

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 11025 OF 2013

Asset Reconstruction Company (India) Ltd.,
a Company incorporated under the Companies Act, 1956, registered as Securitisation Company and Reconstruction Company under the provisions of Section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the SARFAESI Act) and having its registered office at The Ruby, 10th floor, 29, Senapati Bapat Marg, Mumbai 400 028 acting as a sole trustee of Arcil-SBPS-017-I Trust through its Assistant Manager Mr.Nilesh Bhople

...Petitioner

Versus

1 Florita Buildcon Private Limited

A private Limited Company, having its registered Office at 425/A, Raut Industrial Estate, 1st Floor, Behind Johnson & Johnson Mogul Lane, Mahim(W), Mumbai-400 016

2 Shaikh Husain Nanasaheb

Adult, Indian, Inhabitant of Mumbai residing at Kamgar Nagar, Rahivasi Sangh, 7 Bungalows, Link Road, Andheri(West), Mumbai-400 058

3 Mehboob Subhan Nanasaheb

Adult, Indian, Inhabitant of Mumbai residing at Kamgar Nagar, Rahivasi Sangh, 7 Bungalows, Link Road, Andheri(West), Mumbai-400 058

4 Mohammed Yusuf Nanasaheb

Adult, Indian, Inhabitant of Mumbai residing at Kamgar Nagar, Rahivasi Sangh, 7 Bungalows, Link Road, Andheri(West), Mumbai-400 058

...Respondents

WITH
CIVIL APPLICATION NO. 2969 OF 2015
IN
WRIT PETITION NO. 11025 OF 2013

Florita Buildcon Private Limited	...	Applicant
<u>In the matter between</u>		
Asset Reconstruction Company (India) Ltd.	...	Petitioner
V/s.		
Florita Buildcon Private Limited & Ors.	...	Respondents

Mr.Nitin Thakkar, Senior Advocate with Mr.Rohit Gupta, Mr.Vinod Kothari & Ms.Salma Mansuri i/b.M/s.Apex Law partners for Petitioner.

Mr.Ravi Kadam, Senior Advocate with Ashish Kamat, Mr.Roshan Kadam, Mr.Nikhil Rajani & Ms.Pallavi Ghaisas i/b. M/s.V.Deshpande & Co. for Respondent No.1.

CORAM : S.C. DHARMADHIKARI & DR. SHALINI PHANSALKAR-JOSHI, J.J.

RESERVED ON : 5TH AUGUST, 2016.

PRONOUNCED ON : 1ST DECEMBER, 2016.

JUDGMENT : [Per Dr. Shalini Phansalkar-Joshi, J.]

1] By this petition filed under Article 226 of the Constitution of India, the Petitioner is invoking extraordinary writ jurisdiction of this Court for issuance of writ of certiorari to quash and set-aside the order dated 23rd September, 2013 passed by the Debts Recovery Appellate Tribunal, Mumbai in Appeal No.161 of 2011 and thereby to dismiss the said appeal.

2] The facts, in the light of which above said prayer is made, can be stated in brief as follows;

The Petitioner is a Securitization Company, incorporated under the provisions of the Companies Act, 1956 and registered

under Section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (*hereinafter referred to as "SARFAESI Act"*, for the sake of brevity). Petitioner is having its registered office at the Ruby, 10th floor, 29 Senapati Bapat Marg, Dadar (West), Mumbai. The Petitioner had, vide Assignment Agreement dated 31st March, 2008 acquired the rights with respect to the account of M/s.D.N. Exports from the Assignor Bank i.e. Bank of India.

3] Respondent No.1 is the purchaser of the properties mortgaged to the Petitioner. Respondent Nos.2 to 4 are the partners who had guaranteed the repayment of the dues of M/s.D.N. Exports and they are also erstwhile owners of the mortgaged properties.

4] The Petitioners' predecessor-in-interest i.e. Bank of India had guaranteed financial assistance to M/s.D.N. Exports, wherein Respondent Nos.2 to 4 are the partners as well as the guarantors. Respondent Nos.2 to 4 had mortgaged in favour of Bank of India the immovable property, which is a piece and parcel of land being CTS No.1309/19, Survey No.131 area 1743 sq.mtrs. situated at village Varsova, Taluka Andheri, Mumbai. As the account of M/s.D.N. Exports had become a non-performing asset, a notice

dated 22nd October, 2003 was issued by Bank of India under Section 13(2) of SARFAESI Act to M/s. D.N. Exports. It was also published in newspaper on 22nd February, 2004. Bank of India, thereafter, assigned the debt by Deed of Assignment dated 31st March, 2008 to the Petitioner along with Security Interest in the mortgaged property. In the meantime, Debts Recovery Tribunal, Chennai in O.A. No.2036 of 2001 had issued a Recovery Certificate in the sum of Rs.24,88,66,110.17 on 3rd April, 2009. The Petitioner made an application before DRT-II Chennai to bring its name on record in place of Bank of India, in view of the Assignment Deed dated 31st March, 2008. The said application was allowed on 27th July, 2010 and the Recovery Certificate has been amended accordingly.

5] As per the case of the Petitioner, the Authorized Officer appointed by the Petitioner had, meanwhile, taken possession of the mortgaged property on 24th June, 2009 and published the possession notice in respect thereof, in various newspapers, dated 25th June, 2009, as required under the Security Interest (Enforcement) Rules, 2004. Neither the Mortgagors, i.e. Respondent Nos.2 to 4, nor any third party challenged the possession of the Petitioner and the measures taken by the Petitioner under Section 13 of SARFAESI Act. Thereafter, on 23rd July, 2009 the Petitioner

published a notice in "Free Press Journal" for sale of the said mortgaged property intimating that the Authorized Officer would sell the said mortgaged property in his possession, after a period of 30 days from the date of notice i.e. 23rd July, 2009.

6] In pursuance of the said notice, the Director of Respondent No.1 approached the Petitioner and evinced his interest in purchasing the mortgaged property. After discussion, it was informed to Respondent No.1 that the Petitioner would issue bid document to interested parties detailing terms and conditions for sale by first week of August, 2009. In due course, the bid document was issued to various parties inviting offers for purchase of the mortgaged property on "*as is where is and as is what is basis*". The various terms and conditions forming the part of bid document clearly casted the responsibility and liability on the bidder to ensure that the title of the mortgaged property is verified by the bidder and the property is being sold clearly on "*as is where is and as is what is basis*".

7] It is the case of the Petitioner that the first respondent, by its letter dated 10th September, 2009, submitted its bid along with Annexure-II and Annexure-III duly stamped and forwarded Pay

Orders totaling Rs.83,75,000/- in respect of its bid of Rs.3,51,00,000/-. On 15th September, 2009 sale was conducted amongst various bidders. In the said sale, Respondent No.1 enhanced its bid to Rs.7,01,00,000/- which was accepted by the Petitioner, by their letter dated 16th September, 2009, recording that the sale was confirmed on "*as is where is and as is what is basis*". Respondent No.1 was required to pay balance amount of purchase consideration on or before 30th September, 2009 and get the Sale Certificate stamped. Accordingly, Respondent No.1 by its letter dated 22nd September 2009 recorded that 25% of the total purchase consideration of Rs.1,75,25,000/- was already paid and they are enclosing the balance consideration amounting to Rs.5,25,75,000/-. By the said letter Respondent No.1 also requested for issuance of Sale Certificate and for delivery of possession.

8] In accordance therewith, on 24th September, 2009, the Petitioner handed over possession of the mortgaged property to Respondent No.1 and called upon Respondent No.1 to get the said Sale Certificate stamped. According to the Petitioner, the Petitioner was always ready and willing to execute the Sale Certificate after it was duly stamped. However, instead of getting the Sale Certificate stamped, Respondent No.1 started to wriggle out of the sale. By the

letter dated 7th October, 2009, Respondent No.1 demanded return of the consideration amount. The Petitioner informed Respondent No.1 by the letter dated 16th October, 2009 that the sale having been confirmed, in as much as the contract between the Petitioner and Respondent No.1, having been completed and concluded, there was no scope or warrant for cancelling the same. Moreover, as the sale was on *“as is where is and as is what is basis”*, Respondent No.1 cannot wriggle out of the said sale. It was also pointed out that, it was for Respondent No.1 to carryout due diligence including the title and all related aspects and once Respondent No.1 has voluntarily entered into the contract, Respondent No.1 cannot withdraw from the same.

9] Respondent No.1, however, filed Securitisation Application No.48 of 2009 in the Debts Recovery Tribunal, Mumbai to set aside the sale on the count that the mortgaged property was falling in Coastal Regulation Zone (CRZ) and was a plot reserved for Recreation Ground (RG) and, therefore, there was no saleable interest in the mortgaged property. It was also contended that Respondent No.1 came to know about the same only when Respondent No.1 started erecting shed on the said property.

10] The Petitioner challenged the Securitization Application by contending *inter alia* that the Debts Recovery Tribunal will not have jurisdiction to entertain and try the said Application at the instance of the purchaser, as the sale was concluded and finalized and the possession was also given to the purchaser. It was also contended that the purchaser cannot take advantage of his own wrong, especially when the property was sold on “*as is where is and as is what is basis*”.

11] The learned Presiding Officer of Debts Recovery Tribunal, by its order dated 29th July, 2001, dismissed the Securitisation Application.

12] Being aggrieved, Respondent No.1 filed Appeal No.161 of 2011 before the Debts Recovery Appellate Tribunal, Mumbai. The Petitioner filed reply in the said Appeal and raised the very same contentions, which were agitated before the Debts Recovery Tribunal. However, the Debts Recovery Appellate Tribunal, Mumbai allowed the Appeal vide its order dated 23rd September, 2013, which was more than 6 months after the hearing was completed.

13] The submission of learned senior counsel for the Petitioner is two fold. In the first place, it is submitted that the

Securitisation Application itself was not maintainable as the Application under Section 17 to set-aside the Sale cannot lie at the instance of the purchaser. According to learned Senior Counsel for the Petitioner, Respondent No.1 had no *locus standi* or statutory right to file such an Application as Respondent No.1 cannot be termed as “any person”, who is aggrieved by any of the measures referred to, in Sub-Section 4 of Section 13 of SARFAESI Act. It is urged by him that the only person who could be aggrieved by a measure under Section 13(4) of SARFAESI Act would be a borrower or any third party claiming interest in the property. The purchaser, in whose favour the interest is created, would come in picture only after the measure under Section 13(4) is completed. Therefore, the purchaser cannot be regarded as a party, who is aggrieved by the measure taken under Section 13(4). Hence, according to him, the alleged Securitisation Application filed by Respondent No.1 was not maintainable in itself. According to him, the Appellate Tribunal has, therefore, committed an error in holding such Application to be maintainable and at the same time allowing it.

14] As regards the merits of Respondent No.1's claim, it is submitted by learned Senior Counsel for the Petitioner that Respondent No.1 was estopped from challenging the sale as he has

voluntarily participated in the Auction Purchase. Therefore, he could not be called as “aggrieved person”. Moreover, he also cannot be permitted to contend that the Petitioner had no 'saleable interest' in the property. It is urged that Appellate Tribunal also failed to appreciate that in case of a plot falling within the CRZ and reserved as “RG Plot”, ownership thereof stands vested in the sub-plot owners, only after the Conveyance is executed in their favour. As in the present case, no such Conveyance has been executed, the original owners continued to retain the ownership of the mortgaged plot. In view thereof, there was hardly any substance in the contention of Respondent No.1 that the Petitioner had no 'saleable interest' in the mortgaged property.

15] Further it is submitted by learned Senior Counsel for the Petitioner that, when the sale was strictly on “*as is where is and as is what is basis*” and the bid document contained in so many words the said terms and conditions, Respondent No.1 is now estopped from challenging, in any way, the concluded sale on the ground that the mortgaged property is an RG Plot. It is urged that there was absolutely no question of any cheating, misrepresentation or dishonest concealment on the part of the Petitioner, as observed by the Appellate Tribunal. It was clearly the responsibility of Respondent

No.1 to take the search of the necessary documents and conduct the due diligence before entering into the contract, which Respondent No.1 has failed to do. According to learned Senior Counsel for the Petitioner, the fact that mortgaged property is within CRZ or is reserved as “RG Plot” can, by no stretch of imagination, be held to be a mistake of fact on the part of both the parties, as is held by the Appellate Tribunal. It is submitted that the fact that the mortgaged property was a plot reserved as “RG”, was within the public domain.

16] Ultimately, it is also submitted by learned Senior Counsel for the Petitioner that the question of validity of mortgage was an issue before the Debts Recovery Tribunal, Chennai in O.A. No.2036 of 2001 and had been decided by it. Therefore, the said question could not have been reopened or decided by the Appellate Tribunal. Moreover, the said question was exclusively between a mortgagor and mortgagee and no third party, like Respondent No.1, could question any decision regarding the same.

17] Further, according to learned Senior Counsel for the Petitioner, the reservation of the plot for a particular purpose does not restrict its transferability but only affects the user of such plot and

therefore, in no way, there was any scope for canceling the sale, which was duly effected in favour of Respondent No.1. According to learned senior counsel for the Petitioner, Appellate Tribunal has thus committed a grave error in allowing the appeal and setting aside the sale and the order passed by the Presiding Officer of Debts Recovery Tribunal. Therefore, the impugned order needs to be quashed and set aside.

18] This petition came to be resisted by learned senior counsel for Respondent No.1 by strongly supporting and upholding the impugned order of the Appellate Tribunal, contending *inter alia* that the Appellate Tribunal has rightly decided all the factual and legal issues and hence no interference is warranted in those findings in the limited scope of this extraordinary writ jurisdiction.

19] According to learned senior counsel for Respondent No.1, when the mortgaged property, admittedly, falls within CRZ and is reserved as a "RG Plot", it could not be sold by the original owner Smt.Anusaya Kantilal Shah, in favour of Respondent Nos.2 to 4. Respondent No.2 to 4, therefore, could not become owners of the said plot on the basis of Conveyance Deed executed by Smt.Anusaya Kantilal Shah in their favour. Therefore, having not

acquired any ownership of the said plot, Respondent Nos.2 to 4, in their turn, could not create any security interest upon the said plot in favour of Bank of India, to secure the amount of credit facilities availed by M/s. D.N. Exports. It is pointed out by learned Senior Counsel for Respondent No.1 that the "RG Plot" cannot be used for any purpose other than the beneficial use of the remaining plot holders. "RG Plot", therefore, cannot be freely and openly saleable in the true sense and, in such circumstances, even if the mortgaged property is sold on "*as is where is and as is what is basis*", even then for want of saleable interest of the Petitioner in the said plot, the sale becomes non-existent and void in itself. According to him, Respondent No.1 can, therefore, very well challenge the sale even if it was concluded. It is submitted by him that the wording "*any person aggrieved by the measures taken under Section 13(4) can file such Application*", as used in Section 17 of SARFAESI Act, being wide in scope, the Application filed by Respondent No.1 before the Tribunal was maintainable. According to learned Senior Counsel for Respondent No.1, as the sale is yet not completed strictly, considering that Sale Certificate is not yet stamped, Respondent No.1 can very well challenge the same. Appellate Tribunal has, therefore, in his submissions, rightly allowed the appeal and set

aside the order of the Debts Recovery Tribunal and the auction sale.

20] In support of their respective contentions, learned Senior Counsels for both the parties have relied upon various judgments and authorities of the Hon'ble Apex Court and this Court, which we find convenient to deal with as and when the relevant contentions are considered in the course of judgment.

21] Thus, having heard learned Senior Counsels for both the parties at length and in extenso, the first and foremost question, which, in our opinion, necessarily arises for our determination is about the maintainability of the Securitisation Application filed under Section 17 of SARFAESI Act before the Tribunal. Admittedly, the Application was preferred by the Auction Purchaser i.e. Respondent No.1 herein. According to learned Senior Counsel for the Petitioner, the words “*any person*” used in Section 17 of SARFAESI Act cannot cover the Auction Purchaser. They can only cover the mortgagor or the guarantor, but not the Auction Purchaser. To substantiate this submission, learned Senior Counsel for the Petitioner, has relied upon the decision of the Division Bench of this Court in *Umang Sugar Pvt.Ltd. Vs. State of Maharashtra and anr.*¹.

1 2014 (4) Mh.L.J.

22] As against it, learned Senior Counsel for Respondent No.1 has submitted that, the words “*any person*”, used in Section 17 of SARFAESI Act, are not, in any way, “qualified” to give restricted meaning to them, as they are wide enough to cover even the successful purchaser of the secured assets. According to him, as Respondent No.1 is challenging the measures taken under Section 13(4) of SARFAESI Act, he being aggrieved by the measures taken under the said provision, the only remedy available to Respondent No.1 is an application under Section 17 of SARFAESI Act. According to him, as the SARFAESI Act is a complete Code in itself, Respondent No.1 has to approach the Debts Recovery Tribunal only, and no other Forum, for getting redressal of his grievance.

23] In order to appreciate these rival submissions advanced before us, we find it useful to first reproduce, for ready reference, the relevant provisions of Section 13(4) of the SARFAESI Act, which read as follows;

“13(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 realizing the secured asset;

- (b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realizing 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”.

24] At this stage, it may also be necessary to reproduce Section 17 of the SARFAESI Act, under which Application was preferred by Respondent No.1 before the Debt Recovery Tribunal. It reads as under:

“17. Right to appeal

(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application alongwith such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken:

PROVIDED that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation: For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower

shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.

- (2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.*
- (3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the business to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditors as in valid and restore the possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case may be, and pass*

such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

- (4) *If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.*

- (5) *Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:*

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

- (6) *If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any part to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.*
- (7) *Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the rules made thereunder.”*

25] Admittedly, in this case, the measures of 'taking possession' and of 'selling the mortgaged property' are taken by the Petitioner under Section 13(4) of SARFAESI Act. Respondent No.1 is aggrieved by such measures, on the count that the Petitioner was not having any 'saleable interest' in the mortgaged property, as the mortgaged property falls in CRZ and is reserved as a “RG Plot”. Therefore, Respondent No.1 is aggrieved on count of the measures

of auction of property, which, according to Respondent No.1, is void in itself. Therefore, needless to state that he is aggrieved by the measures referred to in Sub-Section 4 of Section 13 of the SARFAESI Act.

26] Now the question is, '*whether the words "any person" used in Section 17 of the SARFAESI Act are of wide import or their scope is restricted only to cover mortgagor or the guarantor?*' In our considered opinion, these words are of wide import, as they are not qualified in any way. We also say so, in view of decision of the Hon'ble Apex Court in the case of *United Bank of India Vs. Satyawati Tandon & Ors.*², relied upon by learned Senior Counsel for Respondent No.1. In this decision, after considering the entire scope of the SARFAESI Act and the provisions of Section 13(4) in the context of Section 17, it was categorically held in paragraph 42 of the judgment that the expression "*any person*" used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also the guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. The similar view was taken by this Court also in the case of *State Bank of India Vs. Jigishaben B. Sanghavi & Ors.*³, wherein while considering the bar of

2 (2010) 8 SCC 110

3 (2011) (2) Mh.L.J.

jurisdiction of a Civil Court for entertaining any suit or proceedings in respect of the matters which can be determined by the SARFAESI Act itself, in paragraph No.17 of the judgment, this Court was pleased to rely upon its earlier judgment in *M/s.Trade Well Vs. Indian Bank*⁴ and held that, *“once a measure is adopted under Section 13(4), a statutory remedy provided under Section 17 is available not only to the borrower, but to any person who is aggrieved by the taking of a measure”*.

27] It was further held that, *“the remedy provided under Section 17 is an efficacious alternate remedy available to a third party as well as to the borrower, where all grievances can be raised.”*

28] In this judgment, this Court has also considered the above-said decision of the Hon'ble Apex Court in the case of *United Bank of India Vs. Satyawati Tondon*⁵, holding that, the expression 'any person', used in Section 17(1), is of wide import. It takes within its fold, not only the borrower but also guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14.

4 2007(2) Mh.L.J. (Cri) 412 = 2007(3) AIR Bom R 656 (DB)

5 2010(3) Bankers' Journal 581

29] We can, in this respect, also take recourse to the landmark decision in the case of *Mardia Chemicals Vs. Union of India*⁶, wherein the Hon'ble Apex Court has considered entire scheme of the SARFAESI Act and held that the said Act provides a comprehensive scheme and is a complete code in itself. It was held that once a measure is adopted as per Sub-Section 4 of Section 13, the Act provides for a remedy of an Appeal under Section 17. The scheme, which is enunciated under the Act, cannot be rendered nugatory by seeking recourse to the jurisdiction either of a Civil Court or for that matter, in adopting writ proceedings under Article 226 of the Constitution of India. When the law expressly contemplates a challenge to a measure taken under Section 13(4) and such challenge is provided before the Tribunal, then it follows that such challenge before any other Forum is barred; the only remedy available to the aggrieved party being an Appeal under Section 17 of the Act, when such measure is taken.

30] In the above-said decision of *State Bank of India (supra)*, the Division Bench of this Court was further pleased to hold that, “*once a measure is adopted under Section 13(4), the Act*

6 2004 (2) Mh.L.J. (SC) 1090 = AIR 2004 SC 2371

provides a statutory remedy not only to the borrower, but to any person aggrieved by taking of a measure. While enquiring into an Application under Section 17, the Tribunal is empowered to determine whether the action, which is taken by the secured creditor, is in accordance with the provisions of the Act and the Rules made thereunder. If the Tribunal comes to the conclusion that the action was invalid, it is vested with wide powers, including both to restore the management of the business or restoration of possession to the borrower and to pass such orders as it may consider appropriate and necessary in relation to the recourse taken by a secured creditor under Sub-Section 4 of Section 13.”

31] What is important to know is that, in this authority, it was further held that, *“when a person other than a borrower is aggrieved by a measure taken by the secured creditor under Sub-Section 4 of Section 13, a remedy is equally made statutorily available to such a person.”*

32] Learned Senior Counsel for Respondent No.1 has, in this context, also relied upon the recent decision in the case of *Jagdish Singh Vs. Heeralal and Ors.*⁷, wherein the Hon'ble Apex Court was pleased to once again reiterate that the expression “any

⁷ (2014) 1 SCC 479

person”, used in Section 17, is of wide import and takes within its fold not only the borrower but also the guarantor or any other person who may be affected by action taken under Section 13(4) of the SARFAESI Act.

33] The learned Senior Counsel for Respondent No.1 has placed reliance on the definition of the 'aggrieved person', as given in “Black's Law Dictionary-Tenth Edition”, which defines “*aggrieved party*” to mean, “*a party entitled to a remedy; especially, a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment*”.

34] Here in the case, Respondent No.1 claims that its property rights have been adversely affected by the measures taken by the Petitioner in auction sale of the mortgaged property, by not disclosing that the mortgaged property was falling within the CRZ and was reserved as “RG Plot”. Hence, he is an aggrieved person. His grievance pertains to one of the measures taken by the Petitioner under Section 13(4) of the SARFAESI Act. Respondent No.1 has no other remedy, in such situation, considering the law laid down by the Hon'ble Apex Court, and by this Court. In the law laid

down in the above said authorities, the jurisdiction of Civil Court to entertain Petitioner's grievance is completely barred. The only remedy, therefore, which the aggrieved person, like Respondent No.1, is having, is of a right of appeal before the Debts Recovery Tribunal. Hence, in our considered opinion, the Securitisation Application preferred by Respondent No.1 before the Tribunal was very much maintainable. As to the Judgment of the Division Bench of this Court, relied upon by learned Senior Counsel for the Petitioner, in the case of *Umang Sugar Pvt. Ltd. (supra)*, in our considered opinion, it cannot be made applicable to the facts of this case, as the facts of the Judgment were different. In that case, the bidder had filed Writ Petition raising certain grievances in respect of tender document. The maintainability of the Writ Petition was challenged on the count that there was an efficacious remedy available under Section 17 of the SARFAESI Act. In that context, it was held that the Petitioner, being a bidder only, and neither a borrower, nor a secured creditor, has a limited issue to the extent of recovering the E.M.D. and to withdraw from the tender proceedings. Therefore, he could not be said to be an "aggrieved person" in respect of the measures taken under Section 13(4) of the SARFAESI Act. It was further held that, "from the admitted facts, neither Respondent No.2-Bank, nor

the secured creditor has resorted to any measures under Section 13(4) of the SARFAESI Act and hence, considering the words “*any of the measures*”, referred to in Sub-Section 4 of Section 13 taken by the secured creditor, it was held that the Petitioner therein, would not have a remedy of right to appeal under Section 17 of the SARFAESI Act. It was further held that, a bidder in auction sale is not an aggrieved person and hence has no remedy to file an appeal. No doubt, in this context, it was held that, “*if the Auction Purchaser is permitted to challenge the auction or measures resorted to under Section 13(4), he cuts his own legs and indirectly, will be assisting the cause of borrower also. It will thus be prejudicial not only to his own interests but to the interests of Respondent No.2 as well.*”

35] However, in our considered opinion, these observations being made in the facts of the said case, they cannot be said to be laying down a law as such that if the purchaser himself is a aggrieved person, on count of the measures taken under Section 13(4) of the SARFAESI Act, he is not having remedy to file Application under Section 17 of the Act. If one considers the fact that the SARFAESI Act is a complete Code in itself, meant for providing efficacious and expeditious remedies to the party, aggrieved on account of the measures taken under the said Act, then, in our

considered opinion, such remedy is available to the Auction Purchaser also in respect of measures taken by the Petitioner-Bank under Section 13(4) of the SARFAESI Act. Therefore, as far as this aspect is concerned, in our considered opinion, both the Tribunal and Appellate Tribunal have rightly held that the Application filed by Respondent No.1 before it under Section 17 of the Act was maintainable.

36] This takes us to the next question, '*as to whether Respondent No.1 can successfully set aside the sale, on count that the Petitioner has not acquired any 'saleable interest' in the mortgaged property?*' This question requires consideration of two aspects: first, whether Respondent No.1 is estopped from doing so, as the said issue is already set at rest in the proceedings before the Debts Recovery Tribunal, Chennai in O.A. No.2036 of 2001, and, secondly, whether Respondent No.1 in his capacity as an Auction Purchaser can do so? According to learned Senior Counsel for the Petitioner, in the proceedings before the Debts Recovery Tribunal, Chennai, this issue is already decided and concluded. Neither the guarantors nor borrowers have challenged their 'saleable interest' in the mortgaged property, which is acquired by the Petitioner and, therefore, Respondent No.1, who is an Auction Purchaser, is now

estopped from challenging the same.

37] In our considered opinion, in order to appreciate these rival contentions, it would be necessary to take brief overview of the facts of the case. Undisputedly, Smt. Anusaya Kantilal Shah was owner and in possession of the plot bearing Survey No.131, ad-measuring 22156.535 sq.mtrs. situated at village Versova within the boundaries of Ward "K" of the Municipal Corporation Greater Mumbai. She had divided the said plot into 19 sub-plots, in the year 1970. Out of them, sub-plot Nos.131/19 and 131/4 forming 15% of the total area of the main plot were earmarked as 'Recreation Ground' (RG). It necessarily implies that the said plots were meant for the use of other 17 sub-plot owners. The dispute in the present petition relates to the sub-plot No.131/19, which was the mortgaged property. It is a matter of record that the original owner Smt. Anusaya Kantilal Shah had submitted a Layout Plan of the entire plot, bearing Survey No.131, before the Municipal Corporation of Greater Mumbai (MCGM) for development, which was sanctioned by the Competent Authority of the MCGM on 19th February, 1976. On 3rd April, 1971 she had transferred this sub-plot, bearing No.131/19, which is ad-measuring 1743 sq.mtrs. in favour of Respondent Nos.2 to 4 through unregistered Deed of Conveyance.

38] Subsequent thereto in the year 1997 Smt. Anusaya Kantilal Shah has executed registered deed of confirmation in favour of Respondent Nos.2 to 4 confirming the earlier deed of conveyance and agreement of sale dated 3rd April, 1971. Thereafter, another registered deed come to be executed between Smt. Anusaya Kantilal Shah and Respondent Nos.2 to 4 on 18th February, 1998 declaring conveyance in respect of the very property. On 23rd May, 2000 Respondent Nos.2 to 4 deposited registered Deed of Confirmation dated 20th June, 1997 of the Conveyance Deed dated 3rd April, 1971 and thus created equitable mortgage of the property in favour of Bank of India for securing dues of M/s.D.N. Exports.

39] According to learned senior counsel for Respondent No.1, as the layout plan of the aforesaid plot was sanctioned by the MCGM in the year 1976 itself Smt. Anusaya Kantilal Shah could not have transferred the said plot in favour of Respondent Nos.2 to 4, on the basis of unregistered Conveyance Deed. Hence Respondent Nos.2 to 4 could not become owners of the said plot. Though, Smt.Anusaya Kantilal Shah had, thereafter, on 20th June, 1997 made the registered sale-deed of the said plot in favour of Respondent Nos.2 to 4, but according to learned senior counsel for Respondent

No.1 she was not entitled to do so, as the said plot was already reserved as a RG plot under the sanctioned layout plan. The said plot therefore, could be only used by the sub-plot owners for the limited purpose of recreation facilities and upto limited extent only, as permissible under Development Control Regulation (DCR). Thus, according to learned senior counsel for Respondent No.1, the unregistered Conveyance Deed dated 3rd April, 1971 and registered deed of confirmation dated 18th February, 1997 executed by Smt.Anusaya Kantilal Shah in favour of Respondent Nos.2 to 4, could not and did not confer any right, title and interest in respect of the said plot in favour of Respondent Nos.2 to 4. Therefore, Respondent Nos.2 to 4 could not become owner of the said plot and as a result, they could not mortgage the said plot in favour of Bank of India, to secure the amount of credit facilities extended to M/s.D.N. Exports. Hence according to learned senior counsel for Respondent No.1, the so called mortgage created by Respondent Nos.2 to 4 in favour of Bank of India is void in the eyes of the law and on the basis of so called equitable mortgage, the Bank of India had got no security interest upon the said plot. As a result thereof, the Petitioner had also not derived any security interest on the said plot so as to sell the same by auction.

40] As against it, the submission of learned senior counsel for the Petitioner is that, although the said plot falls within the CRZ and is reserved as a RG plot, it has not lost the 'saleable interest' as it was transferable. It is submitted by him that according to Regulation 23 (1) (e) of the DCR, the ownership of such sub-plot reserved as 'Recreational Ground' shall vest in the other sub-plot owners, only if the conveyance deed had been executed by the owner of the plot in favour of other sub-plot holders in accordance with sanctioned layout plan. In the instant case, it is submitted by him, that the ownership of the said plot had not been vested in other sub-plot holders as no such Conveyance Deed has been executed. Therefore, the owner of the plot namely Smt. Anusaya Kantilal Shah was not divested of her ownership rights over the subject plot. She was very much competent and therefore, entitled to transfer it in favour of Respondent Nos. 2 to 4. Respondent Nos. 2 to 4 having become the owners of the said plot on the basis of the unregistered sale-deed dated 3rd April, 1971 which was confirmed in the year 1997, they had saleable interest and were entitled to create mortgage of the said plot in favour of the Bank of India. Thus, according to learned senior counsel for Petitioner, the mortgage created by Respondent Nos. 2 to 4 in favour of Bank of India is

perfectly valid and on the basis of such mortgage, the Bank of India received security interest/saleable interest in the said plot. It is urged that the said issue has already decided in Original Application (OA) No.2036 of 2001 in Debts Recovery Tribunal, Chennai against borrower and guarantor, vide judgment and order dated 12th September, 2008. Admittedly, the said judgment and order is not challenged by any of the parties, therefore, it has attained finality and the said plot has been declared as mortgaged property. Therefore, according to learned senior counsel for the petitioner, now it is not open to the Auction Purchaser to dispute the security interest of the Bank or its assignee. Respondent No.1 has also accepted the 'saleable interest' of the Petitioner in the said plot and had participated in the Auction Sale and hence, Respondent No.1 is now estopped from challenging the security interest of the Petitioner in the said plot.

41] In our considered opinion, the real issue in crux arising for our consideration is thus, whether the plot, which is declared to be a RG plot, is transferable or not ? Depending on answer to this question, we will have to consider, whether the security interest as defined under the SARFAESI Act is created in favour of the petitioner in the said plot or not. For that purpose we may usefully

refer to the definition of “security interest” as given in Section 2(zf) of the SARFAESI Act, which states that the “security interest” 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”*. The security interest thus necessarily means right, title and interest in respect of any property. Hence, one has to consider whether Respondent Nos.2 to 4 were having such right, title and interest in the mortgaged property so as to transfer the same in favour of the Bank of India and then the Bank of India was having such right, title and interest to assign the same in favour of the Petitioner.

42] In this respect, we will have to therefore, consider what is the exact legal position as to the right, title and interest in respect of the plot, which is reserved as 'Recreation Ground' under the provisions of Development Control Regulations (DCR for short) and whether there is any restriction on the sale of such plot which is reserved as a RG plot. For that purpose, we have to take recourse to Rule 23 of DCR for Greater Bombay.

43] For ready reference, we may reproduce Regulation 23

of the Development Control Regulations, the relevant portion of which, reads as under:-

“23. Recreational/Amenity Open Space :-

- (i) *Open Spaces in residential and commercial layouts:-*
- (a) *Extent-In any lay-out or sub-division of vacant land in a residential and commercial zone, open spaces shall be provide as under:-*
Area from 1001 sq.m. to 2500 sq.m.-15%
- (b) ...
- (c) ...
- (d) ...
- (e) *Ownership :- The ownership of such recreational space shall vest, by provision in a deed of conveyance, in all the property owners on account of whose holdings the recreational space is assigned.*
- (f) ...
- (g) *Structures/uses permitted in recreational open spaces:-*
- (i) ...
- (ii) *In a recreational open space or playground of 1000 sq.m. or more in area (in one piece and in one place), structures for pavilions, gymnasia, club houses and other structures for the purpose of sports and recreation activities may be permitted with built-up area not exceeding 15 percent of the total recreational open spaces in one place. The area of the plinth of such a structure shall be restricted to 10 percent of the areas of the total recreational open space. The height of any such structure which may be single storey shall not exceed 8 m. A swimming pool may also be permitted in such a reccreational open space and shall be free of the structures for such sports and recreation activities shall conform to the following requirements:-*

- (a) *The ownership of such structures and other appurtenant users shall vest by provision in a deed of conveyance, in all the owners on account of whose cumulative holdings, the recreational open space is required to be kept as recreational open space or ground viz."R.G." in the layout of sub-division of the land.*
- (b) *The proposal for construction of such structure should come as a proposal from the owner/owners/society/societies or federation of societies without any profit motive and shall be meant for the beneficial use of the owner/owners/members of such society/societies federation of societies.*
- (c) *Such structures shall not be used for any other purpose, except for recreational activities for which a security deposit as decided by the Commissioner will have to be paid to the Corporation.*
- (d) *The remaining area of the recreational open space of playground shall be kept open to sky and properly accessible to all members as a place of creation, garden or a playground.*
- (e) *The owner/owners/society or societies shall submit to the Commissioner a registered undertaking, agreeing to the conditions in (a) to (d) above."*

44] The Development Control Regulations for Greater Mumbai, 1991 (for short "DC Regulations") are traceable to section 22 of the Maharashtra Regional and Town Planning Act, 1966 (for short "MRTP Act"). Section 22 sets out the contents of a

development plan. One important content of the plan are the regulations applicable to use and development of land and building activities. The attempt is to regulate such activities for proper and complete planning. That is how the DC Regulations have been brought into force. Regulations 2 and 3 refer and contain the definitions. The definition of the term “amenity” is to be found in Regulation 3(7). That means roads, streets, open spaces, parks, recreational grounds, playgrounds, gardens etc. and other utilities, services and conveniences. If parts of these regulations are perused, then, it would be evident that they are divided with some specific object and purpose. The Administration is covered by Part-I. That contains regulations enabling grant of development permission and commencement certificate. They outline the procedure for obtaining the permission and certificate and the procedure to be followed during construction. Part II is titled General planning requirements, Land users and manner of development. Regulations 9 to 36 fall in this Part. Regulation 9 clarifies that the uses of all lands situated within the Municipal limits of Greater Mumbai which have been allocated, designated or reserved for certain purposes in the development plan, shall be regulated in the type and manner of development/redevelopment according to Table 4. Then, there are

various aspects in relation to grant of development permission in respect of public housing / high density housing. Then, there are regulations dealing with every minute aspect so as to sub-serve the general planning requirements and land uses. Recreational/Amenity open spaces is an aspect dealt with by Regulation 23. Sub-regulation (1) thereof provides for open spaces in residential and commercial layouts and their extent. While it is stated that these open spaces shall be exclusive of areas of accesses / internal road / designations or reservations, development plan roads and areas for road widening and shall as far as possible be provided in one place, however, there are exceptions and to be found in clause (a) of sub-regulation (1) of Regulation 23. Various clauses of this sub-regulation would clarify as to how eventually the ownership of such recreational spaces shall vest, by a provision in a deed of conveyance, in all the property owners on account of whose buildings the recreational space is assigned. There are structures/uses permitted in recreational open spaces and even that aspect is highlighted in clause (g) of sub-regulation (1) of Regulation 23. Various sub-clauses even in relation to these structures and permissible uses in recreational open spaces would denote that the ownership does not vest automatically but by a provision in a deed of

conveyance.

45] It is not possible to agree with Mr. Kadam, learned senior counsel appearing for respondent No.1 that Regulation 21, dealing with layout of land and land sub-division as also Regulation 23 with the sub-regulation and sub-clauses highlighted by him, namely, (a), (b), (d) and (e) of sub-regulation (1) of Regulation 23 would mean that there is a vesting of recreation space and that ownership thereof goes at the sub-division to the plot holders on whose account the recreation area is to be provided. If that had been the intent, then, there not be any necessity of inserting the words "*shall vest by a deed of conveyance*". These are not mere surplusage. It is apparent and unambiguous that even where reservations are carved out and for public purposes in a development plan, there is no automatic vesting. These lands or reserved plots do not vest in the State or the Planning Authority straight away. The Planning Authority has to acquire them and the rights therein by an elaborate process. All the more in layouts and particularly private layouts, such recreation spaces would have to be conveyed and transferred to those on whose account these spaces are assigned. It is not possible to agree with him that the words

employed in these regulations denote only a manner in which the vesting would take place. He would urge that vesting and conveyance are the words employed not in their strict legal sense. Meaning thereby, a specific act being required to be performed for this purpose, but it generally indicates the mode and manner of handing over. Mr. Kadam has gone as far as suggesting that mere provision or assigning of a recreation area or recreation open space means no alienation is possible of the earmarked plot. According to the respondent No.1, by mere provision the divesting of the right of re-alienation takes place. Alternatively Mr. Kadam would suggest that DC Regulation 23 operates as a statutory bar on alienation. He would submit that there is a common usage contemplated and, therefore, reading of this DCR would mean once layout is sanctioned the land gets alienated to the alienee. Mr. Kadam then contends that the title vests with the plot holders and, therefore, Anusuya could not have sold this plot nor anyone claiming through her could have transferred it. Once Anusuya had no title and from inception, then, no interest could have been created.

46] Mr. Kadam has relied upon paragraph 14 page 72 of the compilation Volume I which is a pleading in the securitisation

application. He also relied upon the grounds at page 14, paragraphs 20 and 21. These are the pleadings in the writ petition. He submits that these pleadings and the grounds in the writ petition are based on the pleadings filed in the Debts Recovery Tribunal and Debts Recovery Appellate Tribunal. Our careful reading of all the clauses and the DC Regulations as a whole leaves us in no manner of doubt that they and DC Regulation 23 contemplate regulation and control of use and development of land and in that a provision has to be made for recreational/amenity spaces but as far as their ownership is concerned, that would have to be governed by clause (e) of Regulation 23 sub-regulation (1). It may be that property holders, on account of whose holdings the recreational space is assigned, can claim and ought to have access to it, still, its ownership is governed by general principles and would require conveying the space and area specifically to a defined legal activity. Therefore, vesting and ownership of the recreational space takes place by a provision in a deed of conveyance. There is neither any deprivation of title of Anusuya or respondent Nos.2 to 4.

47] Mr. Kadam's arguments overlook the fact that even when there are designations and allocations in a development plan

and proposals are made reserving lands, time and again it has been held by the Hon'ble Supreme Court that such plots or lands and which are styled as reserved plots/lands do not vest or get transferred to the Planning Authority or the State free of cost. In fact, provisions of this nature have been struck down as unconstitutional by the Hon'ble Supreme Court of India and suffice it to refer to the judgments delivered in the case of *Yogendra Pal & Ors. vs. Municipality, Bhatinda and Anr. AIR 1994 SC 2550* and *Pandit Chet Ram Vashist vs. Municipal Corporation of Delhi, AIR 1995 SC 430*. In the latter case, the Hon'ble Supreme Court held that the resolution of the Standing Committee of the Corporation holding that area specified in the layout plan for parking and school shall vest in the Corporation free of cost was not in accordance with law. Once we are dealing with a private land, then, all the more it is not possible to agree with Mr. Kadam.

48] Thus, in our considered opinion, though the bare reading of Rule 23 indicates that the ownership of the RG plot vests in all the property owners, on account of whose holdings the recreational space is assigned, however, as such vesting takes place only by Deed of Conveyance, this Regulation thus does not

put or create any embargo as such, for sale or transfer of the RG plot. This Regulation also does not provide for automatic vesting of the said plot in the name of sub-plot holders but it provides that vesting is to take place only after the Deed of Conveyance is executed. Hence, it follows that merely because in the layout plan, some open plot is shown as RG plot, it does not mean that the owner of the plot ceases to have any right, title and interest in such a RG plot. It may be true that use of a RG plot may be restricted, as its user other than for the purpose of RG is not permissible. Its user cannot be made except for certain structures, as provided by the Development Control Regulations. The scheme of Development Control Regulations reveals that the proposal for construction of such structure should come from the owners for whom the RG plot is meant and it should be for their beneficial use. However, restrictions on user of the RG plot cannot and does not in any way affect the transferability of the said plot. Hence it would be difficult to accept the proposition, submitted by learned senior counsel for Respondent No.1 that as the RG plot cannot be used for any other purpose, other than the beneficial use of the remaining plot holders, the transferability of the RG plot is also affected. It has to be held that the RG plots are as open and free in nature as in the case with any

other ordinary plots. In our considered opinion, therefore, even assuming that the transferability of RG plots is restricted or qualified, it will not be possible in any way to say that RG plots are not having any 'saleable interest'. It cannot be, therefore, accepted that Smt. Anusaya Kantilal Shah has no 'saleable interest' in the said plot, so as to transfer the same to Respondent Nos.2 to 4. The title of this sub-plot though reserved as RG remained with her, which she had validly transferred in the name of Respondent Nos.2 to 4, who have in their turn created mortgage in the said plot in favour of Bank of India.

49] In our considered opinion, the Debts Recovery Tribunal has, in this respect rightly placed reliance on the judgment of the Division Bench of this Court in *Municipal Corporation of Greater Mumbai and Ors. Vs. L.K.Builders*⁸. In this judgment, the question raised before the Division Bench of this Court was whether the plots reserved for public purposes like college, cemetery, play-ground, recreation ground, municipal hall, garden, school, etc have got any rateable value? The Additional Chief Judge of Small Causes Court, Mumbai before whom, the rateable value fixed on such R.G. plots by Mumbai Municipal Corporation, was challenged, held that such plots

8 1995(4) Bombay CR 606

have nominal or nil rateable value. The MCGM preferred an Appeal against said judgment of reducing the rateable value as nominal value. In the said context it was held by this Court as follows;

“Merely because all these plots are reserved for certain public purposes as mentioned in earlier part of this judgment under the development plan or under the town planning scheme, it does not follow that the same have no value for the owner of the plots. Whenever a town ship is to come or whenever a huge building complex is to be constructed, the entire land can never be built upon. Some of the remaining sub-plots of the land are always required to be kept open under the Development Control Rules or some such plots can be used for limited purposes. It does not follow that these plots have no rateable value or no value at all”.

50] It was further categorically held in this judgment that, “there is no restriction on the sale of such RG plots”. In our considered opinion, in view of this categorical observation made by this Court that there is no restriction on the sale of RG plots, the contention of learned senior counsel for Respondent No.1 that the mortgaged property in the instant case, being a RG plot, Smt.Anusaya Kantilal Shah was not having any 'saleable interest' therein, so as to transfer the same to Respondent Nos.2 to 4, cannot be accepted.

51] The next question for consideration is, '*whether the fact of it being an RG plot was not disclosed in tender documents, is sufficient to entitle Respondent No.1 to cancel or set aside the Auction Sale itself?*' According to learned senior counsel for Respondent No.1, the fact that it was a RG plot necessarily implies that there was either non existence of title on the said plot or if there is a title, then it was defunct in the sense that no one can purchase or sell the said plot, except the sub-plot owners. Therefore, this defect in the title or absence of title goes to the root of the matter and as such the Auction Sale, conducted by the petitioner without disclosing this material fact cannot be called as legal and valid and hence, it needs to be set aside. However, once it is held that reservation of the subject plot as RG plot has no effect on its title or saleability, then, this contention of Respondent No.1 holds no merits.

52] Moreover, Respondent No.1 is otherwise also not entitled to raise such contention, if we have regard to the terms and conditions of the tender document, namely "the Invitation of the Sale". In this case, admittedly the Auction Sale was conducted on "*as is where is and as is what is basis*". This fact is not disputed by Respondent No.1 also. Learned senior counsel for the Petitioner had

also highlighted the various relevant clauses at Sr. Nos.12, 13, 15 and 27 of the said Tender Document, which can be reproduced below for ready reference and which emphasize the fact that the sale was strictly on “as is where is and as is what is basis”.

- “12. The successful Quoter(s) shall be deemed to purchase the property with full knowledge of and subject to all the reservations, if any, in the Master Plan and/or Development Plan or Draft Development Plan or Town Planning Scheme affecting the said property and consent, including permission of the competent authority and/or under the provisions of the Urban Ld (Ceiling & Regulation Act) if any required form the concerned authorities.
13. The secured assets are offered for sale strictly on “as is where is and as is what is basis”. Neither ARCIL nor the authorized Officer undertakes any responsibility to produce any permission/licence etc. in respect of the assets offered for sale. The secured assets are being sold with all known and unknown encumbrances.
15. The Quoters in order to protect their individual interests are advised to verify the assets, conduct due diligence at their own costs in respect of the same, as well as ascertain the known and unknown liabilities, encumbrances and authorities of stake holders to their satisfaction before submitting the Quotation. Any Quotation made

shall be deemed to have been submitted after complete satisfaction of title thereto and or all claims there against and due proper inspection of the secured assets and hence the Quoter shall not be entitled to make any representation or raise any query/objection vis-a-vis ARCIL/Authorized Officer/Secured Creditor as to the title or condition of the secured assets or any part thereof any liabilities/ encumbrances/ dues/taxes/ levies irrespective as to whether disclosed or undisclosed.

27. *The information in respect of the said secured assets, including the description as per Annexure I and dues specified hereinabove, in any, have been stated to the best of the knowledge of the Authorized Officer, who, however, shall not be responsible for any error, misstatement or omission in the said particulars. The Quoter is, therefore, requested to verify the same for their own individual before submitting their Quotations."*

53] Learned senior counsel for the Petitioner has also, in this respect, drawn attention to the following clauses in Appendix-II of the Quotation Form submitted by Respondent No.1.

"We are also aware and confirm that ARCIL/authorized Officer have not made any representation as to the correctness, validity or adequacy or otherwise of any information pertaining to liabilities, encumbrances and

dues and have carried out our own due diligence for the purpose before submitting this Quotation. ARCIL/authorized Officer shall not be in any way liable for anything pertaining to the same”.

54] Our attention is also invited to the Annexure 'B' to the Respondent No.1's letter dated 16th September, 2009 accepting the bid. It reads as follows;

“The purchaser is deemed to have verified the Secured Assets, conducted due diligence in respect of the same, as well as ascertain the known and unknown liabilities, encumbrances and any other dues from concerned authorities or stake holders to their satisfaction. The payment of purchase consideration for secured assets to ARCIL is deemed to have been submitted after complete satisfaction of title thereto and / or all claims there against and due proper inspection of the Secured Assets and hence the purchaser shall not be entitled to make any representation or raise any query / objection / I ARCIL / Authorized Officer as to the title or condition of the Secured Assets or any part thereof or any liabilities / encumbrances / dues / taxes / levies irrespective as to whether disclosed or undisclosed.”

55] The perusal of these various clauses in the Tender Bid, Appendix-II and Respondent No.1's letter dated 16th September, 2009 thus makes it very clear that, it was entirely the responsibility and liability of the bidder/purchaser, Respondent No.1 herein, to make necessary enquiries as to the title of the mortgaged property. Clause No.12 of the Tender Document makes it abundantly clear

that successful bidder shall be deemed to purchase the property with full knowledge and subject to all the reservations, if any, in the Master Plan or Development Plan or Draft Development Plan or Town Planning Scheme, affecting the said property. Thus, it was not only a sale on *“as is where is and as is what is basis”* but it was also casting a positive burden on the purchaser to ensure that he has made the necessary enquiries with all the relevant authorities to know that the property is not affected, in any way, either in its title or even under Development Control Regulations. Respondent No.1 has also, vide its letter dated 16th September, 2009, accepted these terms and conditions, with a categorical statement that Respondent No.1 is deemed to have verified the Secured Assets, conducted the due diligence in respect of the same, as well as has ascertained the known and unknown liability, encumbrance etc. over the secured assets. It was also made clear in the said letter that the Authorized Officer of the Petitioner has not made any representation as to the correctness, validity, adequacy or otherwise of the information pertaining to the assets, liabilities etc.

56] Thus in this case, it is clear that the Auction Sale was held on the terms and conditions reproduced above, which were binding on both the parties. These terms and conditions had put the

positive burden and liability on Respondent No.1, the purchaser, of satisfaction of the valid title as also the satisfaction that the said property is not reserved under development plan or town planning scheme. As the reservation of the plot as RG is under Sanctioned Development Plan or Town Planning Scheme, in our considered opinion, it was obligatory on the part of Respondent No.1 to verify whether there was any reservation on the sale/plot under Development Control Regulation, before submitting its bid.

57] It is a matter of record and undisputed fact that Respondent No.1 has obtained the search report of the lawyer, who has searched the record of the Registrar of Assurances. It was, therefore, for Respondent No.1 only, to take the search of the relevant reservations on the said plot from Town Planning Authority under Town Planning Scheme. If Respondent No.1 has not done so, then now he cannot contend that the sale should be set-aside.

58] According to learned senior counsel for Respondent No.1, however, it was necessary for the Petitioner also to disclose this relevant and material fact in the Tender Bid. It is urged that the fact that plot was reserved as RG has material bearing on the transferability and beneficial use of the said plot. It has also the

effect on the value of the said plot and, therefore, in the public notice of the sale, the Petitioner should have mentioned this relevant and material fact. In this respect learned senior counsel for Respondent No.1, has relied upon Clause (f) of proviso to Sub-Rule 6 of Rule 8 of the Security Interest (Enforcement) Rules, 2002 which provides about the facts to be disclosed in the notice for auction/sale and it reads as follows;

“Any other thing which the authorized officer considers it material for a purchaser to know in order to judge the nature and value of the property”.

59] According to learned senior counsel for Respondent No.1, as the reservation of the subject plot as RG was having bearing on its value, it was necessary for the Petitioner to mention the same in the public notice. The Petitioner, therefore, cannot contend that as the sale was on *“as is where is and as is what is basis”*, Respondent No.1 is bound by the said sale, though, the fact that it was a RG plot has caused serious prejudice to the rights of Respondent No.1 over the said plot.

60] However, in our view, as rightly submitted by learned senior counsel for the Petitioner, when the auction sale is on *“as is where is and as is what is basis”*, that too, casting a clear duty on the

bidder/purchaser to ascertain the title and all relevant facts with due diligence, then the sale cannot be set-aside on account of the negligence on the part of the bidder/purchaser to do so. We may in this respect rely upon the judgment of the Hon'ble Apex Court in the case of *United Bank of India Vs. Official Liquidator and Ors.*⁹, wherein the Auction Purchaser has challenged the sale conducted by the Official Liquidator on count that the property was onerous. While rejecting this contention, it was held that as the sale was on “as is where is basis”, Auction Purchaser cannot wriggle out of the same on the count of diminution of the sale price. It was held that;

“When the Official Liquidator sells the property and assets of a company in liquidation under the orders of the Court he cannot and does not hold out any guarantee or warranty in respect thereof. This is because he must proceed upon the basis of what the records of the company in liquidation show. It is for the intending purchaser to satisfy himself in all respects as to the title, encumbrances and so forth of the immovable property that he proposes to purchase. He cannot after having purchased the property on such terms then claim diminution in the price on the ground of defect in title or description of the property. The case of the Official Liquidator selling the property of a company in liquidation under the orders of the Court in

9 (1994) 1 SCC 575

altogether different from the case of an individual selling immovable property belonging to himself".

(Emphasis supplied)

61] Learned senior counsel for the Petitioner has also in this respect rightly relied upon the decision of the Madras High Court in the case of *V. Sambandan Vs. The Punjab National Bank by its Chairman cum Managing Director and Anr.*¹⁰, wherein also relying upon the above said decision of the Hon'ble Apex Court in the case of *United Bank of India (Supra)*, it was held that when the sale is on "as is where is basis" and it is by the Official Liquidator, it does not hold out any guarantee and/or warranty in respect of the title to the said property.

62] We can also consider in this respect the judgment of the Delhi High Court in the case of *M/s.Midas Electronics Pvt.Ltd. Vs. Small Industrial Development Bank of India and Ors.*¹¹, relied upon by learned senior counsel for the Petitioner. In that case also, the Auction Sale was conducted by the Bank on "as is where is basis", highlighting that it was the duty of a bidder to ascertain the title of the property, whether there were encumbrance thereon; as also the physical measurement and the site condition. In the said case also

10 CDJ Law Journal 2009 MHC 5179

11 WP(C) No.2089 of 2015, dated 09/05/2016

the reliance was placed on Sub-Rule 6 of Rule 8 of the Security Interest (Enforcement) Rules, 2002 by the Auction Purchaser to challenge the said sale by contending that it was the duty of the secured creditor like Bank to disclose the material things which a purchaser must know, in order to judge the nature and value of the property. It was contended that as it was not disclosed that the title to the sale property was "leasehold" and that there were outstanding lease rentals payable, the auction notice had to be quashed and the money be returned with interest. This contention was however, rejected by the Delhi High Court, holding that though, as per Clause (a) to the proviso to Sub-Rule 6 of Rule 8 of the Security Interest (Enforcement) Rules, 2002 any encumbrance known to the secured creditor of a property has to be indicated in the public notice inviting bids, however, the 'lease-hold' title is not an encumbrance. The advertisement was neutral. It neither informed that property is 'free-hold' nor informed that the property is 'lease-hold'. The prospective bidders however, were clearly informed that property being sold is on "*as is where is basis*". Hence relying on the above said authority of *United Bank of India (Supra)*, it was held that when there was clear indication to the prospective bidders that property is put up for sale on "*as is where is basis*", no case was made out to set aside the

auction sale. The Writ Petition came to be dismissed accordingly.

63] As to the judgment of the Hon'ble Apex Court in *Haryana Financial Corporation & anr. Vs. Rajesh Gupta*¹², on which the learned Appellate Tribunal has relied upon, in the said case, auction sale was challenged on the ground that in the public notice the non existence of the independent passage to the unit was not disclosed. Moreover, copy of the site application and the building plan, although demanded by the purchaser to ascertain the correct position, was not supplied. In such situation, it was held that in view of Section 55 of the Transfer of Property Act, 1882, which casts a duty of the seller to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not, with ordinary care discover. It was held that it was incumbent on the State Financial Corporation to disclose to the Auction Purchaser about the non-existence of the independent passage to the unit. As the Corporation failed to do so and also failed to produce to the buyer the entire documentation as required by Section 55(1) (b) of the Transfer of Property Act, 1882, the sale was required to be set aside.

64] Thus, in the said case, the observations made by the

¹² (2010) 1 SCC 655

Hon'ble Apex Court in paragraph 29, reveal that the Respondent-Auction Purchaser, therein, had made all necessary enquiries and had also called upon the Petitioner Corporation to produce the necessary documents which Corporation failed to do and hence in the light thereof, it was held that the Corporation has failed to perform its obligation in giving fair description of the property offered for sale. The Hon'ble Apex Court has therefore, in this context relied upon provisions of Section 55 (1)(a) & (b) of the Transfer of Property Act, 1882 and upheld the contention of the Auction Purchaser. Thus, it can be clearly seen that the facts of this authority are totally different from the facts of the case before us. In this authority, the sale was not as on "*as is where is and as is what is basis*", with so many conditions attached thereto as in the instant case. Learned Presiding Officer of Debts Recovery Tribunal has therefore, rightly distinguished the facts of this case to the facts of the reported authority, which Appellate Tribunal has failed to do.

65] As held by the learned Debts Recovery Tribunal that in the instant case there are so many other conditions of the sale, which clearly cast a duty on Respondent No.1 to satisfy itself not only about the valid title of the property but also to the fact whether sale plot was reserved under the Development Plan or Town

Planning Scheme. It is also pertinent to note that the Petitioner has not deliberately withheld the said information from the knowledge of prospective bidders. Both, the Debts Recovery Tribunal and the Appellate Tribunal have arrived at the conclusion that it was a mutual mistake on the part of both the parties as both the parties were not aware of the plot being RG plot. Hence having regard to the terms and conditions of the Tender Bid of which Respondent No.1 was fully aware, and which casted a burden on Respondent No.1 to verify whether the plot was reserved or otherwise, and as Respondent No.1 has not done so, in our opinion, now he cannot turn back to the auction and contend that auction be set-aside. It is also not the case, as held hereinabove, that RG plot cannot be sold or there is blanket bar on sale of such plots. If it was so, then one would have considered the contention of Respondent No.1 that the Petitioner had no 'saleable interest' in the subject plot which the Petitioner could transfer to Respondent No.1. The legal position is however, very clear that the title in law remained vested with Smt.Anusaya Kantilal Shah, even after the plot was declared as RG plot. She was not divested of the same and therefore, as the Petitioner had 'saleable interest' in the plot, the Auction of the plot cannot be set-aside merely because Respondent No.1 had failed to act with due

diligence and subsequently discovered that it was a RG plot, its use is restricted and hence value is diminished, especially when it was the sale on *“as is where is and as is what is basis”* casting in so many terms and conditions, the burden and liability on Respondent No.1 to ascertain whether it was so reserved or otherwise.

66] In our considered opinion, therefore, the impugned judgment and order of the Appellate Tribunal, setting aside the sale cannot be sustained; it is liable to be quashed and set-aside, restoring thereby the order of Presiding Officer of the Debts Recovery Tribunal dated 29th July, 2011.

67] Accordingly, the writ petition is allowed. The impugned judgment and order passed by Debts Recovery Appellate Tribunal dated 23rd September, 2013 is hereby quashed and set-aside. As a result, the Appeal No.161 of 2011 stands dismissed. In consequence, the order passed by Debts Recovery Tribunal dated 29th July, 2011 is upheld. In the circumstances, Rule is made absolute in these terms leaving parties to bear their own costs.

68] At this stage, request is made by learned counsel for first respondent to continue the order passed on 5th February, 2014, for further two months, so as to enable the first respondent to

consider their position, if advised, to challenge the judgment of this Court in the Higher Court. This request is opposed by learned counsel for the petitioner and it is submitted that once the petition succeeds, then there is no warrant for continuing this arrangement.

69] In the circumstances, and when there was a direction to refund the amount of Rs.7.01 Crores as a final order, which has been set-aside by us, then, there is no warrant for continuing this interim arrangement. We do not think that the first respondent is without any remedy. In the event, this judgment is reversed, they can seek appropriate relief in the Higher Court. The request is, therefore, refused.

70] The amount deposited in the Court is thus allowed to be withdrawn by the petitioner with accrued interest thereon.

71] Civil Application is, accordingly, disposed of in the above terms.

(DR.SHALINI PHANSALKAR-JOSHI, J.)

(S. C. DHARMADHIKARI, J.)