IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 2414 OF 2013
ALONGWITH
WRIT PETITION NO.2512 OF 2013

Vasanji Asaria Mamania ...... Petitioner.

V/s

M/s Kalyani Exporters & Ors. ......Respondents.

Mr. Nitin Thakkar, Senior Counsel with Ms. Anita Borkar for the Petitioner.
Ms. Vishwajeet Kapse with Mr. Upendra Mahadik with Ms. Sapna Raichure i/b T/N. Tripathi & Co. for Respondent No.1.
Rishabh Shah a/w Ms. Fatema Barodawala i/b Raval Shah & Co. for Respondent Nos. 2 and 3.

CORAM: V. M. KANADE &
REVATI MOHITE DERE, JJ.

Order reserved on : 27/04/2015
Order pronounced on : 09/06/2015

<u>P.C.:-</u> (Per V.M. Kanade, J.)

1. Both these Petitions can be conveniently disposed of by this common order since the facts and points involved therein are identical.

2. Rule. Rule is made returnable forthwith. Respondents

waive service. By consent of the parties, both these Petitions are taken up for final hearing.

3. The short question which falls for consideration before this Court is : whether the amount which is deposited by the auction purchaser whose sale has been confirmed can be adjusted towards the amount which has been directed to be deposited by the DRAT under section 18 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002?(For short “SARFAESI Act, 2002”) The ancillary question which also arises is : whether such an amount which has been deposited by the auction purchaser can be adjusted if the judgment debtor challenges the auction sale by filing proceedings under the SARFAESI Act, 2002 before the DRAT?

4. Petitioner is an auction purchaser and his sale was confirmed after the Respondents failed to deposit the amount which was directed to be paid by the DRAT. However, DRAT by its order dated 21/04/2011 which was passed in application for extension of time for depositing the amount, held that the said amount deposited by the auction purchaser could be adjusted towards the direction given by the DRAT to deposit an amount of Rs 1 crore and, accordingly, modified the earlier order and it was held that

the appeal was entertainable. Petitioner has challenged not only the order passed by the DRAT on 21/04/2011, directing amendment of the appeal filed by Respondent No.1 for adding the Petitioner as party-respondent Nos. 2 and 3 in the appeal but also the order permitting adjustment of the amount deposited by the auction purchaser towards the amount directed to be paid under section 18 of the SARFAESI Act, 2002 and RDDBFI Act, 1993.

5. Brief facts which are relevant for the purpose of deciding these Petitions are as under:-

6. Respondent No.3 sanctioned to Respondent No.1 : (i) Export Packing Credit Limit of Rs 375 lacs, (ii) Foreign Bill Negotiation Limit of Rs 375 lacs, (iii) Letter of Credit of Rs 100 lacs and (iv) Bank Guarantee of Rs 100 lacs.

7. Respondent No.3, on account of non-payment of the sums which were due and payable by Respondent No.1 issued demand notice dated 01/06/2004 under section 13(2) of the SARFAESI Act, 2002 demanding Rs 3,93,56,070.20 under EPC facility, Current Account and Bank Guarantee. Thereafter, symbolic possession was taken under section 13(4) on 16/10/2004. According to Respondent No.1, this was done without obtaining any order under section 14 of the

SARFAESI Act, 2002. Respondent No.1 filed Securitization Application No.27 of 2006 on 17/03/2006 against Respondent No.3 – Bank before the DRT. On 12/04/2006, DRT rejected the said application. Against this order, Respondent No.1 preferred an Appeal No. 209 of 2006 before the DRAT, challenging the order of rejection dated 12/04/2006. Respondent No.2 to whom the debts were assigned by Respondent No.3 on 30/12/2006, filed OA No.112 of 2007 against Respondent No.1 for recovery of an amount of Rs 3,96,84,570.89 and for further interest on the said amount for enforcement of mortgage.

8. In the meantime, on 06/08/2007, DRAT dismissed Appeal No.209 of 2006 filed by Respondent No.1 against the order of rejection of Securitization Application No.27 of 2006 dated 12/04/2006 since Respondent No.1 had not paid security deposit which was directed to be paid under section 18 of the SARFAESI Act, 2002. By virtue of rejection of the appeal filed by Respondent No.1, the challenge to the possession being taken by Respondent No.3 failed and taking of possession by the Bank was confirmed. Thereafter, notice was given for taking physical possession of the assets on 08/04/2010 and on 27/04/2010, notice of sale of property was given by Respondent No.2. The auction of the assets took place on 31/05/2010.

9. Respondent No.1 filed second Securitization Application No.225 of 2010, challenging the demand notice dated 1/6/2004 and also the notice of possession dated 08/04/2010 which was already dismissed when Securitization Application No.27 of 2006 was dismissed including the appeal No. 209 of 2006 which was also dismissed. Respondent No.1 also challenged the notice of sale dated 27/04/2010 and the sale conducted on 31/05/2010. On 01/12/2010, Securitization Application No.225 of 2010 was rejected. However, the notice of sale dated 27/04/2010 and the sale conducted on 31/05/2010 was set aside and the liberty was granted to Respondent No.2 to issue fresh sale notice.

10. On the same day i.e. on 01/12/2010, OA No.112 of 2007 filed by Respondent No.2 against Respondent No.1 was partly allowed and Respondent No.2 was permitted to recover an amount of Rs 1,31,19,449.14 alongwith interest @ 12% from 27/02/2007 and Respondent No.2 was also permitted to proceed against the mortgaged property for recovery of amount and issuance of recovery certificate. Two orders were, therefore, passed on 01/12/2010. One order was passed on the application No.225 of 2010 filed by Respondent No.1 challenging the demand notice, notice of possession, notice of sale and sale and by the said order

application was partly allowed and though demand notice and notice of possession was dismissed on the ground that it was barred by the principle of *res judicata*, the sale notice dated 27/04/2010 and sale conducted on 31/05/2010 was allowed. The second order was passed on the application filed by Respondent No.2 in OA No.112 of 2010 which was for recovery of an amount of Rs 3,96,84,570.89. This was partly allowed and Respondent No.2 was permitted to recover Rs 1,31,19,449.14 alongwith interest from 27/02/2007 and to proceed against the mortgaged property.

11. Against these two orders, two appeals were filed by Respondent No.1. Appeal No.44 of 2011 was filed challenging the order dated 01/12/2010 in Securitization Application No.225 of 2010 and the second appeal was an appeal No.45 of 2011 which was passed in OA No.112 of 2007 filed by Respondent No.2 adjudicating the claim and permitting recovery of an amount of Rs 1,31,19,449.14. In these two appeals, Respondent No.1 filed two Miscellaneous Applications for waiver of security deposit viz Misc. Application No.184/2011 in Appeal No.44 of 2011 (SARFAESI Act) and Misc. Application No.186/2011 in Appeal No.45 of 2011 (RDDBFI Act).

12. In the application filed against the order passed in the

adjudication application No.112 of 2007 viz. Misc. Application No.186 of 2011 in Appeal No.45 of 2011, Respondent No.1 was directed to deposit Rs 50 lakhs on/or before 18/03/2011 and the balance amount of Rs 50 lakhs on/or before 29/03/2011. DRAT also permitted auction sale which was fixed on 04/03/2011. However, confirmation of the sale was stayed with a rider that in the event of default of any one installment by Respondent No.1, interim order would stand vacated automatically and the sale, therefore, would be confirmed. However, Misc. Application No.184 of 2011 in Appeal No.44 of 2011 was adjourned to 30/03/2011. Petitioner, who is a bonafide purchaser, paid EMD of Rs 20,00,000/- and submitted their bid. On 04/03/2011, auction sale was held and the Petitioner was declared to be the successful bidder. On 05/03/2011, Petitioner paid Rs 26,25,000/- towards the purchase price by Demand Draft. On 18/03/2011, Petitioner paid balance amount of Rs 1,38,75,000/- towards the purchase price.

13. Respondent No.1, who was ordered to deposit Rs 50 lakhs on/or before 18/03/2011 by order dated 02/03/2011, failed to deposit Rs 50 lakhs and by virtue of the conditional order interim stay to the confirmation of the sale was vacated and, therefore, on 21/03/2011, the order of confirmation of sale in favour of the Petitioner was passed.

Two days after the sale was confirmed and five days after the Petitioner paid the entire amount, Respondent No.1 once again filed three applications; two in Appeal No.45 of 2011 (RDDBFI Act) viz (i) Misc. Application No.284 of 2011 for extension of time for depositing an amount of Rs 1 crore in two installments under order dated 02/03/2011 and (ii) Misc. Application No.310 of 2011 in Appeal No.45 of 2011 (RDDBFI Act) for recall/modification of the order dated 02/03/2011 directing deposit of Rs 1 crore in two installments with leave to treat the sale proceeds which were deposited as to be adjusted towards the deposit under section 18. The third application being Misc. Application No.345 of 2011 was filed in Appeal No.44 of 2011 (SARFAESI Act) to add the Petitioner as party-respondent.

14. In the meantime, however, on 25/03/2011, Respondent No.2 gave physical possession of the auctioned property i.e. Gala No.4 to the Petitioner. Respondent No.1, therefore, filed one more Misc. Application being Misc. Application No.346 of 2011 in Appeal No.45 of 2011 (RDDBFI Act) for adding the Petitioner in appeal and for injunction in respect of the said property.

15. DRAT passed the following orders on 21/04/2011 on the applications filed by Respondent No.1:-

(i) DRAT allowed Misc. Application No.346 of 2011 and the Petitioner was impleaded as party-respondent. This order is challenged in Writ Petition No.2414 of 2013.

(ii) DRAT allowed Misc. Application No.284 of 2011 and Misc. Application No.310 of 2011 in Appeal No.44 of 2011 (SARFAESI Act) and modified the order dated 02/03/2011 and adjusted the amount deposited by the Petitioners towards the auction purchase and towards the amount which was deposited by Respondent No.1 and waived the amount which was to be deposited by Respondent No.1 under section 18 and restrained the Petitioner from creating any third party right in the auctioned property. This order is also challenged in Writ Petition No. 2414 of 2013.

(iii) DRAT allowed both the Misc. Application No.184 of 2011 and Misc.

Application No.345 of 2011 in Appeal No.44 of 2011 by holding that the appeal was entertainable without any deposit and allowed the Petitioner to be made as party-respondent in the said appeal. This order is challenged in Writ Petition No.2512 of 2013.

16. Mr. Nitin Thakkar, the learned Senior Counsel appearing for the Petitioner submitted that the order directing adjustment of amount paid by the Petitioner towards auction purchase could not have been adjusted towards the amount of Rs 1 crore which was to be deposited in two installments on/or before 18/03/2011 and 29/03/2011 and, secondly, extension of time to deposit the amount which had already expired could not have been granted. Thirdly, it is submitted that the amount had to be deposited by the borrower and, therefore, could not be adjusted towards the mount which was deposited by the auction purchaser for the purchase of mortgaged property.

17. In support of his submissions the learned Senior Counsel appearing on behalf of the Petitioner has relied on the following judgments.

Sr.No.	Name of parties	Citation
1.	Indian Bank, Asset Recovery Management Branch-I vs. Debt Recovery Appellate Tribunal and Ors.	Legalcrystal.com/ 905473
2.	Narayan Chandra Ghosh vs. UCO Bank & Ors	2011 AIR (SC) 1913
3.	Indian Bank vs. Blue Jaggers Estates Ltd and Others	2010 AIR (SC) 2980
4.	Valji Khimji & Company vs. Official Liquidator of Hindustan Nitro Product (Gujarat) Ltd. & Ors	2008 (8) JT 610
5.	Janak Raj vs. Gurdial Singh	1967 AIR(SC) 608

18. On the other hand, Mr. Kapse the learned Counsel appearing on behalf of Respondent No.1 submitted that under section 18 of the SARFAESI Act, 2002, there is no provision for automatic dismissal of the appeal on non-payment of the amount which was directed to be paid by the DRAT. He submitted that possession of the flat had been taken without following the procedure laid down under section 13. He also submitted that, on merits, Respondent No.1 has a very good case and though, initially, the claim made by the Bank was Rs 3.50 crores approximately, it was reduced to 1 crore by the DRT. He submitted that the Bank

had not challenged the said decree which was passed by the DRT. He submitted that merely because the sale had become final, that would not create indefeasible right in favour of the auction purchaser since under section 19 of the SARFAESI Act, 2002, even thereafter possession could be handed over to the borrower. He submitted that Petitioner had purchased the said property during the pendency of the appeal and he was, therefore, aware of the risk involved in purchasing the said property. He further submitted that sale of securities had resulted in realization of Rs 2.95 crores out of which Respondent No.2 had appropriated its entire dues of Rs 1.99 crores towards the loan amount and, therefore, Rs 1 crore was surplus amount lying with Respondent No.2. He, therefore, submitted that DRAT was justified in giving credit of realization on confirmation of sale while deciding the waiver application. Reliance has been placed on the order passed by the Division Bench of this Court dated 17/08/2006 passed in Writ Petition No.4979 of 2006 and order dated 27/1/2011 passed in Writ Petition No.66 of 2011 and also on the order dated 20/1/2014 passed in Writ Petition No.2941 of 2012. Reliance also has been placed on the judgment of the Delhi High Court in *Poonak Manshani vs. J. & K. Bank Ltd*.[1]. It is further submitted that demand notice dated 01/06/2004 was ex facie illegal and all consequential actions based

1 AIR 2010 DEL 28

thereon are liable to be quashed and set aside and, therefore, DRAT was justified in giving credit of realization of confirmation of sale while deciding the waiver application. It is submitted that there is considerable delay in filing these Writ Petitions and, therefore, Writ Petitions are liable to be dismissed on account of inordinate delay and laches. In support of his submissions, he also relied upon the following judgments:-

Sr.No.	Name of parties	Citation
1.	Parsn Medical Plants Private Limited & Anr vs. Indian Bank and Ors.	(2011) 15 SCC 253
2.	Mathew Varghese vs. M. Amritha Kumar	[2014] 44 taxmann.com 137 (SC)
3.	J. Rajiv Subramaniyan and Anr. vs. Pandiyas and Others	(2014) 5 SCC 651
4.	Vasu P. Shetty vs. Hqtel Vandan Palace and Others	(2014) 5 SCC 660
5.	S. Shanmugavel Nadar vs. State of T.N and Anr.	(2002) 8 SCC 361

19. The questions which fall for consideration before this Court are : **(i)** whether DRAT could have passed the order directing adjustment of the amount realized from the sale of the mortgaged properties towards the amount which was

directed to be paid as condition for entertaining the appeal under section 18 and particularly when the sale of the auctioned property was challenged by the borrower in separate proceedings before the DRAT and **(ii)** whether the DRAT has committed jurisdictional error in entertaining the appeal without the borrower depositing the amount under section 18 by treating the amount realized after sale of the auctioned properties as amount deposited by the borrower and, thereafter entertaining the appeal?

20. Before we consider the rival submissions, it will be necessary to take into consideration some of the relevant provisions in the SARFAESI Act, 2002 since the entire controversy is with regard to the waiver of the deposit amount. It will be necessary to have a look at section 18 of the SARFAESI Act, 2002 which reads as under:-

> **“18. Appeal to Appellate Tribunal**.-(1) Any person aggrieved, by any order made by the Debts Recovery Tribunal [under section 17, may prefer an appeal along with such fee, as may be prescribed] to the Appellate Tribunal within thirty days from the date of receipt of the order of debts Recovery Tribunal.
>
> [Provided that different fees may be prescribed

for filing an appeal by the borrower or by the person other than the borrower:]

[Provided further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent. of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less:

Provided also that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent. of debt referred to in the second proviso.]

21. Perusal of the aforesaid provisions reveals that the person aggrieved by the order of the Debt Recovery Tribunal (DRT) passed under section 17 can prefer an appeal to the Debt Recovery Appellate Tribunal (DRAT) by paying necessary fee and subject to the borrower depositing with the Appellate Tribunal 50% of the amount of the debt due from him which, for the reasons separately recorded, could be reduced to 25%. The discretion therefore granted to the Appellate Tribunal is limited to reducing the amount from 50% to 25% subject to reasons to be recorded separately.

22. The Apex Court had an occasion to interpret the said

provision and it is held that the the term 'borrower' means any person who has been granted financial assistance by any Bank of Financial Institution or who has given any guarantee or created any mortgage or pledge as security for financial assistance granted by the Bank. The Division Bench of Madras High Court in its judgment dated 16/6/2010 in *Indian Bank, Asset Recovery Management Branch-I vs. Debt Recovery Tribunal* delivered in Writ Petition No.17016 of 2009 considered the said question and in para 14 has observed as under:-

> "14. From this definition clause it is clear that the 'borrower' includes the guarantor also. Therefore, it goes without saying that the obligation created on the person who has availed loan from the Bank or the financial institution, under second proviso to Section 18(1) to deposit fifty percent of the amount of debt to avail the appeal remedy before the Appellate Tribunal also applies equally to the guarantor and no difference or distinction could be made between a debtor and a guarantor, while entertaining the appeal under Section 18(1) of the SARFAESI Act. That being the legal situation, we have no hesitation to hold that the first respondent/Appellate Tribunal has committed a gross legal error in ordering to give credit of the amount deposited by the auction purchaser to the guarantor, as the auction purchaser cannot be brought within the fold of 'borrower' defined under the SARFAESI Act. For these reasons, the legal point framed above, is

> answered against the respondents 3 and 4/guarantors. For all the above discussions held, both the above writ petition and the civil revision petition stand allowed. The order of the first respondent/Appellate Tribunal is set aside as non est in law. All the connected Miscellaneous Petitions are closed. No costs."

The Division Bench of Madras High Court, therefore, has clearly held in the said case that the auction purchaser cannot be brought within the fold of 'borrower' defined under the SARFAESI Act and set aside the order passed by the DRAT.

Similarly, the Apex Court in *Narayan Chandra Ghosh vs. UCO Bank & Ors*[1] also has held that requirement of pre-deposit under section 18 is mandatory and there is no reason for not giving full effect to the provisions of the said section. In the said judgment, the Apex Court in this context has observed in para 8 as under:-

> "8. Section 18(1) of the Act confers a statutory right on a person aggrieved by any order made by the Debts Recovery Tribunal under section 17 of the Act to prefer an appeal to the Appellate Tribunal. However, the right conferred under section 18(1) is subject to the condition laid down in the second proviso thereto. The second

1 2011 AIR (SC) 1913

proviso postulates that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less. However, under the third proviso to the sub-section, the Appellate Tribunal has the power to reduce the amount, for the reasons to be recorded in writing, to not less than twenty-five per cent of the debt, referred to in the second proviso. <u>Thus, there is an absolute bar to entertainment of an appeal under Section 18 of the Act unless the condition precedent, as stipulated, is fulfilled.</u> <u>Unless the borrower makes, with the Appellate Tribunal, a pre-deposit of fifty per cent of the debt due from him or determined, an appeal under the said provision cannot be entertained by the Appellate Tribunal.</u> The language of the said proviso is clear and admits of no ambiguity. It is well-settled that when a Statute confers a right of appeal, while granting the right, the Legislature can impose conditions for the exercise of such right, so long as the conditions are not so onerous as to amount to unreasonable restrictions, rendering the right almost illusory. Bearing in mind the object of the Act, the conditions hedged in the said proviso cannot be said to be onerous. Thus, we hold that the requirement of pre-deposit under sub-section (1) of Section 18 of the Act is mandatory and there is no reason whatsoever for not giving full effect

> to the provisions contained in Section 18 of the Act. In that view of the matter, no court, much less the Appellate Tribunal, a creature of the Act itself, can refuse to give full effect to the provisions of the Statute. We have no hesitation in holding that deposit under the second proviso to Section 18(1) of the Act being a condition precedent for preferring an appeal under the said Section, the Appellate Tribunal had erred in law in entertaining the appeal without directing the appellant to comply with the said mandatory requirement.” *(Emphasis supplied)*

The Apex Court then in *Indian Bank vs. Blue Jaggers Estates Ltd and Others*[1] has taken a similar view and in para 2 of the said judgment has observed as under:-

> “2. These appeals filed for setting aside order dated 23.10.2009 passed by the Division Bench of Madras High Court are illustrative of how a defaulting borrower can use the court process for frustrating the action initiated by a bank under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'the Act') for recovery of its dues.”

The facts in B*lue Jaggers Estates and Others* (supra) have been briefly narrated in para 12 of the judgment which reads

1 2010 AIR (SC) 2980

as under:-

> “12. Since the respondents did not comply with the order passed by the Appellate Tribunal, the authorised officer of the appellant auctioned some of the mortgaged properties for which bids of Rs 5 crores were received. Thereafter, the respondents filed three applications before the Appellate Tribunal for waiver of the requirement of pre-deposit enshrined in second proviso to Section 18(1) of the Act. While dealing with those applications, the Appellate Tribunal suo motu took cognizance of the fact that the notice had been issued to the respondents for recovery of Rs 9,86,25,736.95 and directed them to deposit Rs 4.50 crores in two equal instalments. This enabled the respondents to indulge in further litigation. They filed Writ Petition No.19346 of 2009 for quashing order dated 15.5.2009 passed by the Appellate Tribunal and another Writ Petition bearing No.19746 of 2009 for issue of a mandamus to the Tribunal to dispose of O.A. No.1098 of 1998 along with I.A. No.237 of 2008 within a fixed time frame. When those petitions were taken up for hearing, learned counsel appearing for the appellant fairly conceded that the Appellate Tribunal does not have suo motu power to increase the amount required to be deposited in terms of the mandate of second proviso to Section 18(1). After taking cognizance of his statement, the Division Bench of the High Court passed the impugned order

> whereby it not only set aside the second interim order passed by the Appellate Tribunal, but also nullified the earlier conditional interim order by declaring that as a result of sale of the property worth Rs. 5 crores, the requirement of deposit of Rs 3 crores stands satisfied. The Division Bench also directed the Tribunal to dispose of O.A. No.1098 of 1998 and I.A. No.237 of 2008 within two months."

Finally, in the said judgment, the Apex Court in para 18 has observed that reasons given by the High Court for declaring that the requirement of pre-deposit will be deemed to have been satisfied do not stand scrutiny.

The Apex Court in its recent judgment in *Sadashiv Prasad Singh vs. Harendar Singh & Ors*[1] has held that rights of third party auction purchaser in the property purchased by him cannot be extinguished except in cases where the said purchase can be assailed on the grounds of fraud and collusion. In para 14 of the said judgment, the Apex Court has observed as under:-

> "14. A perusal of the impugned order especially paragraphs 8, 12 and 13 extracted hereinabove reveal that the impugned order came to be passed in order to work out the equities between the

1 2014 SCC OnLine SC 22

parties. The entire deliberation at the hands of the High Court were based on offers and counter offers, inter se between the Allahabad Bank on the one hand and the objector Harender Singh on the other, whereas the rights of Sadashiv Prasad Sinha – the auction-purchaser, were not at all taken into consideration. As a matter of fact, it is Sadashiv Prasad Sinha who was to be deprived of the property which came to be vested in him as far back as on 28.8.2008. It is nobody's case, that at the time of the auction-purchase, the value of the property purchased by Sadashiv Prasad Sinha was in excess of his bid. In fact, the factual position depicted under paragraph 8 of the impugned judgment reveals, that the escalation of prices had taken place thereafter, and the value of the property purchased by Sadashiv Prasad Sinha was presently much higher than the bid amount. Since it was nobody's case that Sadashiv Prasad Sinha, the highest bidder at the auction conducted on 28.8.2008, had purchased the property in question at a price lesser than the then prevailing market price, <u>there was no justification whatsoever to set aside the auction-purchase made by him on account of escalation of prices thereafter. The High Court in ignoring the vested right of the appellant in the property in question, after his auction bid was accepted and confirmed, subjected him to grave injustice by depriving him to property which he had genuinely and legitimately purchased at a public auction. In our considered view, not</u>

only did the Division Bench of the High Court in the matter by ignoring the sound, legal and clear principles laid down by this Court in respect of a third party auction purchaser, the High Court also clearly overlooked the equitable rights vested in the auction-purchaser during the pendency of a lis. The High Court also clearly overlooked the equitable rights vested in the auction purchaser while disposing of the matter." *(Emphasis supplied)*

Similar view has been taken by the Apex Court in *Valji Khimji & Company vs. Official Liquidator of Hindustan Nitro Product (Gujarat) Ltd. & Ors.*[1]. In para 20 of the said judgment, the Apex Court has observed as under:-.

> "20. Moreover, whenever anyone goes to buy some property in an auction sale, the person proposing to bid always makes enquires about the properties for which he is proposing to make the bid. In fact, he will in all probability inspect the said property/assets, and he will not make any bid without making thorough enquiries about the said properties/assets. Hence, we are of the opinion that all the bidders in the auction knew what they were bidding for. Respondent No.9 never participated in the auction and we fail to understand how he could start objecting to the auction more than one year after the same was confirmed."

1 2008(8) JT 610

23. The law laid down by the Supreme Court, therefore, is quite well settled. Under section 18, the 'borrower' which includes guarantor has to deposit 50% or 25% of the amount due as directed by DRAT and upon non-payment of such amount, DRAT cannot entertain the appeal filed by the borrower. As a natural corollary, therefore, the amount which has been deposited by the auction purchaser cannot be adjusted as money paid by the borrower, unless he accepts the sale and does not challenge it by filing a separate appeal. In other words, the borrower cannot on the basis of money paid by the auction purchaser continue to pursue his appeal. The borrower cannot have his cake and eat it too. The borrower has an option of accepting the sale and then requesting the DRAT to hold the money which has been deposited by the auction purchaser for pursuing his appeal but he cannot pursue his appeal against the order passed by DRT for recovery of money by the Bank and, at the same time, also challenge the sale which is taken place and which is confirmed in favour of the auction purchaser. Such an interpretation would militate against the object of the Act and more particularly provisions of section 18 of the SARFAESI Act, 2002. The “sale proceeds” cannot be the amount belonging to the borrower, unless the borrower accepts the sale and does not seek any relief against the auction purchaser.

24. For the aforesaid reasons therefore the submissions made by the learned Counsel appearing on behalf of the Respondents cannot be accepted.

25. Mr. Kapse, the learned Counsel appearing on behalf of Respondent No.1 relied on the judgment of the Apex Court in *Parsn Medical Plants Private Limited and Another vs. Indian Bank and Others*[1]. Perusal of the said judgment indicates that the order apparently has been passed by the Apex Court in view of the concession made by the Counsel appearing on behalf of the Bank. In our view, ratio of this judgment, therefore, cannot apply to the facts of the present case.

26. Mr. Kapse the learned Counsel for Respondent No.1 then relied on the judgment of the Apex Court in *Mathew Varghese vs. A. Amritha Kumar*[2]. In our view, ratio of this judgment is not applicable to the facts of the present case. The issue which is being decided by this Court in this case is : whether after confirmation of sale, the borrower can request DRAT to waive the condition of pre-deposit and request the DRAT to adjust the amount paid by auction purchaser towards the amount which is payable by him

1 (2011) 15 SCC 253
2 [2014] 44 taxmann.com 137 (SC)

under section 18. The ratio of the said judgment therefore will not be of any assistance to the Respondents. For the same reasons therefore ratio of the judgments of the Apex Court in *J. Rajiv Subramaniyan and Another vs. Pandiyas and Others*[1] *and in Vasu P. Shetty vs. Hotel Vandana Palace and Others*[2] would not apply to the facts of the present case.

27. We are, therefore, of the view that the impugned order passed by the DRAT in both the appeals is contrary to the law laid down by the Supreme Court and after confirmation of sale and payment of the sale consideration by the auction purchaser, the borrower cannot file an application to the DRAT that the sale proceeds from the auction should be adjusted towards the money which is directed to be deposited by DRAT under section 18 of the said Act and at the same time also challenge the sale. It is clarified that if the auction purchaser makes an application for adjustment of the sale proceeds from the auction sale on the condition that he will not challenge the sale of the asset then such sale proceeds can be adjusted by the DRAT.

28. For the reasons stated above, both these Petitions are allowed in terms of prayer clause (a-1). Rule is made absolute accordingly.

1 (2014) 5 SCC 651
2 (2014) 5 SCC 660

29. At this stage, the learned Counsel appearing on behalf of the Respondents requested for stay of this judgment for a period of six weeks. Mr. Nitin Thakkar, the learned Senior Counsel appearing on behalf of the Petitioner, however, makes a statement that that the Petitioner shall not create any third party rights in respect of the said property which has been purchased by the Petitioner in auction for a period of six weeks from today.

(REVATI MOHITE DERE, J.) **(V.M. KANADE, J.)**