HON'BLE SRI JUSTICE R. SUBHASH REDDY

AND

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

WRIT PETITION No.29158 OF 2015

ORDER: (Per Hon'ble Sri Justice A. Shankar Narayana)

Seeking Writ of Mandamus to declare the auction conducted by respondent No.1 - Bank of Baroda, Rajahmundry, East Godavari District, on 31.08.2015 pursuant to the auction notice, dated 25.07.2015, concerning the properties belonging to the respective petitioners as illegal and arbitrary and in violation of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'the Act'), the instant Writ Petition is filed.

2. For the sake of convenience, respondent Nos.1 and 2 are hereinafter referred to as bank and borrower respectively, and respondent Nos.3 and 4 are referred to as auction purchasers respectively.

3. Respondent No.2, which is an educational society called
'M/s. Manikanta Educational Society', is borrower, availing credit limits aggregating to Rs.800.00 lacs from the bank in the year 2009 for running its educational society. The petitioners herein stood as guarantors along with two (2) others by mortgaging their respective extents which

constitute a contiguous block. When the borrower committed default in payment of loan amount, bank resorted to recovery by initiating appropriate measures under the Act, initially by issuance of notice under Section 13(2) of the Act on 08.10.2012.

It appears that neither the borrower nor the petitioners could avail the opportunity to make representation under Section 13(3) of the Act.

4. The petitioners gave the details as to the properties mortgaged by them towards collateral security stating that petitioner No.1 created mortgage over Ac.1.00 of land in R.S. No.490/02, petitioner No.2 mortgaged an extent of Ac.0-661 cents in

R.S. No.489/01&03, and petitioner No.3 mortgaged Ac.0-29 cents in

R.S. No.490/03 and Ac.1-00 of land in R.S. No.490/02 situated at Bhimavaram Village, Samarlakota Mandal, East Godavari District under the respective title deeds.

5. It is stated that having been impressed with the social objectives of the borrower as an educational society intending to provide quality education in the rural area i.e. at Mummadivaram village and mandal of East Godavari District, surrounded by fishermen families, petitioners intending to support its cause, accepted the request of the borrower consenting to provide the subject properties towards collateral security for the credit facility

availed by it.

6. It is stated that on 01-09-2015, on coming to know through their neighbouring land owners, that third parties have come to the lands and informed them that they have purchased the said extents in the auction conducted by the bank on 31-08-2015, they immediately rushed and contacted the management of the borrower, but it was indifferent except expressing that its income was not adequate even to meet the expenses for running the educational institutions and they were to get substantial amount from the State Government in the form of fees reimbursement etc., and that they were trying to close the accounts under One Time Settlement scheme and they have already submitted a letter to that extent and pursuing the same. They stated that when they approached the bank for relevant details stating that no notices were issued to them, they were denied the information except informing them that it had issued auction notice, dated 25-07-2015, fixing the date of auction on 31-08-2015 and that the properties were sold in the said auction.

7. The petitioners state that on securing the auction notice, they found that the bank issued the same for the total properties as a single unit and fixed reserve price. According to them, four properties belong to them and the other two properties belong to two other mortgagers.

Hence, the auction conducted by the bank on 31.08.2015 pursuant to the notice, dated 25.07.2015, is illegal, arbitrary and in violation of the Act and also Article 300-A of the Constitution of India and sought to set aside the same.

8. The petitioners also referred to the meaning of the word ‘borrower’ occurring in Section 2(f) of the Act claiming that the notice under Section 13(2) of the Act ought to be served on them and due to non-service thereof, they lost their valuable right to submit their objections as provided under Section 13(3-A) of the Act.

9. It is stated that the bank failed to serve possession notice as required by the relevant provisions of the Security Interest (Enforcement) Rules, 2002 (for short ‘the Rules’) including the notice under Rules 8(5) and 8 (6) of the Rules.

10. It is their specific case that all the six (6) schedule properties mentioned in the auction notice are separate and distinct, purchased and owned by the petitioners and two other mortgagers under separate sale deeds and, therefore, the bank cannot unilaterally fix price for all the properties together as a single unit, though, each property has got separate schedules and the same should have been sold separately by giving separate value for each property and consequent to combining all

the properties as a single unit, several bidders who could have purchased for a better price, if they were sold separately, could not participate in the auction and resultantly it must have fetched less price in the auction. The petitioners also stated that initially the bank ought to have proceeded against the properties mortgaged as security by the borrower and in case it fails to realise the entire amount, then only ought to have brought their properties for sale. On the ground that there is no regular Presiding Officer to preside over the Debts Recovery Tribunal, Vishakapatnam (DRT), and the in-charge Presiding Officer holds camp for three days in a month, that too his schedule is uncertain, they have no other efficacious and alternative remedy except to invoke the jurisdiction of this Court under Article 226 of the Constitution of India.

11. Bank filed its counter resisting the request of the petitioners. In its counter, it states that notices under Section 13(2) of the Act were issued to the petitioners on 08.10.2012 and the same were received by them. It is stated that possession of the mortgaged properties was taken on 10-01-2013 and possession notices were also served on the petitioners. According to the bank, petitioners have ample opportunity to make representation(s) under Section 13(3-A) of the Act against the notices issued under Section 13(2) of the Act and

even the petitioners had ample opportunity to approach the DRT, Vishakapatnam, and having kept quite till the properties were put to auction, approached this Court only to stall the sale process. Concerning notices under Rules 8(5) and 8(6) of the Rules, bank states that petitioner Nos.1 and 2 received notices, but petitioner No.3 evaded to receive the same. It is stated that the petitioners have full knowledge about the sale to be held on 31-08-2015.

12. Bank states that the total extent of all the properties
i.e., Acs.4-89 cents were converted as a block into non-agricultural land vide proceedings, dated 16-09-2009, issued by the Revenue Divisional Officer, Kakinada, and that they are situated in the same area, and, therefore, one reserve price was fixed and the sale proceeds will be distributed proportionately in accordance with the extent of the land of each guarantors/mortgagers and, thus, there is no illegality in fixing one reserve price for all the properties which are part of one extent of land and converted into non-agricultural land as a block. Bank also states that it has published possession notice in compliance of the Rules in the leading newspapers both in vernacular and English language.

13. Concerning valuation of the properties, bank submits thus:

> "………The copies of the valuation reports are filed herewith which shows that the properties are similarly

situated, therefore, the reserve price is fixed common to all the properties."

14. Concerning fixation of reserve price for the entire block, bank mentioned in its counter thus:

> "12. It is also false to contend that the notice of sale under Rule 8(6) was not served on the petitioners. Therefore the grounds in this regard are baseless and illegal. With regard to the fixing of reserve price, it is submitted that all the properties which are pieces of lands situated in the same area and which were converted as a block from agricultural land into non-agricultural land and therefore the fixation of reserve price is not illegal."

15. Stating that the petitioners filed the instant writ petition only to procrastinate the proceedings so as to avoid the process of recovery initiated by the bank, sought to vacate the interim order staying confirmation of sale and to dismiss the writ petition. Relevant documents have been filed along with the counter.

16. The auction purchasers - respondent Nos.3 and 4, together filed vacate stay petition in WVMP No.4237 of 2015. The affidavit was filed by respondent No.4 on his behalf and on behalf of respondent No.3. They have taken preliminary objection stating that the petitioners have alternative efficacious remedy to move before the DRT challenging the auction notice, dated 25.07.2015, but kept quite for a long time and only after the auction was held and the entire sale consideration was deposited by them, the instant writ petition is filed for extraneous

reasons.

17. They state that they jointly filed a bid through electronic mode by paying an amount of Rs.45,01,800/- towards earnest money deposit (EMD) and the auction was conducted on 31-08-2015 and their bid was the highest and they were declared as successful bidders for an amount of Rs.5,09,43,000/- and as per the tender conditions, they have deposited 25% of the amount on the same day, the amount being Rs.1,27,35,750/- having deducted EMD amount paid on
31-08-2015, and the remaining 75% amount was paid within the stipulated time. Thereafter, the bank has promised them to deliver possession of the property to them. According to them, the instant writ petition is filed without any *bona fides* since the Secretary and Correspondent of the principal borrower society are close relatives of the petitioners, they have full knowledge about the sale and wantonly allowed the bank to conduct sale and made them to deposit the entire sale consideration.

18. The auction purchasers state that they were informed that the petitioners received all the notices under Section 13(2) of the Act, possession notice which was published in newspapers and the properties were also got valued through the registered valuers as per rules and reserved price was fixed at Rs.4,50,18,000/-. Concerning allegations of the petitioners that the bank fixed reserve

price by making all the six (6) properties as a single unit, they state that the petitioners along with the principal borrower were possessing the lands in contiguity and filed a common application before the Revenue Divisional Officer, Kakinada, for conversion of their land from agriculture to non-agriculture and a common order for the entire extent was made by the competent authority by the proceedings, dated 13-09-2009. Therefore, it is not open for the petitioners to now contend that the properties ought to have been sold separately.

It is according to them that if the properties were sold separately, the backside lands will not have any access to road and as such the entire block was shown as a single unit basing on the proceedings of the Revenue Divisional Officer, Kakinada. They also state that even if the properties of the petitioners were sold separately, they would not have fetched the bid amount on account of the uneven size of the bits. Contending that they were *bona fide* purchasers and parted with more than Rs.5.00 crores having borrowed the money from local private financiers for huge interest and they are burdened heavily towards interest to be paid to the local private financiers every month and they invested the amount with a fond hope that they can convert the said property for house plots, sought to allow their petition vacating the interim orders.

19. Heard Sri C.S.N. Raju, learned counsel for the petitioners, and Sri K. Mallikarjuna Rao, learned counsel

for the bank (respondent No.1), and Sri N. Siva Reddy, learned counsel for the auction purchasers (respondent Nos.3 and 4).

20. Learned counsel for the petitioners would submit that the bank failed to serve notice to the petitioners under Section 13 (2) of the Act and Rule 3 of the Rules depriving the petitioners of their valuable right to raise their objections as provided under Section 13(3A) of the Act. It is his further submission that the possession notice was not effected on the petitioners and even affixture of possession notices were not resorted to in compliance of Rules 8(1) and (2) of the Rules. Further, the bank did not publish possession notice to their knowledge in two leading newspapers and one in a vernacular language as per the statutory mandate. His next submission is that the bank failed to obtain valuation report from the approved valuer as per Rule 8(5) of the Rules and fixed the reserve price. His further submission is that the bank failed to serve thirty days notice to the petitioners in compliance of Rule 8 (6) of the Rules by furnishing the information prescribed in Rule 8(5) of the Rules and thereby contravened the said provisions. He would further submit that even the e-auction notice, dated 25-07-2015, fixing the date of auction on 31-08-2015 was not served on the petitioners.

21. Learned counsel further submits that all the six

(6) properties mentioned in the schedule to the auction notice are separate and distinct, purchased by them and two other mortgagers under separate sale deeds, and, therefore, the bank cannot unilaterally fix reserve price treating them as a single unit. Though, each item has got separate schedule, ought to have been sold separately and consequently several purchasers, who could have purchased each bit for a better price, could not participate in the auction.

22. Learned counsel for the bank would contend that the notices under Sections 13(2) and 13(4) of the Act and Rules 8(5) and 8(6) of the Rules and the e-auction notice under Rule 8(6) of the Rules were served on the petitioners and they were also published in the newspapers, and, therefore, there was no infraction of any of the provisions rendering the auction bad.

23. The learned counsel for the bank would further submit that since the total extent of Acs.4-89 cents was converted as single block into non-agricultural land by issuing proceedings, dated 16-09-2009, by the Revenue Divisional Officer, Kakinada, reserve price was fixed for the entire extent and sale proceeds would be distributed proportionately in accordance with the extent of the land owned by each petitioner. Therefore, fixation of reserve price is not illegal, hence, sought to dismiss the writ petition.

24. The learned counsel for the auction purchasers would submit that if the properties were sold separately, backside lands will not have any access to road and, as such, the entire block was shown as a single unit basing on the proceedings of the Revenue Divisional Officer, Kakinada and would not have fetched the bid amount on account of uneven size of the bits, hence, no infirmity can be viewed in that regard.

25. In the light of the contentions raised by rival parties, the following two questions would arise for consideration:

1. Whether the mandatory requirement of Rules had been adhered to by the secured creditor in completing the sale process for realisation of due amount?
2. Whether any prejudice is occasioned in conducting the sale of all the properties under mortgage as a single block on the ground that the conversion of the land from agriculture to non-agriculture was under a single proceeding issued by the competent authority?

26. Since the petitioners strongly contend that service of notices as contemplated by the provisions of Sections 13(2) and 13(4) of the Act and Rules (5) and (6) of the Rules were not effected in the manner in which they are mandated to be effected, the sale cannot be validated,

it would be relevant to refer to Rules 3, 8 and 9 of the Rules.

27. Rule 3 envisages the manner in which service of demand notice under Section 13(2) of the Act shall be effected. Sub-Rule (3) of Rule 3 of the Rules specifically provides that any other notice in writing to be served on the borrower or his agent by Authorised Officer, shall be served in the same manner as provided in the said rule. Rule 3 reads thus:

> "3. **Demand notice**:- (1) the service of demand notice as referred to in sub-section (2) of Section 13 of the Act shall be made by delivering or transmitting at the place where the borrower or his agent, empowered to accept the notice or documents on behalf of the borrower, actually and voluntarily resides or carries on business or personally works for gain, by registered post with acknowledgment due, addressed to the borrower or his agent empowered to accept the service or by Speed Post or by courier or by any other means of transmission of documents like fax message or electronic mail service:
>
> Provided that where authorized officer has reason to believe that the borrower or his agent is avoiding the service of the notice or that for any other reason, the service cannot be made as aforesaid, the service shall be effected by affixing a copy of the demand notice on the outer door or some other conspicuous part of the house or building in which the borrower or his agent ordinarily resides or carries on business or personally works for gain and also by publishing the contents of the demand notice in two leading

newspapers, one in vernacular language, having sufficient circulation in that locality.

(2) Where the borrower is a body corporation, the demand notice shall be served on the registered office or any of the branches of such body corporate as specified under sub-rule (1).

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

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

28. Rule 8 deals with sale of immovable secured assets.

Sub-Rules (1), (5), (6) and (7) of Rule 8 of the Rules since relevant in the context of adjudicating upon the stand taken by the petitioners and the bank, they are extracted, thus:

"(1) Where the secured asset is an immovable property, the authorized officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.

(2) x x x x

(3) x x x x

(4) x x x x

(5) Before effecting sale of the immovable

property referred to in sub-rule (1) of Rule 9, the authorized officer shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods:-

(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.

(6) The authorized officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5):

Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which shall include,_

(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;

(f) any other thing which the authorized officer considers it material for a purchaser to know in order to judge the nature and value of the property.

(7) Every notice of sale shall be affixed on a conspicuous part of the immovable property and may, if the authorized officer deems if fit, put on the web-site of the secured creditor on the Internet.

(8) x x x x ”

Sub-rule (1) of Rule 9 of the Rules is as under:

> “(1) No sale of immovable property under these rules shall take place before the expiry of thirty days from the date on which the public notice of sale is published in newspapers referred to in the proviso to sub-rule (6) or notice of sale has been served to the borrower.
>
> (2) x x x x x ”

29. The bank has filed documents in an attempt to show that the notices issued under Sections 13(2) and 13(4) of the Act and Rules 8 (5), (6) and 9 (1) of the Rules were effected in the manner as provided by the relevant Rules. It is, therefore, relevant to examine whether the documents filed by the bank along with the counter would substantiate that stand of the bank.

30. Copies of notices issued under Section 13(2) of the Act addressed to the petitioners are filed; they were issued on

08-10-2012. Copies of acknowledgments under which notices said to have served on the petitioners are also filed. So far as petitioner Nos.1 and 2 are concerned, one and the same signature is finding place on the acknowledgments. It is no doubt true, petitioner No.2 is the wife of petitioner No.1, but signatures occurring at the relevant places are not reflecting to identify that they relate to petitioner Nos.1 and 2. However, concerning petitioner No.3, his signature is to be found on the acknowledgment.

31. Possession notice under Rules 8(1) and (2) of the Rules was issued on 10-01-2013. The copies of possession notices addressed to petitioner Nos.1 to 3 have been filed along with the acknowledgments. The acknowledgments relating to petitioner Nos.1 and 2 would show the name of one R.V.P. Rao, but his identity is not projected by the bank in its counter as to whether he is the agent of petitioner Nos.1 and 2 and competent to receive the notices on their behalf. Concerning petitioner No.3, his signature is to be found on the acknowledgment indicating that possession notice was effected on him.

32. Concerning the notices issued under Rules 8(5) and (6) of the Rules, copies addressed to petitioner Nos.1 to 3 are filed along with the acknowledgments. Concerning petitioner Nos.1 and 2, though, their addresses are correctly mentioned on the acknowledgments, but at the relevant place as to the signature of the addressee, except affixture of a seal of

‘AIMS COLLEGE OF ENGINEERING (6L)’, nothing-else is finding place. So far as petitioner No.3 is concerned, though, his address is shown in the cause title of the writ petition, thus:

> “Kalidindi Jagannadha Raju S/o Subba Raju, Neelapalli, Tallarevu Mandal, E.G. District,”

the address on the acknowledgment shows as “Sri Kalidindi Jagannadha Raju S/o Sri Subba Raju, Pallipalem, Tallarevu Mandal, EG Dist.”. The endorsement of the postal authorities would show that the addressee was not in the village, hence returned to the sender.

33. So far as notices under Rules 8(5) and 9(1) are concerned, on the acknowledgment relating to petitioner No.1, again the seal of the ‘AIMS COLLEGE OF ENGINEERING’ is affixed; relating to petitioner No.2, one Saritha’s name is found, but not the signature of petitioner No.2; so far as petitioner No.3 is concerned, the postal authorities endorsed that the addressee was not in the village and returned.

34. Thus, except filing copies of notices addressed to petitioner Nos.1 to 3 and the acknowledgments thereof, as detailed in the above, the bank has not chosen to file any photographs reflecting service by affixture or by taking out publication of contents of the demand notice, possession notice and sale notice.

35. We have referred to in the above Rule 3 of the Rules, which mandate the procedure to be followed in effecting notices including any other notices by the mandate of Sub-Rule (3) thereof. The proviso to Sub-Rule (1) of Rule 3 of the Rules would contemplate that if the authorised officer has reason to believe that the borrower or his agent is avoiding service of notice or that for any other reason, service cannot be effected, service shall be effected by affixture on the outer door or some other conspicuous part of the house or building and also by publishing contents of the demand notice in two leading newspapers, one in vernacular language having sufficient circulation in that locality. So far as service of demand notice, possession notice and sale notice on petitioner Nos.1 and 2 are concerned, they were not effected in the manner in which they were required to be effected as per the mandate of Sub-Rule (1) of Rule 3 of the Rules. The bank ought to have followed the procedure contemplated by the proviso annexed thereto. Nothing is forthcoming from the side of the bank that the authorised officer did really attempt to effect notices by resorting to the procedure prescribed by the proviso to Sub-Rule (1) of Rule 3. Further, the bank has not filed any documents to show that the affixture was resorted to, and simultaneously even publication was taken out in two leading newspapers, one in vernacular language having sufficient circulation in that locality.

36. Concerning petitioner No.3, though, it can be construed that notices under Sections 13(2) and 13(4) of the Act were effected on him personally, since his name is to be found in the respective acknowledgments, but notices issued under Rule 8(5) and (6) and Rules 8(5) and 9(1) of the Rules respectively, were not effected on him. We have referred to in the above that the postal endorsements would reflect that he was not in the village. There is absolutely no material placed on record by the bank to show that the service was effected on him, as required by the proviso to Sub-Rule (1) of Rule 3. Thus, it is clear that the stand of the bank that it has effected the notices on petitioner Nos.1 to 3, more particularly, sale notice under Rules 8(5) and (6) of the Rules, dated 24-07-2015, and also the notice issued under Rules 8(5) and 9(1) of the Rules, dated 27-07-2015, is absolutely incorrect.

37. It would be apt to refer to a decision of the Hon'ble Supreme Court in **Vasu P. Shetty v. M/s. Hotel Vandana Palace & others**[1]**,** in the context of effect of sale without complying with the provisions of Rules 8 and 9(1) of the Rules. In paragraph No.13, the Hon'ble Supreme Court, while observing that the opinion of the High Court on the interpretation of Sub-Rules (5) and (6) of Rule 8 of the Rules is flawless, referring to the earlier decision rendered in the case of **Mathew Varghese v. M.**

Amritha Kumarr & others[2]**,** which was also followed in Civil Appeal No.3865 of 2014 titled as **J. Rajiv Subramaniyan & another v. M/s Pandiyas & others** decided on

14-03-2014 observed thus:

> "13. We may point out, at the outset, that the opinion of the High Court on the interpretation of sub-Rules (5) and (6) of Rule 8 of the Rules is flawless. In this behalf it would be pertinent to mention that there is an imprimatur of this Court as identical meaning is assigned to these provisions. In the case of *Mathew Varghese* **v**. *M. Amritha Kumar and Ors. 2014 (2) SCALE 331.* The aforesaid judgment has been followed by this very Bench of the Court in C.A. No. 3865 of 2014 titled as J. *Rajiv Subramaniyan and Anr.* **v**. ***M/s** Pandiyas and Ors.* decided on March 14, 2014, wherein the earlier referred case has been discussed in the following manner:
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> "12. This Court in the case of Mathew Varghese **v**. M. Amritha Kumar and Ors. examined the procedure required to be followed by the banks or other financial institutions when the secured assets of the borrowers are sought to be sold for settlement of the dues of the banks/financial institutions. The Court examined in detail the provisions of the SARFAESI Act, 2002. The Court also examined the detailed procedure to be followed by the bank/financial institutions under the Rules, 2002. This Court took notice of Rule 8, which relates to Sale of immovable secured assets and Rule 9 which relates to time of sale, issue of sale certificate and

delivery of possession etc. With regard to Section 13(1), this Court observed that Section 13(1) of SARFAESI Act, 2002 gives a free hand to the secured creditor, for the purpose of enforcing the secured interest without the intervention of Court or Tribunal. But such enforcement should be strictly in conformity with the provisions of the SARFAESI Act, 2002. Thereafter, it is observed as follows:

“A reading of Section 13(1), therefore, is clear to the effect that while on the one hand any SECURED CREDITOR may be entitled to enforce the SECURED ASSET created in its favour on its own without resorting to any court proceedings or approaching the Tribunal, such enforcement should be in conformity with the other provisions of the SARFAESI Act.”

13. This Court further observed that the provision contained in Section 13(8) of the SARFAESI Act, 2002 is specifically for the protection of the borrowers in as much as, ownership of the secured assets is a constitutional right vested in the borrowers and protected Under Article 300A of the Constitution of India. Therefore, the secured creditor as a trustee of the secured asset cannot deal with the same in any manner it likes and such an asset can be disposed of only in the manner prescribed in the SARFAESI Act, 2002. Therefore, the creditor should ensure that the borrower was clearly put on notice of the date and time by which either the sale or transfer will be effected in order to provide the required opportunity to the borrower to take all possible steps for retrieving his property. Such a notice is also necessary to ensure that the process of sale

will ensure that the secured assets will be sold to provide maximum benefit to the borrowers. The notice is also necessary to ensure that the secured creditor or any one on its behalf is not allowed to exploit the situation by virtue of proceedings initiated under the SARFAESI Act, 2002. Thereafter, in Paragraph 27, this Court observed as follows:

"27. Therefore, by virtue of the stipulations contained under the provisions of the SARFAESI Act, in particular, Section 13(8), any sale or transfer of a SECURED ASSET, cannot take place without duly informing the borrower of the time and date of such sale or transfer in order to enable the borrower to tender the dues of the SECURED CREDITOR with all costs, charges and expenses and any such sale or transfer effected without complying with the said statutory requirement would be a constitutional violation and nullify the ultimate sale."

14. As noticed above, this Court also examined Rules 8 and 9 of the Rules, 2002. On a detailed analysis of Rules 8 and 9(1), it has been held that any sale effected without complying with the same would be unconstitutional and, therefore, null and void.

15. In the present case, there is an additional reason for declaring that sale in favour of the Appellant was a nullity. Rule 8(8) of the aforesaid Rules is as under:

"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."

16. It is not disputed before us that there were no terms settled in writing between the parties

that the sale can be affected by Private Treaty. In fact, the borrowers - Respondent Nos. 1 and 2 were not even called to the joint meeting between the Bank - Respondent No. 3 and Ge-Winn held on 8th December, 2006. Therefore, there was a clear violation of the aforesaid Rules rendering the sale illegal.

17. It must be emphasized that generally proceedings under the SARFAESI Act, 2002 against the borrowers are initiated only when the borrower is in dire-straits. The provisions of the SARFAESI Act, 2002 and the Rules, 2002 have been enacted to ensure that the secured asset is not sold for a song. It is expected that all the banks and financial institutions which resort to the extreme measures under the SARFAESI Act, 2002 for sale of the secured assets to ensure, that such sale of the asset provides maximum benefit to the borrower by the sale of such asset. Therefore, the secured creditors are expected to take bonafide measures to ensure that there is maximum yield from such secured assets for the borrowers. In the present case, Mr. Dhruv Mehta has pointed out that sale consideration is only Rs. 10,000/- over the reserve price whereas the property was worth much more. It is not necessary for us to go into this question as, in our opinion, the sale is null and void being in violation of the provision of Section 13 of the SARFAESI Act, 2002 and Rules 8 and 9 of the Rules, 2002."

38. It is, thus, clear that infraction of mandatory requirement of the Rules renders the sale invalid. In the present case, we have dealt with the infirmities in effecting

demand notice, possession notice and sale notice on the petitioners which would render the sale in favour of the auction purchasers void, as these infirmities cannot lightly be brushed aside. Thus, the instant question is answered in favour of the petitioners and against the bank and the auction purchasers.

39. Turning to the second question posed in the above, it is not in dispute that under one and the same proceedings issued by the Revenue Divisional Officer, Kakinada, all the properties are converted from agriculture to non-agriculture. It is also not in dispute that all the six properties are contiguous constituting a single block, but the question is whether putting all the properties for auction as a single block would fetch adequate amount and would be advantageous to the petitioners or selling the same separately would fetch adequate consideration and would be advantageous to the petitioners.

40. We have referred to the contentions raised by the petitioners as guarantors, the bank as secured creditor and the auction purchasers. However, in our considered view, there appears to be some substance in the submission made by the petitioners to the effect that if the properties were sold separately, it would have been advantageous to them, for the reason that there would have been more number of bidders to compete the bid. Further, there are five guarantors owning six properties

mortgaged in favour of the bank towards security. Each of the properties were purchased under separate and distinct sale deeds showing specific boundaries.

Except stating that conversion of the land from agriculture to non-agriculture is under a single proceeding and all the properties are contiguous, nothing else is projected by the bank to show that the sale of the properties as a single block would fetch higher rate and the same is advantageous to the petitioners. Thus, we find no substance in the argument advanced by the learned counsel for the bank, and even in the stand taken by the auction purchasers that there would not be access to the extents situated on the backside of the subject property in case they were sold separately. Hence, we answer this question also in favour of the petitioners.

41. Before concluding, we feel it appropriate to refer to the scheme of safeguards for protection of borrower's interest under

Rule 9 of the Rules vis-à-vis liability of the lender under the provisions of the Act. The decision rendered by the Hon'ble Supreme Court in **Mardia Chemicals Limited and others v. Union of India and others**[3] would be apt in the context of laying down the principle that possessing more drastic powers calls for exercise of higher degree of good faith and fair-play, which is the basic principle of lender's liability and the right of borrowers to plead in defence deficiencies on the part of banks and financial institutions. The observations of the Hon'ble Supreme Court contained in paragraph Nos.70 and 71 would be relevant for the present purpose, thus:

> "70. At this stage we may also take note of the arguments raised on behalf of the petitioners that in the present-day world concept of lender's liability has also developed which cannot be ignored. We have already referred to certain facts in relation to this point that at one stage a statement was made on the floor of the House that it was necessary to legislate on lender's liability. No such bill though seems to have been introduced. Certain decisions pertaining to the liability of the lenders have been cited on behalf of the petitioners and a few others by the learned counsel for the respondents. Learned counsel for the petitioners emphatically submitted that the Act is loaded against the borrowers and no provision regarding the liability of the lenders has been made in the Act. Given below are some of the cases on the point cited by the parties:
>
> *KMC Co. v. Irving Trust Co. and Palisades Properties, Inc. v. Brunetti.*
>
> 71. Arguments have been advanced as to how far principles of lender's liability are applicable. Whatever be the position, however, it cannot be denied that the financial institutions, namely, the lenders owe a duty to act fairly and in good faith. There has to be a fair dealing between the parties and the financing companies/institutions are not free to ignore performance of their part of the obligation as a party to the contract. They cannot be free from it. Irrespective of the fact

> as to whatever may have been held in decisions of some American courts, in view of the facts and circumstances and the terms of the contract and other details relating to those matters, that may or may not strictly apply, nonetheless, even in absence of any such decisions or legislation, it is incumbent upon such financial institutions to act fairly and in good faith complying with their part of obligations under the contract. This is also the basic principle of the concept of lender's liability.
>
> It cannot be a one-sided affair shutting out all possible and reasonable remedies to the other party, namely, borrowers and assume all drastic powers for speedier recovery of NPAs. Possessing more drastic powers calls for exercise of higher degree of good faith and fair play. The borrowers cannot be left remediless in case they have been wronged against or subjected to unfair treatment violating the terms and conditions of the contract. They can always plead in defence deficiencies on the part of the banks and financial institutions."

Applying the above principles, we are of the considered view, that the bank has not adhered to the mandatory requirements of the provisions of Section 13 of the Act and Rules 8 and 9 of the Rules as discussed by us under the first point.

42. Therefore, we have no hesitation to set aside the sale held on 31-08-2015 pursuant to the auction notice, dated 25-07-2015, acceding to the request of the petitioners and, consequently, direct the Bank to refund

the entire amount of Rs.5,09,43,000/- (Rupees five crores nine lakhs and forty three thousand only) to the auction purchasers. However, we are not inclined to grant any interest on the aforesaid amount to the auction purchasers in view of the fact that though, they have deposited 25% of the bid amount on 31-08-2015, neither they nor the Bank did mention the date of payment of remaining 75% of the bid amount. Further, the bank shall initiate steps from the stage of issuance of demand notice under Section 13(2) of the Act.

43. Therefore, the instant Writ Petition is allowed directing the bank to refund the entire bid amount to the auction purchasers. There shall be no order as to costs.

44. As a sequel thereto, miscellaneous petitions, if any pending in this petition, stand closed.

R. SUBHASH REDDY, J

A. SHANKAR NARAYANA, J

December _____, 2015.
PV/Mgr

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[1] (2014) 5 SCC 660

[2]. 2014 (2) SCALE 331

[3] (2004) 4 SCC 311