IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.10743 OF 2016

Athani Sugars Limited,
a Company incorporated and registered
under the provisions of Indian Companies
Act, 1956 having its registered office
at Vishnu Anna Nagar, Post Navalihal,
Taluka Athani, District: Belgavi
through the Director
Shri Sushant Shrimant Patil,
Age: 28 years, Occ: Business,
r/o Plot No.20, Vasant Housing
Society, Near Market Yard,
Sangli – 416 416. .... Petitioner

- Versus -

1. Indira Gandhi Bharatiya Mahila Vikas Sahakari Sakhar Karkhana Limited, a co-operative sugar factory registered under the provisions of Maharashtra Cooperative Societies Act, 1960, having its office at Anturli (Tambale), Taluka Bhudargad, Dist: Kolhapur.

2. M/s. Vyankateshwar Suppliers through Mr. Arvind Malappa Enapure Office: At Kawathe Ekand, Taluka-Tasgaon, Dist: Sangli.

3. Dalamiya Bharat Sugars Limited, 11th and 12th floor, Hansalaya Building, 15, Barkhamba Road, New Delhi Pin 110 001.

4. I.D.B.I. Bank Limited
having its office at N.M.G. West-1,
I.D.B.I. Tower, 4th floor, Plot No.C-7,
Block G, Opp: N.S.E. B.K.C. Bandra(E),
Mumbai.

5. The Authorized Officer,
I.D.B.I. Bank Limited
having its office at N.M.G. West-1,
I.D.B.I. Tower, 4th floor, Plot No.C-7,
Block G, Opp: N.S.E. B.K.C. Bandra(E),
Mumbai. .... Respondents

Mr. Girish S. Godbole i/by Mr. Drupad S. Patil and
Mr. Sumit Kothari for the Petitioner.
Mr. Shriram S. Kulkarni for Respondent No.1.
Mr. Nitin Thakkar, Senior Counsel with Mr. S.S.
Patwardhan for Respondent No.3.
Mr. Venkatesh Dhond, Senior Counsel with Mr. Vijay
Chandavale for Respondent No.4.

CORAM: S.C. DHARMADHIKARI &
B.P. COLABAWALLA, JJ.

DATE : SEPTEMBER 29, 2016

ORAL JUDGMENT (Per Shri S.C. DHARMADHIKARI, J.):

1. Rule. The respondents appearing through Advocates waive service. By consent, rule is made returnable forthwith and the petition is taken up for hearing and final disposal.

2. By this petition under Article 226 of the Constitution of India, the petitioner challenges the orders passed by the Presiding Officer of the Debts Recovery Tribunal (DTR), Pune. The orders dated 1-9-2016 and 3-9-2016 passed in Securitisation Application (Lodging) No.750 of 2016 (Annexures “E” & “F”) are challenged in the following factual background.

3. The petitioner is a private limited company and, according to it, is running a sugar unit in the State of Karnataka. The first respondent/borrower is a Co-operative Society, rather a co-operative sugar factory, claimed to be administered and managed exclusively by women. It obtained credit facilities from respondent No.4-Bank. As a security for the said financial assistance, a property belonging to the first respondent was mortgaged with the Bank.

4. The first respondent failed and neglected to repay the loan. The respondent No.4-Bank, therefore, resorted to the

the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, "the SARFAESI Act"). The petitioner states that after following the process of law, symbolic possession of the immoveable property was taken. Thereafter, the Bank was desirous of auctioning the property. It is stated that an auction was conducted on 29-8-2016. A certain amount, namely, Rs.42,50,41,807/- was determined as the reserve price and an Earnest Money Deposit (EMD) of Rs.4,25,04,180/- was fixed accordingly.

5. This action of respondent No.4-Bank was challenged in the above securitisation application. An Interim Application No.1157 of 2016 was moved in the said securitisation application. An interim order was passed on 24-8-2016 allowing respondent No.4 to proceed with the auction. However, the Bank was restrained from confirming the sale till 1-9-2016. The first respondent was granted an opportunity to bring a buyer/bidder for the amount of Rs.94 crores or more. This order was passed without prejudice to the rights and contentions of all

parties. Annexure-B is a copy of this order dated 24-8-2016.

6. The claim of the petitioner is that, it emerged as the successful bidder for the auction held on 29-8-2016. It already had remitted the EMD and offered the balance sum of Rs.93,41,80,807/-. Once the petitioner claims to be the highest or the successful bidder, which fact is confirmed by the Bank, then, the petitioner was expecting the further formalities to be completed in the form of issuance of sale certificate, etc.. However, in the light of the order passed by the DRT, even though the auction was complete, save and except the above formalities, the Bank did not issue the acceptance letter. The petitioner states that it was ready and willing to deposit the entire sum and had made arrangements accordingly. Reliance is also placed by the petitioner on a letter dated 29-8-2016, issued to the Authorised Officer (respondent No.5).

7. The factual narration continues and a reference is made to the proceedings before the Presiding Officer on

1-9-2016. It is stated that the Managing Director of the petitioner was present in the Tribunal. During the course of submissions, an Advocate representing respondent No.1/borrower sought liberty to introduce a bidder – M/s. Vyankateshwar Suppliers, who was allegedly ready and willing to pay an amount of Rs.95 crores on the same terms and conditions. This Vyankateshwar Suppliers is now impleaded as the second respondent to the writ petition. The request of that second respondent's representative was opposed by the petitioner. However, without noticing the objection, the Presiding Officer adjourned the proceedings to 3-9-2016 for *inter se* bidding between the successful bidder and M/s. Vyankateshwar Suppliers.

8. Thereafter, the securitisation application was listed on 3-9-2016. As per the earlier order, M/s. Vyankateshwar Suppliers was to deposit the amount of the EMD. However, its representative expressed inability to deposit the same. The representative, though present, was not in a position to produce

even an authority letter. The petitioner filed Interim Application No.1253 of 2016 for intervention as a necessary party. The petitioner's grievance is that, once the borrower could not resist the auction proceeding and a bid brought by the borrower was duly considered, but that bidder did not comply with the conditions imposed on it, then, the learned Presiding Officer should have dismissed Interim Application No.1157 of 2016 as also the securitisation application. However, without assigning any reason, the Presiding Officer allowed the third respondent to step in. Its Advocate submitted a fresh offer of Rs.96 crores. The Presiding Officer was pleased to direct the Authorised Officer to consider the offer made by respondent No.3 and to confirm the sale in accordance with law.

9. The grievance of the petitioner is that such liberty granted by the Presiding Officer virtually sets aside the auction process or it has been rendered redundant.

10. It is claimed that an affidavit was filed by respondent

No.4-Bank on 9-9-2016 stating that it conducted an auction on 29-8-2016 in accordance with the Security Interest (Enforcement) Rules, 2002. The petitioner had submitted the highest bid. It was further stated that the sugarcane crushing season commences from 1-10-2016. The factory is closed for past three years. For the successful operation of the factory, it would be necessary to undertake the cleaning and maintenance works of the plant and machinery. The grievance is that despite such a request from the Bank, it was not allowed to confirm the auction process and all these orders, therefore, caused serious prejudice to the petitioner.

11. This writ petition was moved before us on 19-9-2016, in the morning session at 11:00 a.m.. The Bank's Advocate stated that in pursuance of the order of the DRT the bidding is going on. We clarified that we do not wish to interfere with that ongoing process, but everything would be subject to the outcome of this petition.

12. We recorded the statement of Mr. Godbole, learned

Counsel appearing for the petitioner that a sum of Rs.89 crores would be deposited with respondent No.4-Bank without prejudice to the rights and contentions of all parties.

13. The writ petition was placed on 27-9-2016 for admission.

14. The petitioner's Advocate tendered an additional affidavit of the petitioner in which its Director states that on 16-9-2016 the intervention application as also the securitisation application were on board before the Presiding Officer. Therefore, the Advocate for the petitioner requested the Presiding Officer to allow the intervention application and requested to defer the hearing of the securitisation application. The learned Presiding Officer allowed the intervention application but rejected the request for adjournment. He passed an order on 16-9-2016 directing the Authorised Officer to conduct e-auction by way of rebidding on 19-9-2016 at 11:00 a.m. on the online portal. The petitioner and others were

directed to participate in this process.

15. The intervention application was allowed, but the Bank filed a reply to the intervention application and supported the petitioner. The third respondent also filed Interim Application No.1264 of 2016 seeking intervention. A copy of that application was not served on the petitioner. The fourth respondent has filed reply to that application. The respondent No.4 has filed statements of objection to the securitisation application also.

16. The petitioner states in this additional affidavit that it has received e-mails from respondent No.5, the Authorised Officer of respondent No.4, directing the petitioner to participate in the proposed auction. The petitioner states that the orders passed on 1-9-2016 and 3-9-2016 are passed on oral request of the first respondent. The Interim Application No.1253 of 2016, filed by the petitioner, was allowed on 16-9-2016. Therefore, the petitioner had every right to contest and object to respondent

No.3's interim application. However, without giving an opportunity to the petitioner, the Presiding Officer allowed that application.

17. Then what we have on our record is the affidavit in reply of respondent No.3. The respondent No.3/Dalamiya Bharat Sugars Limited has raised preliminary objections to the maintainability of the writ petition. It is stated that the petitioner is no longer in the race inasmuch as this third respondent is the highest bidder in the rebidding conducted by the Bank pursuant to the order dated 16-9-2016. It has already deposited Rs.25 crores being 25% of the bid amount, after deducting the EMD, in compliance with Rule 9(3) of the Rules. The petitioner has not deposited any amount except sum of Rs.4 crores required for participating in the bid and prior to filing of the present petition. The petitioner has no right to claim confirmation of its bid under the provisions of the SARFAESI Act, so also the Rules framed thereunder. In any case, the petitioner has not complied with Rule 9(3) of the SARFAESI

Rules and a deposit at this stage is of no avail. The third respondent, in the affidavit, places reliance upon several Judgments interpreting the said Rule to submit that once there is no compliance with the requirement of this Rule, then, the bidder is out of the process. The DRT has passed order dated 24-8-2016, prior to the bidding inasmuch as it stays the confirmation of the bid by the respondent-Bank. The Authorised Officer placed the said order on its website at the e-auction. Pursuant to that order, the bidding was conducted and admittedly, the petitioner participated in the bid without challenging the order dated 24-8-2016. Therefore, the petitioner has no right to challenge the above order at this stage and to claim any vested right over the secured assets. For all these reasons, it is submitted that the writ petition be dismissed.

18. The other facts and which are narrated in this affidavit are more or less identical to the petitioner's factual narration. The third respondent, however, in para 24 of the affidavit has stated that it has brought the compliance amount of

Rs.75 crores by way of Demand Draft, the details of which are also set out together with its copy annexed to this affidavit.

19. The respondent No.4-Bank has filed an affidavit. That is filed for the limited purpose of placing on record the developments which have taken place subsequent to the last hearing held on 19-9-2016. In the e-auction (rebidding) conducted on 19-9-2016 only one bidder, namely, the third respondent participated and submitted a bid of Rs.100 crores. The confirmation of the deposit made and how the balance sum would be remitted has then been set out.

20. It is also confirmed that the petitioner deposited with respondent No.4 a sum of Rs.88,75,38,000/- on 24-9-2016. This was in addition to the sum of Rs.4,25,04,180/- deposited as EMD. Thus, the total sum deposited is Rs.93,00,42,180/-. The Bank, therefore, states that the Court should take into consideration the interest of respondent No.4 and that is best served by obtaining the highest bid price and resolving the

uncertainty. The dues are to the tune of Rs.235 crores.

21. It is on this material that we have heard the Counsel appearing for the parties.

22. Mr. Godbole, appearing on behalf of the petitioner would submit that the orders passed by the Presiding Officer are contrary to law. They are entirely without jurisdiction. He would submit that the borrower invoked Section 17 of the SARFAESI Act. The securitisation application is pending. The borrower apprehending in the meanwhile, the sale of the properties which are mortgaged to the Bank moved an interim application. In that interim application the Presiding Officer unaware of his mandate and flowing from the substantive provision, namely, Section 17, took over the functions of an Authorised Officer and in the garb of guiding him, issued to him directions as to how he should proceed with the auction or which bid should be considered or accepted by him. Mr. Godbole would submit that a distinct field is reserved for the Tribunal and the Authorised

Officer under the SARFAESI Act and the Rules. They perform distinct duties and functions. The Presiding Officer should not have attempted to take over the conduct of sale, for his mandate was to consider the legality and validity of the measures taken under Section 13(4) of the SARFAESI Act. If during the pendency of the application the properties are put up for sale, then it goes without saying that such sale would have to abide by the outcome of the securitisation application. The Presiding Officer, therefore, need not intervene. Mr. Godbole would submit that the entire focus has been shifted and in the garb of considering the interim application seeking interim reliefs pending the main securitisation application, the learned Presiding Officer has ordered rebidding. He has virtually set aside the earlier sale. This process and which was conducted by the Authorised Officer has yet not been adjudged as illegal, much less void or without jurisdiction. Even the securitisation application is pending. The learned Presiding Officer proceeds on the footing that the borrower has nothing to say except that it has brought a bid and which bid should be considered, and the assumption by the Presiding Officer, therefore, was that the borrower was not concerned with the challenge to the securitisation measures but only the sale or the auction. It is not clear, therefore, as to whether the borrower has given up the challenge to the securitisation measures or has now stepped in for somebody else to say that the sale conducted was not in accordance with law. The Presiding Officer in this whole process has allowed such parties who had nothing to do with the bidding to intervene and step in. The petitioner was forced to step in simply because the sale was notified, having participated therein, being declared the highest bidder, the future was uncertain. It became uncertain because M/s. Vyankateshwar Suppliers were allowed to re-enter in the proceedings in the garb of entertaining an application and a request from the borrower. Later on, even that party did not evince any interest and found that it is not possible to comply with the terms and conditions imposed. Taking advantage of the situation, another bidder M/s. Dalamiya Bharat Sugars Limited steps in and stakes claim. Therefore, this entire process and as directed in terms of the interim order demonstrates as to how the Presiding Officer lost focus and completely misdirected himself.

23. Alternatively and without prejudice, Mr. Godbole would submit that the settled principles are that a auction sale and which has been already conducted ordinarily must be allowed to go through. That is conducted after adequate publicity. If anyone wanted to make a bid, he should have participated in the auction. Once the sale was to take place under the auspices of the Authorised Officer, then, every bidder should have been taking part at that auction. Several objections can also be raised. If the concluded process is not vitiated by any fraud, then, the same should have been confirmed. Thereafter, the petitioner's bid being the highest, it should have been declared successful and the sale should have been knocked in its favour. Mr. Godbole would, therefore, submit that the impugned orders are *ex facie* without jurisdiction, contrary to the SARFAESI Act and the Rules, vitiated by total non-application of mind and the Presiding Officer in any event over-stepping his

limits and jurisdiction. These are the settled parameters therefore enabling the writ Court to interject in its writ jurisdiction. He would, therefore, submit that all the orders be quashed and set aside.

24. Reliance is placed on the Judgment of the Hon'ble Supreme Court in the case of **Valji Khimji and Company Vs. Official Liquidator of Hindustan Nitro Product (Gujarat) Limited and others**, reported in (2008) 9 SCC 299.

25. To such a petition, ordinarily we would not be required to hear anybody except the Bank. We do not think that the Bank is interested in anything except the early conclusion of the auction proceedings so as to enable it to adjust or appropriate its dues in part from the sale proceeds. The respondent No.2-M/s. Vyankateshwar Suppliers though made party respondent, we do not think that it had anything to offer and therefore the presence of respondent No.2 was not required at all.

26. As far as the third respondent is concerned, Mr. Thakkar, learned Senior Counsel appearing on its behalf, consistent with its stand in the affidavit, submitted that now this party has out-bid the petitioner. The offer of Rs.100 crores was worth accepting and the Authorised Officer intending to accept it, we should not set aside or interfere with the impugned orders. He would submit that rebidding pursuant to the order of the Presiding Officer has fetched a sum higher than the earlier attempt or exercise and therefore all the more, in our equitable jurisdiction, we should not interfere with the impugned orders. He would submit that the same may be maintained and the writ petition be dismissed.

27. We have before us a scenario now in which we are told to consider even the petitioner's offer and that is higher than that of respondent No.3.

28. We do not think that we can entertain such a request

or enter into this controversy.

29. For appropriately appreciating the rival contentions, we must make a reference to the SARFAESI Act. It is an Act to regulate securitisation and reconstruction of financial assets and enforcement of security interest and now its preamble is substituted by effecting an amendment and which is to provide for a Central database of security interests created on property rights, and for matters connected therewith or incidental thereto.

30. We need not advert to its Statement of Objects and Reasons, for they are highlighted and emphasised in the Judgment of the Hon'ble Supreme Court in the case of **Mardia Chemicals Ltd. Vs. Union of India**, reported in AIR 2004 SC 2371 = (2004) 4 SCC 311.

31. Chapter-I contains the preliminary provisions. Section 2 appearing therein sets out the definitions. We are aware of the fact that the term "Bank" is defined in Section 2(c)

and to mean a banking company, or a corresponding new Bank, or the State Bank of India, or a subsidiary Bank, or such other Bank which the Central Government may, by Notification, specify for the purpose of this Act. The term "borrower" is defined after defining the term "banking company". It means any person who has been granted financial assistance by any Bank or financial institution or who has given any guarantee or created any mortgage or pledged as security for the financial assistance granted by any Bank or financial institution and includes a person who becomes borrower of an asset reconstruction company consequent upon acquisition by it of any rights or interest of any Bank or financial institution in relation to such financial assistance, and now by amendment, or who has raised funds through issue of debt securities. The definitions of the other terms need not be gone into in great detail for the simple reason that before us the issue is, when the Bank proceeds to enforce its security interest and in terms of clear legal provisions enabling it to do so, what can be the remedies of the borrower and the legal impact on the measure that the Bank has taken?

32. In that regard Chapter-III, which is titled Enforcement of Security Interest, is relevant. Section 13 provides for enforcement of security interest and contains several sub-sections. First of all the Bank and notwithstanding anything contained in two provisions of the Transfer of Property Act, 1882 mentioned in sub-section (1) of Section 13, enforce any security interest created in its favour, without the intervention of the Court or Tribunal, but in accordance with the provisions of the SARFAESI Act.

33. Then sub-section (2)says that, where any borrower is under a liability to a secured creditor under any agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as a non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within 60 days from the date of notice failing which the secured

creditor shall be entitled to exercise all or any of the rights under sub-section (4). We are not concerned with the proviso to sub-section (2) of Section 13. If the borrower has made any representation in terms of sub-section (3-A), then, that representation or the objection should be considered and if the objection is rejected, the reasons for non-acceptance thereof have to be communicated to the borrower. The proviso to sub-section (3-A) of Section 13 states that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under Section 17 or the Court of District Judge under Section 17-A. Then comes sub-section (4) which reads as under:-

> *"4. In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-*
>
> *(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured*

asset;

(b) take over the management of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realise the secured asset;

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

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

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

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

34. A bare perusal of above would indicate how, in case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may

take recourse to one or more of the measures in that sub-sections to recover his secured debt. One of the measures is to take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset.

35. What we have then are several sub-sections of Section 13 and which enable the secured creditor to sell the property. The sub-sections (5-A), (5-B) and (5-C) concern the sale.

36. Then what we have to refer is sub-section (6) from which it is clear that the transfer of secured asset after taking possession thereof by the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset. The sub-section (9) was pressed into service by Mr. Kulkarni, appearing for the borrower and he would submit that the Presiding Officer has completely misconstrued

the request made by the borrower in the securitisation application as also the interim application. He would submit that the application was never confined to consideration of the bid of M/s. Vyankateshwar Suppliers or not providing an opportunity to the borrower to bring in any bid at the sale/auction. This was a substantive application invoking Section 17 of the SARFAESI Act and it was permissible for the borrower to question the legality and validity of all measures taken by the secured creditor and in that regard the borrower could have relied upon sub-section (9) of Section 13.

37. It is in these circumstances that we must refer to Section 17 of the SARFAESI Act. Section 17 provides for filing of an application against measures to recover secured debts. This provision opens with the words and title "Right to appeal". Those words are now substituted by the words "Application against measures to recover secured debts". Sub-section (1) of Section 17 enables any person, including a borrower, aggrieved by any of the measures referred to in sub-section (4)

of Section 13 taken by the secured creditor or his Authorised Officer under this Chapter to make an application to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken and the DRT 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. If the DRT, 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 possession of the secured asset to the borrower or other aggrieved person, it may, by order, declare as above and restore the possession.

38. The earlier mandate was limited and the possession could have been restored to the borrower, but now there is an

amendment to the Act and including to the sub-sections of Section 17.

39. We at once clarify that we are not concerned with the issue as to whether the amended provisions would govern the outcome of the pending application or otherwise. We confine ourselves to the legality and validity of the orders passed by the Presiding Officer on the interim application. Admittedly, the substantive application under Section 17 is pending and we have no hesitation, therefore, in concluding that it is open to the DRT on a due consideration of all materials to arrive at a conclusion as to whether it should exercise its power under sub-section (3) of Section 17 or not. The DRT has yet to reach that stage of the proceedings.

40. It is no doubt true that in coming to that conclusion as is referred above, the DRT can also take note of any developments and post the possession being taken over, meaning thereby the property being put up for auction/sale.

However, the pleadings in that regard ought to be before the Tribunal. Any party like the borrower in this case ought to bring to the notice of the DRT these subsequent events and if necessary by making an application for amendment. The events ought to be placed before the Tribunal together with the efforts of the borrower and it is then for the Tribunal to find out as to whether it is necessary for it to consider the issue of the sale being in accordance with the Rules or not. The Tribunal may come to a conclusion that if the initial measures under sub-section (4) of Section 13 upto taking possession of the secured assets are vitiated by non-compliance with the provisions of the SARFAESI Act, then, it may be unnecessary for it to go into any further details and declare the further proceedings to be not in accordance with law. It is entirely at the Tribunal's discretion and what relief should be granted would depend upon the facts and circumstances of each case so also the evidence produced by the parties. If the Tribunal has to decide as to who should be a party to an application filed initially under Section 17, then, it is also open for it to take note of the request for joining any parties other than the borrower and the secured creditor.

41. As far as the Security Interest (Enforcement) Rules, 2002 are concerned, we have Rule 8 therein which provides for sale of immoveable secured assets. That Rule along with its sub-rules and Clauses read as under:-

> ***"8. Sale of immovable secured assets.-***
>
> *(1) Where the secured asset is an immovable property, the authorised 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) The possession notice as referred to in sub-rule (1) shall also be published, as soon as possible but in any case not later than seven days from the date of taking possession, in two leading newspaper one in vernacular language having sufficient circulation in that locality, by the authorised officer.*
>
> *(3) In the event of possession of immovable property is actually taken by the authorised officer, such property shall be kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as a owner of ordinary prudence would,*

under the similar circumstances, take of such property.

(4) The authorised officer shall take steps for preservation and protection of secured assets and insure them, if necessary, till they are sold or otherwise disposed of.

(5) Before effecting sale of the immovable property referred to in sub-rule (1) of rule 9, the authorised 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 such assets; or

(b) by inviting tenders from the public;

(c) by holding public auction; or

(d) by private treaty.

(6) The authorised 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 authorised 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 authorised officer deems it fit, put on the website of the secured creditor on the Internet.

(8) Sale by any methods other than public auction or public tender, shall be on such terms as may be settled between the parties in writing."

42. A perusal of the above would reveal as to how, where the secured asset is an immoveable property, the Authorised Officer shall take or cause to be taken possession, by delivering a possession notice to the borrower and by affixing

that notice on the outer door or at such conspicuous place of the property. The notice is also required to be published in terms of Rule 8, sub-rule (2). By sub-rule (3) it is provided that in the event possession of immoveable property is actually taken by the Authorised Officer, the property shall be kept in his own custody or in the custody of any person authorised or appointed by him. The further steps so as to protect and safeguard it are narrated in sub-rule (4).

43. Then in terms of sub-rule (5), which provides for the procedure to be followed before effecting sale of the immoveable property, the Authorised 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 immoveable secured asset by any of the methods enumerated in Clauses (a) to (d).

44. The sub-rule (6) says that the Authorised Officer

shall serve to the borrower a notice of thirty days for sale of the immoveable secured assets, under sub-rule (5). Then if the sale has to be effected by either inviting tenders from the public or by holding public auction, the procedure enumerated in sub-rule (6) has to be followed. Sub-rules (7) and (8) clarify that the notice of sale shall be affixed on a conspicuous part of the immoveable property and if the Authorised Officer deems it fit, put on the website of the secured creditor on the Internet. Sale by any methods other than public auction or public tender, shall be on such terms as may be settled between the parties in writing. That is what is dealt with by sub-rule (8). Then comes Rule 9 where time of sale, issue of sale certificate and delivery of possession, etc. are the matters provided and dealt with.

45. What we have before us and in the backdrop of the above is the pending securitisation application under Section 17 in which what was prayed by an Interim Application No.1157 of 2016 of the borrower was a restraint against sale of the property.

46. On this application, on 24-8-2016, an order came to be passed, copy of which is at page 43 (Annexure-B) of the paper-book. The borrower projected its grievance that the Bank has fixed the auction sale of the secured asset on 29-8-2016. The contention was that the reserved price in the sum of Rs.41 crores is very less. The applicant has a ready buyer who is ready and willing to bid for Rs.94 crores and therefore the auction proceedings be postponed.

47. The application was opposed by the Bank, as noticed by the Presiding Officer. The Bank contended that the borrower admitted the liability and without making any payment has simpliciter sought ad-interim orders staying the auction proceedings. The learned Presiding Officer felt that interest of justice would be served if the sale is allowed to go through and the borrower is further allowed to bring its bidder Vyankateshwar Suppliers to bid on 29-8-2016 by offering the highest bid in the sum of Rs.94 crores. The offer/bid was to be

without prejudice to the rights and contentions of the parties and this is how the matter was directed to be placed on 29-8-2016.

48. Then what we have is an order passed by the learned Presiding Officer but prior thereto, what we have is a notice which has been put up on 25-8-2016 by the Authorised Officer. He brought to the notice of the bidder the pendency of the proceedings before the DRT and that the sale would be subject to the orders of the Tribunal.

49. The matter was placed before the Tribunal thereafter on 1-9-2016 but prior thereto, what we have on record is a letter dated 29-8-2016 addressed by the petitioner to the Authorised Officer. The petitioner recorded that they have participated in the sale of movable and immoveable properties through e-auction on 29-8-2016. They informed that their bid is the highest and they are the successful bidder. They stated that they are ready to deposit 25% of the bid amount and the balance as per the terms and conditions of the bid.

50. However, on 1-9-2016 the matter was moved before the DRT. It was stated that the borrower was granted liberty to bring its bidder who was ready and willing to pay Rs.94 crores. The representative of that bidder was present in the Court and he stated that he is ready and willing to pay Rs.95 crores on the same terms and conditions as laid down by the Bank. It is also ready and willing to pay the EMD at 10% of the reserved price on 3-9-2016. The learned Advocate for the second bidder submitted that his client is also ready and willing to increase the bid and compete with the other bidders on the same terms and conditions as are laid down by the Bank. The petitioner through its Managing Director opposed the rebidding. The Presiding Officer directed the borrower/applicant to file an affidavit placing all the facts on record regarding the bid and increase of the amount by Vyankateshwar Suppliers on 3-9-2016. Curiously however, the learned Presiding Officer directed that there shall be an *inter se* bidding between the successful bidder, the second successful bidder and Vyankateshwar Suppliers on 3-9-

2016 at 10:30 a.m..

51. We are really surprised as to how this intervention by the Presiding Officer was warranted and if warranted, how could he come to a conclusion that the bidder brought in by the applicant, Vyankateshwar Suppliers was unable to present itself before the Authorised Officer and make a bid for purchasing the immoveable property/secured asset. Earlier as well the presence of this Vyankateshwar Suppliers was noted by the Presiding Officer. M/s. Vyankateshwar Suppliers were thus aware of the process which was scheduled on 29-8-2016. M/s. Vyankateshwar Suppliers by itself may or may not have been able to interject or intervene in the proceedings. The borrower took up the cause, according to the Presiding Officer, for this entity and at the instance of the borrower the said order has been passed. We are further surprised as to what prevailed upon the Presiding Officer to takeover the brief from the Authorised Officer and direct a rebidding. The Presiding Officer has yet to arrive at any prima facie conclusion with regard to the legality

and validity of the measures taken under sub-section (4) of Section 13. He keeps that issue aside and as if the only matter or issue surviving or is being projected is the legality and validity of the auction that he enters that arena and reserved exclusively for the Authorised Officer. It is to emphasise that aspect of the matter that we referred to the legal provisions in great detail. The field is clearly demarcated and reserved for both the DRT and the Authorised Officer. If the Authorised Officer has clearly indicated in the auction notice that substantive proceedings are pending before the DRT and his action would have to abide by the ultimate conclusion and final orders of the DRT, then, all the more it was unnecessary for the Presiding Officer to have allowed each and every bidder to enter the fray and in the pending proceedings before him. Now what has been revealed is that Interim Application No.1157 of 2016 and the matters raised therein are kept aside. The assumption is that the surviving issue is whether there should be rebidding or re-auctioning or not. These are the issues that have influenced the mind the learned Presiding Officer. On 3-9-2016 something more curious takes place.

52. The learned Presiding Officer passes a further order noting that he had directed an *inter se* bidding only between three parties who are all before us, namely, the petitioner, respondent No.2 and respondent No.3. The learned Presiding Officer notes that Vyankateshwar Suppliers were to come with the EMD before him on 3-9-2016 but there is no representation from that agency or entity. One Sachin Bale claims to be the representative of M/s. Vyankateshwar Suppliers but has no authority to represent it.

53. The petitioner claiming to be the successful bidder filed Vakalatnama and has taken out Interim Application No.1253 of 2016 to intervene in the matter as necessary party, which the Presiding Officer takes on record.

54. Equally, he takes on record the appearance and representation of the third respondent Dalamiya Bharat Sugars Limited. The Presiding Officer notes that Dalamiya Bharat

Sugars Limited has raised the offer to Rs.96 crores. He, therefore, directs the Authorised Officer to consider the offer made by Dalamiya Bharat Sugars Limited in accordance with law. At the same time, he allows Vyankateshwar Suppliers to make their bid with EMD to the Authorised Officer. The Authorised Officer to confirm the sale in accordance with law is the penultimate direction.

55. The learned Presiding Officer, therefore, has clearly exceeded his brief. He has confined the bids or offers and the bidding process to only three bidders. The Authorised Officer pursuant to the directions issued to him and assuming them to be legal and valid, was not free to entertain other bid and consider it in accordance with the Rules. Moreover, the learned Judge presumes that a bidding had already taken place on 29-8-2016, but now as the Bank is going to fetch something more that he should direct a rebidding and that is necessary.

56. We have been noticing that such interventions and interjections in the jurisdiction of the Authorised Officer and the

field reserved for him by Rule 9 is a frequent exercise by the learned Presiding Officer of the DRT, Pune. That Tribunal, as a matter of habit and a matter of course has been interjecting and interfering with the auction sale fixed by the Authorised Officer and issuing him directions as to whose bid he should consider and whose bid should be rejected. We think that this is not the job of the Presiding Officer of the DRT. If the Authorised Officer has not conducted the sale in accordance with the Rules, then, depending upon a challenge to it and the necessary evidence on record, it would be open for the Presiding Officer to declare that the sale is not valid. In any event, in the present case everything was subject to the final order in the application under Section 17. In these circumstances, there was no warrant for passing the orders dated 1st and 3rd September, 2016.

57. By such a process, the learned Presiding Officer has closed the doors for even the borrower, whose substantive application is pending.

58. The petitioner moved an application styled as

Interim Application No.1253 of 2016 and in which it was recorded as to how there was an e-auction sale of movable and immoveable properties on “as is where is basis”, “as is what is basis”. Whatever may be the procedure at the above sale and as understood by the parties, the petitioner seeks to support the action of the Authorised Officer and urges that there is nothing wrong in the auction conducted. It says that it is a bona fide purchaser at such auction. It is in these circumstances and when the Authorised Officer also filed an affidavit bringing to the notice of the Tribunal the urgency, namely that the sugarcane crushing season starts from 1-10-2016, we do not think that any intervention by the Presiding Officer was necessary.

59. What we have found from the record is that on 16-9-2016 the Presiding Officer entertained one more interim application, namely, Interim Application No.1266 of 2016. That was taken out by the IDBI Bank seeking clarification whether it should proceed with the *inter se* bidding or in the alternate auction be confirmed of the highest bidder.

60. The Bank stated that the public auction was held on 29-8-2016 at which the bid of the petitioner submitted was the highest. Now the Bank stands by this auction of 29-8-2016, but the borrower/applicant opposes the bank's application and states that the auction has been conducted illegally. The auction proceedings carried out were high-handed and arbitrary. It is stated that the Bank has not complied with the mandatory provisions of Section 13(9) and therefore all the measures taken under sub-section (4) of Section 13 are illegal and deserve to be set aside. Some issue with regard to the dues of the State Government was also raised.

61. This application was opposed by the petitioner. Thus the Bank and the petitioner are on the same side.

62. The learned Presiding Officer in his order passed on 16-9-2016 notes that it is not in dispute that on 29-8-2016 the Authorised Officer of the Bank conducted the e-auction proceedings. In the e-auction sale held on 29-8-2016, the petitioner's bid was accepted. In the meantime, the borrower

moved the Tribunal on the ground that the Authorised Officer should not be permitted to confirm the sale as it has a ready buyer who is ready and willing to bid for Rs.94 crores. Based on this submission of the borrower/applicant, the first order was passed. The Authorised Officer was permitted to conduct the auction proceedings with a caveat that the sale shall not be confirmed till the next date. Thereafter, the Presiding Officer refers to the rebidding directed by him. The reason for the *inter se* bidding was the inadequacy of the price offered by the petitioner and secondly, the auction being not yet confirmed. The auction proceedings were not complete.

63. By such exercise and the process of reasoning therein, the Presiding Officer has foreclosed all legal options available to the Authorised Officer under the Rules. He has not allowed the Authorised Officer to decide as to whether the sale should be confirmed and knocked down in favour of the petitioner, or that the property having a great potential can fetch much more and should be put up for sale again. The learned Presiding Officer having restricted the *inter se* bidding, what

appears to him now is that he is dissatisfied with the adequacy of the price. M/s. Vyankateshwar Suppliers promised to bid for Rs.94 crores. The learned Presiding Officer assumes that the applicant sponsored Vyankateshwar Suppliers for prolonging the auction and in the meanwhile Dalamiya Bharat Sugars Limited has given an undertaking to bid for Rs.96 crores onwards and this is a big difference. Therefore, he once again passes an order of rebidding.

64. He distinguishes the Judgment of the Supreme Court relied upon by Mr. Sanjay Antarkar in the case of **Vedica Procon Private Limited Vs. Balleshwar Greens Pvt. Ltd.**, reported in (2015) 10 SCC 94. He virtually extracts a promise from the defendant-Bank that the Authorised Officer shall conduct the auction online and shall make the online portal available for rebidding. It is in these circumstances, he passed the following order:-

> *"1. The authorised officer of defendant bank shall conduct e-auction by way of rebidding on 19th September, 2016 at 11:00 A.M. on the online portal.*

> *2. The authorised officer of defendant bank shall allow the Intervener nos.1 and 2 and M/s. Vyankatesh Suppliers and other bidders, if any, to rebid in the auction process.*
>
> *3. The authorised officer of defendant bank shall conduct rebidding in accordance with law.*
>
> *4. Interim Application No.1266 of 2016 is disposed of with no order as to cost.*
>
> *5. All concerned to act on the authenticated copy of this order, to be issued on payment of appropriate court fees."*

Thus, he ordered rebidding on 19-9-2016. The Authorised Officer was directed to allow Intervener Nos.1 and 2-M/s. Vyankatesh Suppliers, to rebid along with others at the rebidding. He disposes of the interim application of the borrower and directs that rebidding shall be in accordance with law.

65. We fail to understand as to how this intervention of the Presiding Officer ensures that the immovable properties particularly fetch highest or best competitive price prevailing in the market. If the property has more potential and people step in time and again to enhance their offer, then, there was no

warrant in restricting the rebidding, if at all it was necessary. The order dated 16th September, 2016, directs rebidding on 19th September, 2016 . The Authorised Officer had a very short time at his disposal. Equally, those interested in placing their offers/bids did not have enough time at their disposal. Further and importantly, the field under Rule 9 of the Rules is reserved for the Authorised Officer. He has to act in accordance with that rule and cannot be directed to act in contravention of the scheme. The choice, option including the mode of sale is available to the Authorised Officer. If he decides upon a sale by public tenders or by public auction, then, the Authorised Officer must follow the sub-rules of Rule 9 referred above. Before the sale also he must take the mandatory preliminary steps. The learned Presiding Officer by his directions to the Authorised Officer, even they are not questioned by the Bank/Authorised Officer, has given a go-bye to the rules. He has virtually displaced the Authorised Officer. It is extremely doubtful whether the DRT in its jurisdiction under section 17 of the SARFAESI Act could have directed as above.

66. Every direction of the DRT, Pune is plainly contrary to the rules and which are applicable to public auction. The very purpose of public auction is to ensure that the property obtains highest or the most competitive price. The market forces must be allowed to operate. There is no warrant or necessity for outlining the process of rebidding. We do not see how if the first process conducted on 29-8-2016 did not fetch optimum price, was there an assurance and that the rebidding directed at a short notice would guarantee best or the prevailing price in the market. This is the very fallacy in the reasoning of the learned Presiding Officer. First of all he should have left the matter to the Authorised Officer. If the Authorised Officer has conducted an auction on 29-8-2016, then, without deciding the issue of its legality and validity and without expressing any opinion in that behalf, there was no warrant to direct a rebidding or a auction afresh. Thirdly, there was no necessity of confining or restricting it to only three bidders. All this, in our opinion, runs counter to the very object and purpose of the SARFAESI Act and the Rules.

All the more, when the application under Section 17 is still pending and yet to be decided finally. If everything has to abide by the result of this application, then, strictly there was no apprehension for either the unsuccessful bidders or the parties before the Tribunal that the sale is conclusive and binding.

67. As a result of the above discussion, we set aside the orders passed by the learned Presiding Officer, including the one dated 16-9-2016. We direct that in the event the Authorised Officer is desirous of conducting a fresh sale, he shall strictly proceed in accordance with the Rules, uninfluenced by any directions of the Tribunal till date. Meaning thereby, he shall not confine the auction to only the three bidders named in the orders of the Tribunal. We clarify that all the bidders before the Tribunal are free to participate in the fresh process and if initiated by the Authorised Officer. However, our order and directions shall not mean that we have expressed any opinion, one way or the other, on the pending application under Section 17. We have interfered only because the learned Presiding Officer having directed rebidding time and again that all the

three orders deserve to be set aside. The Authorised Officer upon deciding to hold a public auction must follow the Rules including obtaining proper valuation of the immovable property before conducting the sale/auction. We order accordingly. The writ petition is disposed of. At this fresh auction, even the petitioners shall be entitled to participate, if they so desire.

68. Since there is a lot of confusion generated by the orders of the Tribunal, it would be advisable that the Tribunal take up the main application, that is the application under Section 17 of the SARFAESI Act and endeavour to dispose it of within a period of three months from the date of receipt of this order. All contentions of all parties thereto are kept open. We express no opinion thereon.

(B.P. COLABAWALLA, J.) (S.C. DHARMADHIKARI, J.)