. The order of the Debts Recovery Tribunal is set aside. The Bank is directed to adjust the amount of Rs.50 lacs forfeited by it from the respondent towards the loan account of the borrower and initiate fresh proceedings for recovery of the rest of the dues from out of the mortgaged property. No costs. Consequently, M.P.No.1 of 2009 is closed.

Index: Yes
Internet: Yes (E.D.R., J.) (M.V., J.)
Rao 18.3.2010

To
The Debts Recovery Tribunal-III,
Chennai.

ELIPE DHARMARAO, J.
AND
M.VENUGOPAL, J.

(Rao)

Pre-delivery

18.3.2010