

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: February 26, 2015

Pronounced on: March 20, 2015

+ **W.P.(C) 5580/2011**

URMILA KUMARI

..... Petitioner

Through: Mr.Rishi Malhotra and
Mr.B.Veeraswamy Raju, Advs.

versus

OM PRAKASH JANGRA AND ORS

..... Respondents

Through: Ms.Manju Bhagat, Adv. for Mr.
Vineet Bhagat, Adv. for R-1.
Mr.Vinod Trisal, Adv. for R-2 and R-3.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.K.GAUBA

MR. JUSTICE R.K.GAUBA

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1. The petitioner seeks to invoke the civil writ jurisdiction of this court praying for a writ in the nature of certiorari or any other writ for quashing the order dated 28.04.2011 passed by Debts Recovery Appellate Tribunal, New Delhi (hereinafter referred to as "the DRAT") and the subsequent communication dated 30.06.2011 issued in its wake by LIC Housing Finance Ltd. (respondent No. 3) calling upon her to surrender property No. 1735, New Gita Colony, Mirzapur Road, Hissar, Haryana (hereinafter referred to as "the subject property") within a period of three months beginning 28.04.2011.

2. It is necessary to trace the background facts at some length.

3. The first respondent was the owner of the subject property during the

relevant period when on 16.05.2003 he, along with another, approached the third respondent (“the secured creditor”) for a housing loan. The loan of ₹4,50,000/- was sanctioned against equitable mortgage created in respect of the subject property. The loan amount was re-payable over a period of 15 years with equated monthly installment (EMI) settled at ₹4,919/-. It has been the case of the borrower (the first respondent) that only an amount of ₹2 Lacs was disbursed. The lender invoked the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as “the SARFAESI Act”) by initiating action under Section 13 classifying the loan account as Non-Performing Asset (NPA). It is stated that on being served with demand notice, the borrower raised objection under sub-section (3A) of section 13 by way of reply dated 09.09.2005 mainly on the ground that full loan amount had not been disbursed and so the EMIs calculated on the total disbursable amount were not payable and thus the loan amount could not have been classified as NPA.

4. On 13.03.2006, on an application moved by the secured creditor under Section 14 of SARFAESI Act, the District Magistrate, Hissar passed an order directing Superintendent by Police Hissar to provide police assistance for the possession of the subject property to be taken over. It is claimed that after possession had been taken over, *inter alia*, in terms of possession notice dated 20.03.2006 published in local newspapers, the subject property was put to public auction for sale by the secured creditor. It is further stated that the property was purchased in the said public auction by Vijay Kumar Takker (respondent No. 4) for consideration of ₹3,00,001/- in which context a sale certificate was duly issued and registered in his favour.

The petitioner claims that she had purchased the subject property for consideration from the fourth respondent (“the auction-purchaser”) by sale deed executed and registered on 13.12.2007 and accordingly had taken over the vacant physical possession thereof. She claims that after purchasing the property, being in immediate need, she carried out construction and started using it as residence.

5. On 15.02.2008, a securitization application registered as SA No. 24/2008 was filed by the first respondent (borrower) under Section (17)(1) SARFAESI Act before Debt Recovery Tribunal, Chandigarh (DRT), *inter alia*, questioning the action taken by the secured creditor leading to public auction/possession notice etc. The borrower pleaded in the said application, *inter alia*, that the procedure followed in the matter by the secured creditor was not in accord with the requirements of SARFAESI Act or rules framed thereunder. Various objections as to validity of the process leading to the sale by public auction for recovery were taken including one that the date of NPA or particulars of the account were not mentioned in the notice under Section 13(2); the possession notice/sale notice was not published in the vernacular language; the representation sent in response to notice under Section 13(2) of SARFAESI Act had not been disposed of; the determination of reserve price (₹3,00,000/-) and the auction sale price (₹3,00,001/-) was depressed; and since the valuation of the plot at the time of grant of loan was ₹4,50,000/- and also because construction was carried out thereupon, the sale price should have been higher. Above all, the borrower argued mainly that he learnt about the auction under Section 13(4) SARFAESI Act on 02.01.2008 when attempt was made to take over the physical possession of the subject property forcibly, even while no sale

notice or possession notice had ever been served upon him.

6. The petitioner was also impleaded as a party to the securitization application (SA) before DRT. It appears that she resisted the said move of the borrower, *inter alia*, on the grounds that the application under Section 17 SARFAESI Act was filed beyond the period of limitation of 45 days from the date of the measures under Section 13 (leading to the public auction) was not maintainable and also urged that she was a *bona fide* purchaser from the auction-purchaser. She questioned the truthfulness of the contention of the borrower stating he was not in possession of the subject property since possession had been taken over much earlier in the course of process under Section 13 of SARFAESI Act by the secured creditor.

7. The proceedings arising out of the SA under Section 17 of SARFAESI Act (moved by the borrower before the DRT) were also resisted on the additional ground that the auction-purchaser had not been made a party which vitiated the said proceedings due to non-joinder. The fact, however, remains that the petitioner represented the interest of the auction-purchaser in such proceedings.

8. The SA under Section 17 of SARFAESI Act of the borrower was allowed by DRT by its order dated 30.11.2010. She contends that the objections raised, *inter alia*, by the petitioner mainly on the plea of she being successor-in-interest of a *bona fide* purchaser were repelled. She contends that the objections were not properly adjudicated upon. The petitioner and the secured creditor (LIC Housing Finance Ltd.) appealed before the DRAT but without success.

9. The writ petition at hand was entertained by this court by order dated 05.08.2011 whereby rule *nisi* was issued. Interim protection was granted to

the petitioner against dispossession from the property on condition that she would not sell, alienate, transfer or part with possession thereof. The interim protection was made absolute by subsequent order dated 28.02.2012.

10. The petition is resisted mainly by the first respondent (the borrower). The fourth respondent (auction-purchaser) though served has shown disinterest by suffering the proceedings *ex-parte*.

11. On 15.01.2014, the first respondent questioned the maintainability of the writ petition before this court on the ground that there is no territorial jurisdiction. This issue was considered by another Division Bench of this court on 29.01.2014 when the respondent gave up the objection on the issue of territorial jurisdiction, *inter alia*, in light of the decision of the Supreme Court in *Kusum Ingots & Alloys Ltd. v. Union of India and Anr.*, (2004) 6 SCC 254 and instead raised the question of *forum non-conveniens*. The submissions were considered but rejected by order dated 29.01.2014, *inter alia*, holding that the objection would not survive since the petition had already been entertained and Rule DB issued by the court in exercise of its discretion. The order thus passed reads as under:-

“After some arguments the learned counsel for the respondent fairly stated that while this court has territorial jurisdiction to entertain this writ petition, since it is more convenient for the respondents to have the petition heard before the Punjab and Haryana High Court, therefore this court ought not to entertain this petition any further. Two issues arise at this point. One is the issue of territorial jurisdiction and the other is of convenience.

Insofar as territorial jurisdiction is concerned, it has now been conceded by the learned counsel for the respondent that this court has territorial jurisdiction. Even de hors the

concession, we are of the view that this court has territorial jurisdiction to entertain this writ petition inasmuch as the impugned order had been passed by the Debt Recovery Appellate Tribunal which is situated in Delhi. That constitutes a part of the cause of action as held by the Supreme Court in Kusum Ingots & Alloys Ltd. v. Union of India and Anr.,(2004) 6 SCC 254.

Insofar as exercise of discretion on the question of convenience is concerned, we feel that the respondent cannot now raise the issue because the matter was already admitted for hearing by virtue of an order dated 28.02.2008 when another Division Bench of this court had directed the issuance of "Rule DB". In other words this court had exercised its discretion to hear this matter. This point had already been taken in the counter affidavit filed on behalf of the respondent No.1 at the point of time when rule DB was issued. Therefore, there is no occasion for the respondent to raise the issue of exercise of discretion of this court to entertain this petition on the ground of convenience/inconvenience of the parties. Consequently, the objection raised by the learned counsel for the respondents for hearing this petition does not hold good.

Since the writ petition has already been admitted the matter be listed in the category of regular matters as per its turn."

12. Though the objections on the issue of territorial jurisdiction and those founded on the doctrine of *forum non-conveniens* have already been rejected by a reasoned order (as quoted above) in these very proceedings, when the petition came up for final hearing and disposal, the same contentions were re-agitated, now placing reliance additionally on *Sterling Agro Industries Ltd. v. Union of India* 181 (2011) Delhi Law Times 658 (5 Judges Bench), and two other decisions rendered by learned single judges viz. *Rattan Singh Associates (P) Ltd. v. Gill Power Generation Company Pvt. Ltd.* 136 (2007) Delhi Law Times 629 Delhi High Court and *Chinteshwar Steel Pvt. Ltd. v.*

Union of India LPA 801/2012 (decided on November 26, 2013) first in the context of application under Arbitration and Conciliation Act, 1996 and the other against the backdrop of controversy relating to Mines and Minerals (Development and Regulations) Act, 1957.

13. We have considered the plea again in light of the case law now cited, but find no reasons to take a view different from the one taken by the Division Bench which passed the order rejecting these very contentions on 29.01.2014. In *Sterling Agro* (supra), the larger bench (5 judges) of this court had recognized the permissibility for High Court to “refuse to exercise its discretionary jurisdiction” by invoking doctrine of *forum conveniens* on a petition preferred under Articles 226/227 of the Constitution of India. The said case is no authority to support the contention that the High Court is unexceptionally bound to refuse to exercise the discretionary jurisdiction for such reasons.

14. In our view, the law laid down by the Supreme Court in *Kusum Ingots & Alloys Ltd.* (supra) governs the issue. It is well-settled that even if a small fraction of the cause of action accrues within the jurisdiction of the court, the court may exercise the jurisdiction and since the order of the appellate authority which is the subject matter of challenge constitutes part cause of action to invoke the writ jurisdiction of the High Court, the petition can be maintained before the High Court within the territorial jurisdiction of which the appellate authority is located. This view in *Kusum Ingots & Alloys Ltd.* (supra) was reiterated by Supreme Court in *Canon Steels (P)Limited v. Commissioner of Customs* (2007) 14 Supreme Court Cases 464. The objection based on the doctrine of *forum non-conveniens* having already been rejected, the issue cannot be allowed to be re-opened.

15. The first respondent (borrower) defends the impugned orders of the DRT and the DRAT on the application under Section 17 SARFAESI Act on the ground that the entire process was vitiated and the proceedings under Section 13 SARFAESI Act initiated by the secured creditor having been set at naught, it is only just and proper that *status quo ante* be revived and the parties restored to their respective positions prior to such action. Reliance is placed on *Mathew Varghese v. M. Amritha Kumar & others* (2014) 5 SCC 610 to contend that any sale or transfer of secured asset under SARFAESI Act in violation of the mandatory requirements of law and rules framed thereunder is bound to be treated as invalid and, therefore, has rightly been so held by the authorities below. It is argued that the respondent bank (secured creditor) not having challenged the impugned orders, the petitioner, a third party which had stepped into the property consequent upon such sale as has been held to be effected pursuant to invalid proceedings cannot be allowed to continue to hold onto it to the detriment of the right, title or interest of the original owner.

16. *Per contra*, the petitioner relies on *Sadashiv Prasad Singh v. Harender Singh*, 2014(1) SCALE 230 (SC) to contend that there is no justification whatsoever to disturb the vested rights of the petitioner in the property in question she being the successor-in-interest of the auction-purchaser *bona fides* of whose claim cannot be, and have not been, doubted since he had participated in the public auction and purchased the property genuinely and legitimately.

17. In *Sadashiv Prasad Singh* (supra), the property of the mortgager had been attached and subjected to sale by public auction by the Recovery Officer in discharge of the debt owed by the borrower in proceedings taken

out by the bank (the secured creditor) before the Debts Recovery Tribunal (DRT). The brother of the mortgager had filed objection petition, *inter alia*, claiming that the attached property had been purchased by him on the basis of agreement to sell. The objection petition, however, was abandoned midway the proceedings. Subsequently, the property was sold by the Recovery Officer in favour of the appellant, as he was the highest bidder. The objector challenged the sale by way of writ petition before the High Court and in the course of proceedings arising therefrom even offered a sum higher than the highest bid amount.

18. Section 29 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDBFI Act), *inter alia*, applies, *mutatis mutandis*, provisions of the second schedule to the Income Tax Act, 1961 and Income Tax (Certificate Proceedings) Rules (framed thereunder) to the recovery proceedings initiated pursuant to recovery certificates issued by DRT. The High Court of Judicature at Patna, in the case of *Sadashiv Prasad Singh* (supra), set aside the sale of the property by public auction in favour of the appellant primarily on the basis of holding that there had been flagrant violation on Rule 11(2) of the said rules under the Income Tax Act, inasmuch as the objections initially raised by the brother of the mortgager had not been adjudicated upon. While setting aside the auction sale in favour of the appellant, the Court proceeded to work out the equities between the parties whereunder the money invested by the auction-purchaser, along with interest, were directed to be refunded.

19. In the civil appeal by special leave by the appellant before the Supreme Court, it was contended that property purchased by a third party auction-purchaser, in compliance of a court order, could not be interfered

with on the basis of success or failure of parties to a proceeding, if auction-purchaser had *bona fide* purchased the property. Reliance was placed, *inter alia*, on *Ashwin S. Mehta & Anr. v. Custodian & Ors.*, (2006) 2 SCC 385 and *Janatha Textiles & Ors. v. Tax Recovery Officer & Anr.*, (2008) 12 SCC 582.

20. In *Ashwin S. Mehta & Anr.* (supra), the Supreme Court had ruled thus:-

*“In that view of the matter, evidently, creation of any third-party interest is no longer in dispute nor the same is subjected to any order of this Court. In any event, ordinarily, a bona fide purchaser for value in an auction-sale is treated differently than a decree-holder purchasing such properties. In the former event, even if such a decree is set aside, the interest of the bona fide purchaser in an auction-sale is saved. (See *Nawab Zain-ul-Abdin Khan v. Mohd. Asghar Ali Khan* (1887) 15 IA 12). The said decision has been affirmed by this Court in *Gurjoginder Singh v. Jaswant Kaur* (1994) 2 SCC 368).”*

[emphasis supplied]

21. In *Janatha Textiles & Ors.* (supra), the ultimate conclusion was that a third party auction-purchaser’s interest vis-à-vis the auction property continues to be protected, notwithstanding the fact that the underlying decree subsequently stands set aside. The Supreme Court observed that:-

“Law makes a clear distinction between a stranger who is a bona fide purchaser of the property at an auction-sale and a decree-holder purchaser at a court auction. The strangers to the decree are afforded protection by the court because they are not connected with the decree. Unless the protection is extended to them the court sales would not fetch market value or fair price of the property.”

[emphasis supplied]

22. Of course, referring to *Velji Khimji and Company v. Official*

Liquidator of Hindustan Nitro Product (Gujarat) Limited & Ors. (2008) 9 SCC 299, the court added the caveat that the above rule would exclude the exceptional cases such as of “fraud” or “collusion”. The order of the High Court setting aside the auction sale in *Sadashiv Prasad Singh* (supra) was, thus, held to be “uncalled for” interference “even on ground of equity” because “the auction-purchaser was a *bona fide* purchaser for consideration, having purchased the property in furtherance of a duly publicized public auction.”

23. The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) was enacted to regulate, *inter alia*, “enforcement of security interest”, noting in the statement of objects and reasons that “*our existing legal framework relating to commercial transactions has not kept pace with the changed commercial practices and finance sector reforms*” and that unlike international banks the “*banks and financial institutions in India do not have power to take possession of securities and sell them*” on which account there has been a “*slow pace of recovery of defaulting loans and mounting levels of non-performing assets of banks and financial institutions*”. The law, thus, has conferred on the banks and financial institutions the power “*to take possession of securities given for financial assistance and sell or lease the same or take over management in the event of default, i.e. classification of the borrower’s account as non-performing asset in accordance with the directions given or guidelines issued by the Reserve Bank of India from time to time*” and, for such purposes, has defined the expression “security interest”, made incidental provisions including in the nature of remedies in the form of appeal, etc.

24. The expression “security interest” as defined in Section 2(1)(zf) SARFAESI Act means “right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in section 31”. Similarly, in terms of Section 2(1)(zc) SARFAESI Act, the expression “secured asset” means “*the property on which security interest is created.*” For purposes of this special law, “banks” and “financial institutions”, defined in Section 2(1)(c) and (m) respectively, qualify, as per Section 2(1)(zd), to be treated as “secured creditor”.

25. Under the general law, by virtue of Section 69 of the Transfer of Property Act, 1882, a mortgagee in certain specified category of mortgages, has the power “*to sell the mortgaged property in default of payment of the mortgaged money*”, also “*without the intervention of the court*”, subject, however, to compliance with the procedure prescribed in the said provision. The categories specified in Section 69(1) to which the said power of sale concerns, include English mortgage (which excludes certain specified classes), and cases where such power of sale without the intervention of the court is “*expressly conferred on the mortgagee by the mortgaged deed*” wherein either the mortgagee is the government or the mortgaged property is situate in specified towns. Section 69A of the Transfer of Property Act relates to the appointment of receiver in cases governed by Section 69.

26. Section 13 of the SARFAESI Act is conceived as the code prescribed for “enforcement of security interest” by the secured creditors, *inter alia*, for whose purposes the law was enacted. It opens with non-obstante clause and declares upfront that the provision herein is made, over and above, what is available under the general law through Section 69 and 69A of Transfer of

Property Act.

27. Lest there be any doubt left, Section 37 of SARFAESI Act makes it further clear that the provisions of this law, or rules made thereunder, have been enacted “in addition to, and not in derogation of” other laws including the RDDBFI Act.

28. Section 13 of SARFAESI Act vests in the secured creditor, the power to enforce the security interest “*without the intervention of the Court or Tribunal*”. It may be noted, at the outset, that the rights thus conferred on the secured creditor are exercisable, by virtue of Section 13(12) through officers duly authorized in such behalf. For such purposes, the legislation sets out an elaborate procedure that begins with a notice under Section 13(2) issued by the secured creditor (giving requisite details of the amount due and the secured assets in which respect the enforcement is intended) and addressed to the borrower-in-default requiring him “to discharge in full his liabilities” within 60 days. On the expiry of the said period of 60 days calculated “from the date of notice” if the default continues, the secured creditor acquires the title to proceed further.

29. Upon being served with a notice under Section 13(2), the borrower is given the liberty, by Section 13(3A), to object or make any representation and in the event of such objection or representation, the secured creditor is obliged to consider it and communicate his response (specifying the reasons) within a week. Of course, by virtue of proviso to Section 13(3A), the non-acceptance of the objection or representation at this stage does not confer on the borrower any legal remedy in the nature of appeal or application.

30. In the event of failure on the part of borrower to discharge his liability in full, in terms of the notice under Section 13(2), the secured creditor is

permitted, by Section 13(4), to take recourse to any of the measures indicated in the said clause “to recover his secured debt”. The measures include taking of the “*possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset*”. Noticeably, Section 13(4) broadly indicates the said measures, pursuit whereof requires compliance with the procedure that is laid out in detail thereafter.

31. It is pertinent to add here that since taking over the possession of the secured asset is such action as is expected invariably to meet with some resistance, SARFAESI Act further provides, by Section 14, for requisite assistance of judicial or executive authorities. In terms of Section 14, a secured creditor, who has made out a case to proceed to take possession of a secured asset, after requisite compliance with Section 13, is given the option to approach the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction the secured asset or other documents relating thereto may be situate or found to direct to take, or cause to be taken, such steps as may be necessary to facilitate the possession thereof to be taken for such purposes.

32. Mere taking of possession of the secured asset of the borrower in terms of Section 13(4A), with the aid of Section 14, itself does not immediately lead to the realization of the money due from the borrower; the secured creditor, having taken over the possession of the secured asset, must take certain further steps in the “manner” prescribed, *inter alia*, in terms of Section 13(12) read with Section 38 SARFAESI Act, in the form of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as “the 2002 Rules”), to sell the property.

33. Rule 3 of the Security Interest (Enforcement) Rules, 2002 prescribes the mode of service of the demand notice under Section 13(2). Rule 8 deals at length with the procedure required to be followed, *inter alia*, for taking possession and sale of immoveable secured assets.

34. What needs to be particularly noted here is that the process commences with delivery of “possession notice”, prepared in the prescribed format, and served by affixation on the outer door or at a conspicuous place of the property. The delivery of the possession notice constitutes, under Rule 8(1), the taking of possession of the secured immoveable property. This act, however, is required to be followed by publication of the possession notice in two leading newspapers (at least one of which is in vernacular language), having sufficient circulation in the locality in question. Once possession is taken over by the authorized officer of the secured creditor, he is expected to first take steps for ensuring preservation and protection of the secured asset and obtain valuation of the asset from an approved valuer, *inter alia*, for purposes of fixing the reserved price in terms of Rule 8(5).

35. For bringing the property to sale, the secured creditor (through its authorized officer) is required, by virtue of Rule 8(6), to issue and serve on the borrower “a notice of 30 days for sale of the immoveable secured asset”. The notice of sale is also required to be given widest possible publicity, including, in terms of Rule 8(7), by way of affixing on a conspicuous part of the immoveable property, and if deemed fit, by publication on the website of the secured creditor.

36. There are several modes of disposal of the property at the hands of the secured creditor for purposes of realization of its dues. Barring agreement

of parties (necessarily the secured creditor and borrower) for sale by some other method, the mode of sale through “public auction” or “public tender” are the modes compulsorily required to be adopted in terms of Rule 8(8). In this view, in terms of proviso to Rule 8(6), the sale by “public auction” or “public tender” must be preceded by publication of a public notice published in two leading newspapers (at least one in vernacular language) having sufficient circulation in the locality setting out the terms of sale which necessarily would include not only the description of the immoveable property intended to be sold but also the details of encumbrances, the secured debt being recovered, reserve price, time and place of public auction, etc. Rule 9(1) prescribes that there must be a time lag of minimum 30 days between the date of publication of the public notice of sale in terms of Rule 8(6) and the sale of the property. Of course, in terms of Rule 9(2), sale cannot be confirmed, unless the borrower consents, at a price lower than the reserved price.

37. The sale of immoveable property under the prescribed procedure is “confirmed in favour of the purchaser” who has offered the highest sale price to the authorized officer but is subject to “confirmation by the secured creditor”. Detailed provisions are made in the rules as to the period within which the sale price is to be paid or deposited, the minimum period being “on or before the 15th day of confirmation of sale” in terms of Rule 9(4), which period may be extended. Upon confirmation, necessarily after deposit of the money, the property is delivered by the authorized officer to the purchaser, in terms of Rule 9(9), free from encumbrances “known to secured creditor” followed by “a certificate of sale”, “in prescribed format”, under Rule 9(6).

38. Thus, the procedure for effecting the sale of a secured asset in the nature of immoveable property is a long drawn process strewn with several stages where notices are to be issued, served or published, generally speaking, for keeping all concerned or those interested duly informed but, more particularly, in order to keep the borrower (whose property is the subject matter of such process) in the loop. The objective behind this scheme of things is not difficult to comprehend. The law appreciates that the borrower is bound to be deeply concerned and, thus, might be interested in discharging his liability to the secured creditor otherwise than by having the mortgaged property brought under the hammer, and for such purposes may like to seek redemption. It is with this view that Section 13(8) SARFAESI Act provides as under:-

“13(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 secured asset.”

[emphasis supplied]

39. The procedure prescribed by the law, and rules, for enforcement of security interest, as noted above, at the hands of the secured creditor (or its authorized officer) is subject to the remedy of appeal before the Debts Recovery Tribunal (DRT), constituted under RDDBFI Act, in terms of Section 17 SARFAESI Act. As noted earlier, mere non-acceptance of the objection or representation in response to the initial notice under Section 13(2) does not confer the right of challenge through appeal. The remedy of appeal becomes available as soon as effective action, including taking over

of possession of the secured asset (and further process in the nature of sale, etc.) commences. The test to which the process undertaken by the secured creditor is subjected by DRT is indicated in Section 17(2) as under:-

“17(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.”

[emphasis supplied]

40. Noticeably, the insistence of the law is that the secured creditor in order to exercise its right to enforce security by bringing the secured asset of the borrower to sale (etc.) must ensure that it has invoked the permissible “measures” strictly “in accordance” with the provisions of law and rules made thereunder. In the event of DRT finding the recourse to be in accord with the law, the secured creditor is entitled to proceed further. But, in case the finding of DRT on this score is in the negative, there may be a need to modulate the relief to the affected party in such manner as can ensure effective justice and restore equities if the valuable rights or interests have been unduly disturbed. For such purposes, it is necessary to extract the provision contained in Section 17(3) as under:-

“17(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 secured assets to the borrower or restoration of possession of the secured assets of 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 assets as invalid and restore the possession of the secured assets to the borrower or restore the management of the secured assets 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.

[emphasis supplied]

41. The law recognizes the primacy of the right of the mortgagor to redemption. Section 60 of the Transfer of Property Act, 1882 sets out this right in the following terms:-

***“60. Right to mortgagor to redeem.**—At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:*

Provided that the right conferred by this section has not been extinguished by act of the parties or by decree of a Court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

***Redemption of portion of mortgaged property.**—Nothing in this section shall entitle a person interested in a share only of*

the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share or a mortgagor.”
[emphasis supplied]

42. The SARFAESI Act does not in any manner abrogate or dilute, and instead only reinforces or gives due protection to, the statutorily recognized right of the mortgager to redemption, which inures till the time of registration of the sale in the event of secured creditor enforcing it. Thus, in this scheme of things, a borrower can tender to the secured creditor the dues together with all costs, charges and expenses incurred by the secured creditor at any time before the property is brought to sale or transfer. In the event of such tender, the statutory mandate is that the secured asset cannot be sold or transferred. All actions in the direction of sale or transfer must stop forthwith.

43. It is against the above backdrop that the Supreme Court in the case of *Mathew Varghese* (supra), *inter alia*, observed thus:-

“29.4. 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 or at least ensure that in the process of sale the secured asset derives the maximum benefit and the secured creditor or anyone on its behalf is not allowed to exploit the situation of the borrower by virtue of the proceedings initiated under the SARFAESI Act. ...

30. ... 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.”

[emphasis supplied]

44. A fact situation similar to the one in *Mathew Varghese* (supra) came up before the Supreme Court in the case of *J. Rajiv Subramaniyan and Another v. Pandiyas and Others*, (2014) 5 SCC 651. Besides non-compliance with other requirements of Rule 8 of 2002 Rules, sale effected by the secured creditor in favour of the appellant in that matter “by private treaty” (one of the methods permitted for enforcing recovery) was held to be null and void, it having been brought about without the terms to such effect being “settled between the parties in writing” in terms of Rule 8(8). The ruling in *Mathew Varghese* (supra) was reiterated pointing out that the secured creditor having resort to the extreme measures under SARFAESI Act are expected to take “*bona fide measures*”, *inter alia*, to ensure that the borrower is clearly put on notice of the impending sale or transfer so that he can take all possible steps for retrieving his property, also to ensure that the secured asset is sold to provide maximum benefit and indeed that neither the secured creditor nor anyone on his behalf is able to “exploit the situation”. Noticeably, the Supreme Court equated the secured creditor with a “trustee” vis-à-vis the secured asset.

45. In *J. Rajiv Subramaniyan* (supra), the sale in favour of the purchaser (in SARFAESI Act proceedings) having been set aside, the relief was moulded so as to protect his interest as well.

46. The SARFAESI Act confers upon the secured creditor a right of enforcement of far-reaching import. The secured creditor is spared the rigor of approaching the judicial forums. It does not require “intervention” of a Court or Tribunal, except, of course, for limited purposes of assistance to take possession (Section 14). In a manner of speaking, the secured creditor has acquired under SARFAESI Act the power to be a judge of its own cause, one it is espousing, prosecuting and executing. In construing some of the provisions of this enactment, the Supreme Court, in the case of *Mardia Chemicals Ltd. v. Union of India*, (2004) 4 SCC 311 (Para 60), found it to be “*leaning one-sidedly in favour of the party, who, so far has alone been the party to decide the amount ... without participation/association of the borrower in the process*”. With power of such amplitude having been entrusted in its hands, the law legitimately expects and commands that all actions of the secured creditor towards this end would adhere scrupulously, and without let, in letter and spirit, to the prescribed procedure. Since it is likely that the jurisdiction conferred on the secured creditor to enforce the secured debt may lead to deprivation of the property of the borrower which, by virtue of Article 300-A of the Constitution of India, cannot occur “save by authority of law”, the Supreme Court in the case of *Ram Kishun v. State of U.P.*, (2012) 11 SCC 511 poignantly observed thus:-

“13. Undoubtedly, public money should be recovered and recovery should be made expeditiously. But it does not mean that the financial institutions which are concerned only with the recovery of their loans, may be permitted to behave like property dealers and be permitted further to dispose of the secured assets in any unreasonable or arbitrary manner in flagrant violation of the statutory provisions.”

[emphasis supplied]

47. Clearly, the authority to adjudicate and enforce (execute) a private claim (secured asset) placed by the law in the hands of the claimant (secured creditor) itself is indeed an extraordinary measure, particularly because it is in the teeth of the principles of natural justice doctrinal rule wherein it that no one shall be a judge of own cause. Such extraordinary power cannot come but with extraordinary responsibility. The entity so authorized must adhere to the prescribed procedure. Departure from the prescribed procedure cannot be countenanced; the concerned Tribunals or Courts can take appropriate measures to set at naught the entire process undertaken by the private entity (the secured creditor) under the colour of the authority given to it by the law (SARFAESI Act).

48. In allowing the application under Section 17 of SARFAESI Act of the first respondent, the DRT by its order dated 30.11.2010 returned findings to the effect that the representation submitted by the first respondent, under Section 13(3A) of SARFAESI Act had not been disposed of and that mandatory requirement of Rule 8(1)(2) of the Security Interest (Enforcement) Rules, 2002 had not been complied with. It found fault with the classification of the account of the first respondent as NPA observing that this had been done “without application of mind” and further that even the notice under Section 13(2) SARFAESI Act was deficient since the factum of the account having been declared NPA or the date of NPA had not been indicated. The DRT upheld the contention of the first respondent with regard to the reserve price based on the valuation at ₹3 Lacs against the backdrop of the fact that at the time of sanction of the loan the property had been valued for ₹4.50 Lacs, holding the sale proceedings to be suspect on

account of the further fact that the sale had been confirmed by adding just one rupee over and above the reserve price. It held the entire proceedings under Section 13(2) and 13(4) of SARFAESI Act undertaken by the third respondent as “illegal and invalid”. While setting aside the action under SARFAESI Act, the third respondent was given liberty to proceed afresh for recovery of its outstanding dues after following the due procedure of law. In view of this result of the application under Section 17 of the first respondent, the DRT declined to go into the objections, *inter alia*, of the petitioner.

49. The aforementioned findings of fact rendered by DRT were upheld by DRAT in the appeals taken out by the petitioner and the third respondent. Dealing with the contentions of the petitioner, the DRAT noted that the subject property had been sold in her favour “hurriedly” by the auction-purchaser. Taking note of her stake in the matter, while upholding the directions of DRT setting aside the sale, and the liberty given to proceed ahead for recovery of its dues, the third respondent was directed by DRAT to pay to the petitioner sale price realized in the auction (₹3,00,001/-) from the auction-purchaser along with simple interest calculated @ 8% from the date of the receipt till payment. The DRAT has directed the petitioner to handover the possession of the property to the third respondent within the time specified. On the other hand, the third respondent has been granted the liberty to “retain the possession” of the property “till it is re-auctioned”. Both the borrower and the petitioner (successor-in-interest of the auction-purchaser) have been given liberty to participate in such re-auction which is, however, subject to the right of the borrower of “paying the outstanding dues” under Section 13(8) of SARFAESI Act.

50. Neither the third respondent whose action under SARFAESI Act was

impeached nor the fourth respondent (the auction-purchaser) have challenged the impugned order of DRAT by any further proceedings. Insofar as they are concerned, the findings have attained finality.

51. On the above facts and in the circumstances, the petitioner, not a party to the proceedings leading to the sale, cannot be allowed the liberty of defending the indefensible. There are consistent findings recorded by the two statutory forums below that the entire process undertaken by the third respondent under the colour of authority of Section 13 SARFAESI Act was vitiated. The borrower/mortgager did not have sufficient notice at the crucial stages of the process. His rights were, thus, violated. In the fact-situation noted above, the transfer of his property by way of auction-sale in favour of the fourth respondent was wholly impermissible, unjust and illegal. The manner in which the authorized officer of the third respondent went about putting the property to sale was, to say the least, irresponsible and arbitrarily in flagrant violation of statutory provisions, hardly the conduct expected of a “trustee”. The petitioner may have been a *bona fide* purchaser of the subject property from the fourth respondent. But, this cannot be said of the fourth respondent himself. He was the beneficiary of an auction-sale which has been found to be highly suspect, particularly on account of undervaluation for fixing the reserve price and the consideration for which it was sought to be sold (adding just rupee one to the undervalued reserve price).

52. The case of auction-purchaser under SARFAESI Act cannot be equated with that of an auction-purchaser in a sale monitored by a court of law, particularly when there are reasons to suspect the *bona fide* of the process by which such auction is conducted. In this view, there cannot be an

unexceptional rule that an auction-purchaser (or his successor-in-interest) be afforded protection with regard to the interest he acquires in the auctioned property. For purposes of SARFAESI Act, we would, thus, add the case of “illegal transfer” to the exceptions on account of “fraud” or “collusion” as the considerations on which auction-sale in favour of strangers (third party) may also be set aside.

53. It is not the conduct of the petitioner that had to be scrutinized. The fate of her claim hinges on the *bona fides* of the process through which her predecessor-in-interest acquired title. The action under Section 13 SARFAESI Act having been found to be illegal and vitiated, the sale in favour of the fourth respondent and, in turn, in favour of the petitioner, cannot be saved. We have, thus, no hesitation in upholding the directions of DRT, and DRAT, to the effect of setting aside the sale proceedings. But, at the same time, we find that the authorities below have not issued further requisite directions to properly protect the interests of the petitioner.

54. It is claimed by the auction-purchaser that after having acquired the title of the subject property, being in need of residence, she undertook construction and the house built on the plot of land has been in her use ever since. It is urged on her behalf that it would be grossly unfair, unjust and harsh to dislodge her from the subject property for infractions not attributable to her or to her predecessor-in-title (the auction-purchaser).

55. The provisions contained in Section 51 and 63A of the Transfer of Property Act are germane to the issue raised. The said provisions of law read as under:

“51. Improvements made by bona fide holders under defective titles.—When the transferee of immoveable property makes any

improvement on the property, believing in good faith that he is absolutely entitled thereto, and he subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell interest in the property to the transferee at the then market value thereof, irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.”

“63A. Improvements to mortgaged property.—(1) *Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, been improved, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled to the improvement; and the mortgagor shall not, save only in cases provided for in sub-section (2), be liable to pay the cost thereof.*

(2) *Where any such improvement was effected at the cost of the mortgagee and was necessary to preserve the property from destruction or deterioration or was necessary to prevent the security from becoming insufficient, or was made in compliance with the lawful order of any public servant or public authority, the mortgagor shall, in the absence of a contract to the contrary, be liable to pay the proper cost thereof as an addition to the principal money with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent per annum, and the profits, if any, accruing by reason of the improvement shall be credited to the mortgagor.”*

56. The petitioner, after purchasing the property on 13.12.2007 and having raised further construction, has been using the subject property for her residence. Undoubtedly, the auction-sale in favour of her predecessor-in-interest having been set aside, she has no subsisting right, title or interest left in the subject property. As a consequence of the auction-sale being set aside the petitioner (*bona fide* purchaser) faces the prospect of losing the property. She, however, cannot be denied the value of the improvements made by her in the property after acquiring it for consideration. The spirit of Sections 51 & 63-A of Transfer of Property Act will have to be enforced in her favour.

57. In order to acquire the property (or to regain the title, if we may say so), the petitioner would need to participate in the fresh auction proceedings for conduct of which liberty has been granted by the authorities below to the third respondent (secured creditor). In such fresh auction proceedings, she would be competing against other bidders which may include the borrower, the first respondent. The fresh auction of the property would necessarily have to be arranged on the basis of the current market value of the subject property. The current market value would undoubtedly include the value of the construction which was carried out by the petitioner from her own resources. The petitioner would need to be compensated appropriately for the value addition made by her to the subject property after she had purchased it from the fourth respondent on 13.12.2007.

58. Though the DRAT fixed a timeframe for the petitioner to hand-over the possession of the subject property to the secured creditor (third respondent) and also allowed to the latter the liberty of putting it to re-

auction (with further right given to retain it till the fresh auction is held), strangely, no time-frame for such further proceedings to be conducted has been specified. With stakes of a third party, a *bona fide* purchaser from the auction-purchaser, also having come to be involved, some further directions were necessary to balance out the equities.

59. As noted earlier, one of the grievances raised by the first respondent in the SA filed before the DRT was that the representation made in response to notice under Section 13(2) SARFAESI Act had not been disposed of. It appears that the first respondent had questioned the correctness of the calculation of the amount claimed by the third respondent as due, amongst others, for the reason the interest has been calculated on the total amount of loan sanctioned which was not fully disbursed. Neither DRT nor DRAT considered this aspect in their respective orders.

60. Having regard to the facts and in the circumstances of the case, while upholding the directions of the DRT and DRAT in setting aside the auction sale in favour of the fourth respondent, we direct as under:-

- (i) The DRT is directed to determine the liability of the first respondent towards the third respondent in the context of loan availed, by adjudicating upon the contentions raised in the SA in such regard. Having regard to the need for expedition, DRT shall render its findings within two months from the date of this judgment. For such purposes, the first respondent and the third respondent shall appear before the DRT at 02:30 P.M. on 24.03.2015;
- (ii) The third respondent (LIC Housing Finance Ltd.) shall arrange for the subject property, which includes the super-structure

raised on a plot of land by the petitioner (Urmila Kumari), to be appropriately evaluated by an approved valuer in terms of Rule 8(5) of the Security Interest (Enforcement) Rules, 2002 at the earliest, not later than two months from the date of this judgment. In such exercise, the approved valuer shall be called upon to indicate separately the valuation of the super-structure constructed by the petitioner after she had acquired the property by sale deed dated 13.12.2007. The valuer shall also compute the value of the mesne profits payable by the occupant/user, taking into account the current rental value of the subject property. In such valuation proceedings, the petitioner and the third respondent shall be allowed to participate and give requisite inputs;

- (iii) After the above exercise has been completed, preferably within one month of obtaining the valuation from the approved valuer, the third respondent shall compute, with assistance of the petitioner, the value of her interest, that is to say, the amount paid by her as consideration at the time of purchase of the subject property from fourth respondent on 13.12.2007, along with simple interest calculated @ 8% per annum, in addition to the value (as estimated by the valuer) of the improvements made by her *bona fide* with simple interest at similar rate thereupon (hereinafter referred to as “the amount payable to the petitioner”);
- (iv) The third respondent shall thereafter offer an opportunity for redemption to the first respondent who will be obliged to

deposit with the third respondent, within 15 days of such offer, an amount equivalent to the value at which the subject property has been assessed by the approved valuer or the outstanding dues (the principal loan amount disbursed discounted by amount repaid, if any, with up-to-date interest) owed to the third respondent together with the amount payable to the petitioner, whichever is more;

- (v) In the event of the first respondent failing to deposit the amount in terms of the preceding clause within the time granted, the third respondent shall offer to sell the subject property in favour of the petitioner for consideration equivalent to the value at which it has been assessed by the approved valuer, reduced by an amount equivalent to the amount payable to the petitioner as above, she being obliged to make such deposit with the third respondent within four weeks of such offer;
- (vi) In the event of the petitioner failing to deposit the amount in terms of the preceding clause within the time granted, the third respondent shall proceed to put the property to sale through public auction in accordance with the provisions of SARFAESI Act read with the Security Interest (Enforcement) Rules 2002 wherein the value of the subject property as assessed in accordance with above-mentioned directions shall be treated as the reserve price. Needless to add, the first respondent (borrower/mortgager) and the petitioner shall also be allowed to participate in such auction proceedings;
- (vii) The statutory right of the first respondent (borrower) to redeem

the mortgaged property is protected to the effect that he shall be entitled to discharge his liability towards the third respondent in terms stated above at any point of time before the sale of the subject property in favour of the petitioner or a purchaser in the re-auction is confirmed in accordance with the law and rules indicated above;

- (viii) In the event of the first respondent discharging his liability as above, from out of the amounts deposited by him, the amount payable to the petitioner shall be released to her by the third respondent without delay, not later than 15 days of such deposit;
- (ix) In the event of the petitioner availing of the offer of sale of the subject property in her favour in terms of the above directions, the third respondent after realizing its dues from the amount deposited, shall release the remainder, if any, to the first respondent without delay, not later than 15 days of such deposit;
- (x) In the event of the subject property being sold by way of re-auction, upon such sale being confirmed in accordance with law, the amount payable to the petitioner shall be released to her by the third respondent without delay, not later than 15 days of deposit of the auction sale price. Further, the third respondent after realizing its dues from such amount of auction sale price, shall release the balance the remainder, if any, to the first respondent without delay, not later than 15 days of such deposit; and

- (xi) The petitioner is given liberty to continue to be in possession of the subject property during the above-mentioned exercise subject to her furnishing an undertaking that in the event of the mortgaged property being redeemed or being put to sale by way of public auction in favour of any person other than herself, to handover the vacant possession thereof and to pay mesne profits at the rate assessed by the approved valuer in terms of the above-mentioned directions calculated from the date of this judgment till the date she is obliged to vacate the property on account of such redemption/sale. If the petitioner opts to retain the possession in terms of this direction, she would be bound to furnish the undertaking within two months of this judgment and in case she does not so opt, she shall hand over the vacant possession of the property to the third respondent before the expiry of said two months.
- (xii) The third respondent shall carry out the further process expeditiously in compliance with above directions in accordance with law.

61. The petition is disposed of in the above terms.

R.K.GAUBA
(JUDGE)

S. RAVINDRA BHAT
(JUDGE)

March 20, 2015
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