

SHEPHALI/ATUL

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 2648 OF 2014

Pan India Motors Pvt. Ltd.

a company incorporated under the Companies Act, 1956, having its office at A-1, Surajpur Industrial Area, Noida-Dadri Road Surajpur 203207, District Gautam Budh Nagar, Uttar Pradesh

... Petitioner

Versus

1. **Asset Reconstruction Company (India) Ltd.,**
having their office at 17th Floor, Express Towers, Nariman Point, Mumbai 400 021; & its registered office at The Ruby 10th Floor, 29 Senapati Bapat Marg, Dadar (West), Mumbai 400 028.
2. **The Official Liquidator**
attached to the Hon'ble Delhi High Court as Liquidator to Daewoo Motors India Ltd., having his office at A-2/W-2 Curzon Roads Barracks Kasturba Gandhi Road, New Delhi
3. **Daewoo Corporation**
a Company organized and existing under the laws of Korea, having its registered office at 541, 5GA, Namdaemun-no, Chung-gu Seoul, Korea
4. **Stressed Assets Stabilisation Fund**
IDBI Towers, WTC Complex, Cuffe Parade, Mumbai 400 005

5. **Canara Bank**
Canara Bank Building 112
Jayachamarjidar Road, P.O.Box No. 6648,
Bangalore 560002 (through Chief
Manager (Legal))
6. **Pegasus Asset Reconstruction Pvt. Ltd**
(assignee of State Bank of Patiala) 507,
Dalamal House, Nariman Point, Mumbai
400 021
7. **Indusind Bank**
2401, General Chinmmayya Raod,
Cantonment, Pune 411 001 Through its
Chief Manager
8. **Indian Bank**
66, Rajaji Street, Chennai 600 001
9. **Khade Bapat Kabe Sinha & Associates**
Receiver appointed by DRT-Mumbai,
Bansilal Mansion, Room No. 27-B, 3rd
floor, Homi Mody Street, Fort, Mumbai
400 023
10. **Uttar Pradesh State Industrial
Development Corporation Ltd.,**
Having Head Office at UPSIDC
Complex, A-1/4, Lakhanpur Post Box No.
1050 Kanpur 208024 and having its
Regional Office at Administrative
Building, EPIP, Surajpur V, Kasna
Greater Noida District, Gautam Buddha
Nagar 201 306 (U.P.)
11. **Crosslinks Finlease Pvt. Ltd.**
a company registered under the
Companies Act, 1956 having its registered
office at B1, Kalindi Colony, New Delhi
110 065

... Respondents

APPEARANCES

For the Petitioner	Ms. Fereshte Sethna , <i>a/w Joini Shah, i/b MLS Vani & Associates.</i>
For Respondent No. 1	Mr. T. K. Cooper , <i>a/w Mr. Bhalchandra Palav and Mrs. Radha Jayraman, i/b M/s. Cyril Amarchand Mangaldas & S. A. Shroff & Co.</i>
For Respondent No. 2	Ms. Varsha Parulekar.
For Respondent No. 4	Mr. Sham Walve , <i>a/w Ms. Sushila Vichare, i/b M/s. KS Legal Consultant.</i>
For Respondent No. 10	Mr. Karan Bhosale , <i>i/b Ms. Neha Bhosale</i>
For the Applicant in Notice of Motion No. 345 of 2015	Ms. Bhavna Mhatre , <i>with Ms. Gayatri Singh, Senior Advocate, i/b Kranti LC for the Applicant</i>

CORAM : **S.C. Dharmadhikari
& G.S.Patel, J.J.**

JUDGMENT RESERVED ON : **22nd January 2016**

JUDGMENT PRONOUNCED ON : **22nd April 2016**

JUDGMENT (Per G. S. Patel, J.):

1. By this Petition, filed under Articles 226 and 227 of the Constitution of India, the Petitioner seeks to challenge an order dated 8th January 2014 passed by the Debt Recovery Appellate Tribunal (“DRAT”) in Miscellaneous Appeal No. 58 of 2013. The

present Petitioner was the Appellant before the DRAT. Although Ms. Sethna for the Petitioner says that this is the limited challenge in the Writ Petition, we find that in actuality, there are two other orders that are implicitly under challenge. The first of these is an order dated 22nd November 2012 passed by the Recovery Officer on an application made by the 1st Respondent pursuant to which a certain sale of property, to which we will refer hereafter, in favour of the Petitioner was ordered to be cancelled and was set aside. The second is an order dated 30th January 2013 passed by the Presiding Officer of the Debt Recovery Tribunal in a First Appeal filed by the Petitioner.

2. We have heard Ms. Sethna for the Petitioner and Mr. Cooper for the 1st Respondent, the Asset Reconstruction Company (India) Limited (“**ARCIL**”), at considerable length. The record before us includes the Petition in two volumes, running to about 500 pages, a substantial Affidavit in Reply, a copy of the written submissions filed before the Debt Recovery Appellate Tribunal, a four volume compilation of documents filed by the 1st Respondent, the Petitioner’s written submissions and authorities along with an accompanying compilation and the 1st Respondent’s written submissions and compilation of judgments. There are also two Receiver’s reports, as also two compilations in support of the report of a site commissioner appointed by the Debt Recovery Appellate Tribunal. We have considered all this material.

3. In order to more properly appreciate the controversy before us, it is necessary to set out briefly the facts that led to the filing of this Petition.

- (a) On 26th April 2002, ICICI Bank Ltd. filed Original Application No. 162 of 2002 before the Mumbai Debt Recovery Tribunal (“DRT”). It sought recovery of Rs.511,02,86,697/-, said to be due as on 31st March 2002, jointly and severally from Daewoo Motors Private Limited (“Daewoo”), by then in liquidation, and Daewoo Corporation, a holding company (Respondents Nos. 2 and 3 before us). ICICI Bank also sought further interest at an contractual rate with quarterly rests from 1st April 2002, and sought realization and enforcement of its security over the mortgaged and hypothecated properties as set out in the O.A.
- (b) On 9th May 2002, on ICICI Bank’s application, the DRT appointed its Receiver of the suit property, without, however, a power of sale. On 23rd July 2002, the DRT rejected ICICI Bank’s application for a direction to the DRT Receiver to sell the unit properties. ICICI Bank filed an Appeal before the DRAT. By its order dated 8th August 2002, the DRAT directed the DRT Receiver to sell the suit properties by public auction or private treaty.
- (c) The fixed assets of Daewoo included most importantly a large plot of leasehold land. This was Plot No. A-1, Surajpur Industrial Area, Greater Noida, Gautam Buddha Nagar, Tahasil-Dadri, District Gaziabad, Uttar Pradesh. The plot measures 204 acres. There are several structures standing on this land along with

plant and machinery. This was once a motor car manufacturing and assembly plant.

- (d) Following the order of 9th May 2002 read with the DRT's order of 31st March 2003, the DRT Receiver took possession of the suit properties. This included the land at Surajpur Industrial Estate.
- (e) It seems that the DRT Receiver then made several attempts to sell the suit properties including the public auctions. These attempts were unsuccessful.
- (f) In the the meantime, on 31st August 2004, the ICICI Bank's O.A. was finally allowed. On 11th October 2004, a Recovery Certificate was issued in favour of ICICI Bank.
- (g) By an Assignment Agreement dated 29th March 2005, ICICI Bank assigned, transferred and sold all loans of Daewoo together with the Recovery Certificate and all underlying securities, including the suit properties, to ARCIL. The Recovery Certificate was then amended to bring ARCIL on record. ARCIL then initiated Recovery Proceeding No. 440 of 2004 before the Recovery Officer, Mumbai DRT (**"Recovery Officer"**).
- (h) In the meantime, IDBI Bank, till then also a creditor of Daewoo, entered into an Assignment Agreement by which it assigned, transferred and sold all its loans to Daewoo along with all underlying securities, including

the suit properties, to one Stressed Assets Stabilisation Fund (“SASF”). This is Respondent No. 4 to the present Writ Petition. SASF was brought on record in ARCIL’s Recovery Proceeding.

- (i) Since the DRT Receiver was unable to sell the properties by public auction, ARCIL filed an application before the Recovery Officer seeking that the DRT Receiver be permitted to invite bids in public auction for sale of the assets but on various payment options such as deferred payment, payment in cash, payment in kind and so on. The DRT Receiver attempted to sell the properties in execution of the Recovery Certificate in various public auctions. At a sale conducted on 23rd August 2006, the DRT Receiver certain offers. These were rejected as they were not in accordance with the terms and conditions of the sale fixed by the Recovery Officer. It was in these circumstances that ARCIL says that it sought fresh or modified terms of conditions of sale by way of private treaty (with these modified payment terms) and placed these before the Recovery Officer.¹ The Recovery Officer considered this application and by his order dated 10th November 2006 sanctioned and permitted it. ARCIL then forwarded a list of intending offerers to the DRT Receiver. The DRT Receiver in turn sent an intimation along with a copy of the terms and conditions of sales and other particulars to the intending officers inviting bids. These were to be received on or before 7th December 2006. The DRT

1 ARCIL Compilation, Vol. I, *pp.* 1-18.

Receiver received five offers, including one from one Crosslinks Finlease Private Limited (“**Crosslinks**”), the 11th Respondent before us. At that time, Crosslinks was the second highest bidder at Rs.459 crores. The highest bidder was one Adzon Media Pvt. Ltd.

- (j) The DRT Receiver asked the bidders to improve their offers. Interested bidders submitted revised offers. Crosslinks too made a revised offer dated 18th December 2006 in respect of the fixed assets (Lot No.1) and the current assets (Lot No.2) separately, increasing its offer to Rs.765 crores.² Adzon, previously the highest bidder, was now the fourth highest bidder on this revision; two other bidders had offered more than Adzon, but less than Crosslinks.
- (k) On 2nd January 2007, having studied the revised offers, ARCIL wrote to the DRT Receiver confirming its acceptance of the offer made by the Crosslinks, then the highest offerer.³ On 2nd February 2007, these revised offers with their supporting documents were placed by the Recovery Officer by the DRT Receiver, who made a report on them.
- (l) On 12th February 2007, after notice to parties, the Recovery Officer held extensive hearings. By an order dated 12th February 2007, the Recovery Officer allowed the DRT Receiver’s report dated 2nd February 2007 and accepted Crosslinks’s revised offer in respect

2 ARCIL Compilation, Vol. I, *pp.* 19-20.

3 ARCIL Compilation, Vol. I, *pp.* 21-27.

of the fixed assets in favour of Crosslinks's nominee, i.e., Pan India Motors Private Limited, the Petitioner before us today. The offer made by Crosslinks in respect of Lot No. 2, the current assets, stood rejected.⁴

- (m) On 28th September 2007, an order came to be passed by the Presiding Officer of the DRT recording and noting the support of the workmen's union to the offer made by the Petitioner as a nominee of the Crosslinks.⁵
- (n) It seems that the Recovery Officer's order of 12th February 2007 was carried in appeal by various parties including Canara Bank. In one of these appeals, the Presiding Officer of the DRT passed an order of *status quo* of the sale of the suit properties (i.e., the fixed assets). This order of *status quo* was finally brought to an end by an order dated 5th October 2007 passed by the DRT.
- (o) ARCIL then filed an application before the Recovery Officer seeking compliance of the previous order dated 12th February 2007. On this application, numbered as Exhibit "52", the Recovery Officer passed an order on 16th October 2007 *inter alia* sanctioning the sale of the fixed assets (Lot No. 1) in favour of the Petitioner for

4 ARCIL Compilation, Vol. I, *pp.* 30-47.

5 ARCIL Compilation, Vol. I, *pp.* 28-29.

Rs. 765 crores on the terms and conditions of sale mentioned in that order.⁶

- (p) The offer from the Petitioner was for Rs.765 crores for Lot No. 1. It said it would create a ‘Special Purpose Vehicle’ or SPV to take over these assets. The SPV would be capitalized by equity and debt in the ratio of 35:65. There would be an initial payment of 35% of the sale consideration, i.e., Rs.267.75 crores. The balance, Rs.497.25 crores along with interest at 10% per annum, was to be paid on a deferred date and this was the debt component. That date of payment was deferred to the due date of Secured Non Convertible Debentures (“NCDs”) in the value of Rs.267.75 Crores and Secured Optionally Convertible Debentures (“OCDs”) of Rs.229.5 crores to be issued by the SPV in favour of ARCIL and SASF. Both the NCDs and OCDs were to be secured in favour of ARCIL and SASF by a first charge by way of hypothecation and mortgage over all the SPV’s assets.
- (q) On 16th October 2007, the Petitioner also executed an irrevocable declaration or undertaking in favour of ARCIL and SASF that it would execute the necessary documents to complete the sale transaction in accordance with the order of 16th October 2007 passed by the Recovery Officer.⁷ It was on these basis that ARCIL and SASF issued their no objection letters

6 ARCIL Compilation, Vol. I, *pp.* 48-52.

7 ARCIL Compilation, Vol. I, *p.* 53.

dated 16th October 2007 and 17th October 2007 respectively to the DRT Receiver.⁸

(r) On 17th October 2007, the Recovery Officer passed certain further directions regarding delivery of possession of the fixed assets to the Petitioner.⁹ A day later, on 18th October 2007, one of the unsuccessful bidders filed an application in its pending appeal before the DRT, and sought stay of the Recovery Officer's order of 16th October 2007. By its order dated 18th October 2007, the DRT adjourned this application for orders to 23rd October 2007 and restrained the DRT Receiver from taking any further steps in the matter. Aggrieved by this order, ARCIL and Crosslinks filed separate appeals before the DRAT. By a common order 19th October 2007, the DRAT directed the DRT to dispose of the unsuccessful bidder's application on 22nd October 2007. On that day, the DRT passed an order of interim stay of the recovery proceedings pending the final decision in all pending appeals. Again aggrieved by this order, ARCIL and Crosslinks filed appeals to the DRAT. By its order dated 25th October 2007, the DRAT vacated the interim stay of the recovery proceedings.

(s) On 25th October 2007, the DRT Receiver delivered possession of the fixed assets to the Petitioner.

8 ARCIL Compilation, Vol. I, *pp.* 54-55.

9 ARCIL Compilation, Vol. I, *pp.* 56-67.

- (t) On 7th November 2007, the DRT passed a common order confirming the Recovery Officer's order of 12th October 2007 and rejecting the objections raised by bidders that the sale was not in conformity of the DRT Act and Income Tax Act. The bidders' appeals were dismissed. Aggrieved by this order, Canara Bank filed an appeal to the DRAT. That appeal is pending.

- (u) On 2nd June 2008, the Petitioner filed Miscellaneous Application No.33 of 2008 (later numbered Exhibit "69") before the Recovery Officer. It sought directions against the Uttar Pradesh State Industrial Development Corporation ("**UPSIDC**"), the lessor of the land at the Surajpur Industrial Estate, to forthwith withdraw its claim in relation to the transfer of the lease and demanding that the claim be lodged instead with the Official Liquidator attached to Delhi High Court. ARCIL was not joined as a party to this application. UPSIDC filed an Affidavit and Written Submissions opposing the application. Later that month, ARCIL filed its own Miscellaneous Application seeking a dismissal of the Petitioner's Application No.33 of 2008.

- (v) On 6th March 2009, ARCIL filed another Miscellaneous Application (later, Exhibit "91") seeking a direction against the Petitioner directing it to comply with the Recovery Officer's order dated 16th

October 2009 and, alternatively, for an order setting aside the sale in favour of the Petitioner.¹⁰

- (w) On 24th September 2009, the Recovery Officer directed the Petitioner to insure the property in question, failing which the sale in its favour would be set aside.
- (x) On 13th November 2009, Consent Terms (later Exhibit “141”) were entered into between ARCIL and the Petitioner before the Recovery Officer.¹¹ Under these Consent Terms, the Petitioner was required to comply with the terms and conditions of the sale in a time bound fashion. The actual Consent Terms are about five or six pages. The several annexures to the Consent Terms include draft Deeds of Conveyance, a Deed of Hypothecation and so on. The draft Conveyance Deed is important, for it is Ms. Sethna’s submission that these Consent Terms, with their annexures, formed the entirety of a completed sale and provided for events of default, i.e., if the debentures were not paid or converted on schedule; specifically, for the right of ARCIL/SASF to place their nominees on the Petitioner’s board.¹² Clauses 1 to 3, read with Clauses 4(e) and 4(f) of the Consent Terms meant, she says, that the debenture series were both secured. Clause 4(h) cast an obligation on the Petitioner to insure the property in question.

10 ARCIL Compilation, Vol. I, *pp.* 67A-67AA.

11 ARCIL Compilation, Vol. I, *pp.* 68-309; Petition, Ex. “M”, *pp.* 159-408.

12 Clauses 2(xvii), ARCIL Compilation, Vol. I, *p.* 90; Petition, *p.* 183.

- (y) Two days later, on 15th December 2009, the Recovery Officer gave the Petitioner liberty to clear the entire dues of UPSIDC in order to avoid further delay. The Petitioner withdrew its claim against UPSIDC.
- (z) On 21st December 2009, the Petitioner issued so-called letters of allotment of both the NCDs and OCDs.
- (aa) Under directions of the Recovery Officer, ARCIL then filed an Affidavit dated 29th January 2010, confirming that the Consent Terms of 13th November 2009 did not in any manner detract from or dilute the terms and conditions of the sale. On 8th March 2010, the Recovery Officer took the Consent Terms on file. Accordingly, as provided in those Consent Terms, all pending Miscellaneous Applications filed by both ARCIL and the Petitioner came to be disposed of.
- (bb) On 28th April 2010, a status Affidavit came to be filed before the Recovery Officer pointing out default on the part of the Petitioner. On 3rd May 2010, ARCIL filed another Miscellaneous Application (later, Exhibit “146”) before the Recovery Officer once again seeking to set aside the sale in favour of the Petitioner on the ground that Petitioner was yet in default of their obligations. The Petitioner filed an Affidavit dated 8th June 2012 in reply. On 26th July 2010, the Petitioner sought 15 days for compliance. Time was granted until 10th August 2010. Between June 2010 and February 2011, the Petitioner made several applications for time

extensions for compliance with its pending obligations under the terms and conditions of the sale. The details of these various applications are not immediately germane. It is sufficient to note that throughout this period the Petitioner seems to have been in default. Undoubtedly it put forward some reasons for this non-compliance, but the fact remains that repeated extensions were sought without demonstrating compliance. The requirements in respect of the requisite debenture trust deeds and the pledges of the necessary shares were never fully complied with either. From the record it appears that the Petitioner's advocates kept sending fresh Miscellaneous Applications with proposed documents of pledge and trust deeds but these Miscellaneous Applications were never actually filed.

- (cc) On 26th October 2010, ARCIL wrote to the Petitioner demanding payment of the balance sale consideration.¹³ On 21st December 2010, the Recovery Officer granted further time for compliance to the Petitioner but imposed costs of Rs.5,000/-. The matter was stood over to 13th January 2011. On that date, before the Recovery Officer, the Petitioner filed yet another Miscellaneous Application seeking a further extension of four weeks to comply with the terms and conditions of sale, viz., the creation of a mortgage in favour of ARCIL and SASF and for the pledge of the shares in question.¹⁴ On 24th January 2011, the

13 ARCIL Compilation, Vol. II, *pp.* 67-68.

14 ARCIL Compilation, Vol. II, *pp.* 69-71.

Petitioner sent to ARCIL the purported debentures in ostensible part compliance with the terms and conditions of the sale.¹⁵ By then their redemption and conversion dates had passed. On 25th January 2011, ARCIL filed an Affidavit accepting that a final opportunity be given to the Petitioner till 15th February 2011 to create the requisite mortgage, charge, pledges and other securities in compliance with the terms and conditions of the sale.

- (dd) On 4th February 2011, ARCIL replied to the Petitioner saying that the debentures that ARCIL had received were not in consonance with the terms and conditions of the sale.¹⁶ ARCIL also pointed out that there were further pending compliances required of the Petitioner.
- (ee) On 14th February 2011, the Petitioner wrote to ARCIL saying that it had complied with the terms and conditions of the sale and apparently cleared all the dues of UPSIDC.¹⁷ ARCIL claims that it did not receive this letter till the time of a hearing before the Recovery Officer several days later on 18th February 2011.
- (ff) On that date, i.e., 18th February 2011, ARCIL applied a second time to set aside the sale in favour of the Petitioner. This was numbered as Exhibit “194”.¹⁸

15 ARCIL Compilation, Vol. II, *pp.* 72-77.

16 ARCIL Compilation, Vol. II, *pp.* 101-102.

17 ARCIL Compilation, Vol. II, *p.* 103.

18 ARCIL Compilation, Vol. II, *pp.* 84-117.

Simultaneously, the Petitioner filed an application, Exhibit “196”, bringing some documents on record and seeking yet another time extension.¹⁹ At this time, one RNA, a rival bidder filed a Miscellaneous Application, Exhibit “197”, seeking to continue with its bid application previously filed and numbered as Exhibit “182”, and also seeking to withdraw the praecipe, Exhibit “184”, that it had filed for withdrawal of that bid application. In other words, RNA now tried to withdraw its withdrawal. In Ms. Sethna’s submission this demonstrates that the entire application by ARCIL for cancellation of the sale to the Petitioner is vitiated by *mala fides*, and all that it was trying to do was to re-negotiate an already concluded transaction with a rival bidder.

- (gg) On 18th February 2011, the Recovery Officer passed an order granting part of ARCIL’s application restraining the Petitioner from creating third party rights or executing a lease deed. RNA was allowed to withdraw its withdrawal praecipe and it was directed to deposit Rs.35 to establish its *bona fides*. The matter was stood over to 28th February 2011.
- (hh) By its letter dated 23rd February 2011, ARCIL denied that the Petitioner had at any time complied with the sale conditions, and refuted the Petitioner’s contentions in its letter of 14th February 2011.

19 ARCIL Compilation, Vol. II, *pp.* 214-222.

- (ii) On 28th February 2011, the Petitioner filed Miscellaneous Appeal (L) No.202 of 2011 before the DRT challenging the Recovery Officer's order dated 18th February 2011. The DRT stayed the Recovery Officer's order in part.

- (jj) Meanwhile, on that very day, before the Recovery Officer the Petitioner sought an adjournment to file its reply to ARCIL's application for setting aside the sale. ARCIL's application was at that time already supported by UPSIDC. The Recovery Officer, a few days later, issued directions for filing Affidavits in Reply and Rejoinder.

- (kk) On 24th March 2011, the Petitioner filed a Transfer Petition alleging bias on the part of the Recovery Officer. On 30th March 2011, the ARCIL filed its Affidavit in Rejoinder and the Recovery Officer heard ARCIL's submissions. On 30th March 2011, ARCIL filed its Affidavit in Rejoinder and the Recovery Officer heard ARCIL's submissions on the question of setting aside of the sale. On 5th April 2011, the Recovery Officer was informed of the filing of the Transfer Petition. Despite that Petition having been filed, the Petitioner proceeded to file a compilation of documents before the Recovery Officer, who heard the Petitioner's counsel at some length. At this time written submissions were also filed by the Workmen's Union.

- (ll) On 15th April 2011, the arguments on behalf of the Petitioner were concluded before the Recovery Officer. The matter was adjourned for the arguments of UPSIDC and for ARCIL's Rejoinder.
- (mm) On 26th April 2011, the DRAT allowed the Transfer Petition and transferred the recovery proceedings to the Ahmedabad DRT. This order of the DRT was challenged by ARCIL in Writ Petition No.1445 of 2011 before this Court. On 24th November 2011, this Court disposed of the Petition and transferred the recovery proceedings to the Recovery Officer of the Mumbai DRT No.2.
- (nn) A brief reference is necessary to the events of March 2012. During this period, it appears that the Petitioner filed an application before the Recovery Officer for vacating the Recovery Officer's injunction order dated 18th February 2011, i.e., one that had been passed almost a year earlier. It also filed an application for expediting the hearing. This was rejected. An appeal from the order of rejection was also dismissed. A further appeal to the DRT also failed. The Petitioner filed a Writ Petition before this Court but, on 19th March 2012 withdrew that Writ Petition.
- (oo) On 22nd November 2012, the Recovery Officer set aside the sale in respect of the suit property, viz., the fixed assets, in favour of the Petitioner.²⁰ ARCIL was

20 ARCIL Compilation, Vol. III, *pp.* 13-33.

appointed a Receiver of those properties. The Recovery Officer stayed his own order except to the limited extent of permitting ARCIL to take an inventory of these fixed assets. By this order, the Petitioner's application to create a mortgage, charge, hypothecation, and pledge in compliance with the terms and conditions of sale was rejected by the Recovery Officer.

- (pp) The Petitioner filed an appeal to the Presiding Officer of the DRT. The Presiding Officer continued the stay. Before the DRT, the Petitioner said that the fixed assets had been duly insured. This statement turned out to be incorrect; those assets were never kept insured.
- (qq) On 30th January 2013, the Presiding Officer of the DRT dismissed the Appeal and upheld the Recovery Officer's order of 22nd November 2012.²¹ He also vacated the stay granted by the Recovery Officer.²² On this, the Petitioner filed a Second Appeal to the DRAT. On 27th February 2013, the DRAT granted an order of *status quo* in respect of these fixed assets. On 6th June 2013, ARCIL filed Miscellaneous Application No. 497 of 2013 seeking compliance of the order dated 27th February 2013.
- (rr) On 14th June 2013, the DRT passed an order taking minutes on record for making an inventory of fixed

21 ARCIL Compilation, Vol. III, *pp.* 34-64.

22 ARCIL Compilation, Vol. III, *pp.* 65-67.

assets and appointed the Recovery Inspector as Commissioner for this purpose.²³ ARCIL contends that inventory was refused and obstructed by the Petitioner.²⁴ There are reports of the DRT Receiver and the Commissioner (the Recovery Inspector) relied on by ARCIL in this regard. There is a two-volume compilation with colour photographs. It shows extensive damage to the unit buildings and structures. They appear not only to have been neglected but to have been stripped down to their shells.

(ss) On 8th January 2014, the DRAT dismissed the Petitioner's second appeal. This is the order under challenge in the Writ Petition.²⁵

(tt) There are a few further facts that must be noted subsequent to the order of 8th January 2014. On 14th March 2014, the Recovery Officer passed an order *inter alia* directing simultaneous possession, inventory and valuation of the fixed assets.²⁶ ARCIL's advocates wrote to the Petitioner's Advocates on 26th March 2014 informing them of the Recovery Officer's order of 14th March 2014. By its letter dated 4th April 2014 to the Petitioner, ARCIL fixed 11th April 2014 as the date for taking over possession. On 4th April 2014, the Recovery Officer passed an order appointing a new

23 Affidavit in Reply, *pp.* 558-559.

24 Affidavit in Reply, *pp.* 563-572.

25 Petition, Ex. "A", *pp.* 33-90.

26 Petition, Ex. "W", *pp.* 506-507.

valuer of the fixed assets.²⁷ On 9th April 2014, ARCIL wrote to the Petitioner postponing the possession date and, on 16th April 2014, informed the Petitioner of the Recovery Officer's order appointing a new valuer. On 25th April 2014, ARCIL again wrote to the Petitioner, now fixing the possession date on 5th May 2014. On 5th May 2014, the Petitioner refused to hand over possession or allow an inventory and valuation of the assets. ARCIL took symbolic possession of the fixed assets. This Petition was filed on 3rd May 2014 and served on Arcil on 5th May 2014.

(uu) On 25th July 2014, there was an ad-interim order passed by this Court *inter alia* directing the maintenance of *status quo* and restraining the Petitioner from alienating or disposing of the fixed assets.²⁸ The Petitioner was also directed to insure the fixed assets and ARCIL was allowed full access to these fixed assets for the purposes of inspection and inventory. ARCIL was also permitted to give inspection to prospective bidders after 72 hours' prior notice to the parties. This Court appointed a Court Commissioner to attend the site with ARCIL and to file detailed reports. The Court also allowed the fixed assets to be re-auctioned subject to re-confirmation by this Court.

(vv) We must note in passing, that there are two reports of an Officer of this Court pursuant to this order that are as yet pending final disposal. These are reports made

27 Petition, Ex. "X", p. 508.

28 SJ Vazidar (as he then was) and AK Menon JJ

by Mr. Dilip R. Talekar, presently the Insolvency Registrar of this Court. He has made two site visits. The two reports are dated 29th September 2014 and 29th October 2015.

(ww) On 15th January 2015, on an application by the Official Liquidator, and after some hearing, the Recovery Officer apparently ordered a forfeiture of the amount of Rs. 276.75 crores paid by the Petitioner. This order is under challenge in a First Appeal before the Presiding Officer of the DRT.

(xx) On 19th March 2015, pursuant to the leave granted by this Court, the Recovery Officer initiated a re-auction sale process in respect of the fixed assets. Notices for sale proclamation were served on the Petitioner. On 23rd September 2015, the public notice or proclamation of the sale along with the terms and conditions of the re-auction were issued by the Recovery Officer. The re-auction sale was fixed on 30th October 2015. The encumbrance of the Petitioner was mentioned in the sale notice. A corrigendum followed on 12th October 2015. On 15th October 2015, ARCIL gave the Petitioner advance notice as required by this Court's interim order. On 20th and 21st October 2015, the Petitioner permitted inspection of the fixed assets as mandated by this Court's interim order dated 25th July 2014. However, on 22nd and 23rd October 2015, it seems that the Petitioner did not permit further inspection of these fixed assets. This is noted in Mr. Talekar's second report. On 30th October

2015, the re-auction sale of the fixed assets scheduled for 30th October 2015 was cancelled. A report was filed by ARCIL on 30th October 2015 about the site visit for inspection.

4. We have noted these facts in such detail not because we believe we can go into them in our writ jurisdiction as we might had we been an appellate court, but for precisely the converse reason, i.e., because, given this complexity of facts and the very many orders of the recovery tribunals, we cannot entertain any challenge that is in the least fact-centric. Even assuming we could get into all these disputes, we would then be sitting as a third appellate court, something wholly alien to our jurisprudence.

5. Ms. Sethna's submission is, first, that ARCIL being regulated by the terms of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**SARFAESI Act**") and being an assignee of the original lender, ICICI Bank, elected to conduct a purely private treaty sale. According to Ms. Sethna, such a private treaty sale lies specifically within the purview of Rule 8 of the Security Interest Enforcement Rules framed under the SARFAESI Act. Neither the Act nor the Rules require permission from the DRT for such a sale and ARCIL did not need to go to the DRT for a sale that was, in Ms. Sethna's submission, entirely private. It also consequently did not need a confirmation of the sale from the DRT. It could always enter into a private conditional sale with specific terms and conditions. Ms. Sethna makes reference to various Sections of the SARFAESI Act, in particular Section 31(e), to submit that the SARFAESI Act does not apply to conditional sales over which no security has been created. This, in her submission, bars the application of the

SARFAESI Act. In other words, it operates to oust the jurisdiction of the DRT. Simply put, her submission is that Section 34, the provision of the SARFAESI Act that ousts the jurisdiction of ordinary Civil Courts, is itself ousted in the case of a private conditional sale, and that jurisdiction re-vests with the Civil Court. The SARFAESI Act has absolutely no application to such a sale.

6. Ms. Sethna relies on a number of judgements in support of her submission that once it is shown that the DRT/DRAT lacked inherent jurisdiction, all its orders would be *non est* and void *ab initio*; these could then be challenged at any stage, and even in execution of collateral proceedings.²⁹ Though very well-settled, the manner in which Ms. Sethna places the submission is overbroad and of no assistance to her cause. This indiscriminate citing of precedent, without regard to facts or even the statutes under which those cases were decided, is more distracting than helpful. After all, for the principle to apply, Ms. Sethna must first establish that lack of jurisdiction of which she speaks. This cannot be assumed. There is simply no basis for that submission. With that foundational element gone, no amount of precedent can shore up the case. The question is whether the first submission is at all correct, viz., that the jurisdiction of the DRT and the DRAT stood ousted by virtue of the nature of the sale effected in favour of the Petitioner.

7. We understand Ms. Sethna's submission to mean, first, that the DRT has no jurisdiction over the sale at all, and, second, that

29 *Suryadevi Rai v Ram Chander Rai*, AIR 2003 SC 3044; *State of Madhya Pradesh v Babulal*, AIR 1977 SC 1718; *Arun Kumar v Union of India*, (2006) 286 ITR 89 (SC); *Sarup Singh & Anr. v Union of India*, AIR 2011 SC 514; *Balvant N. Viswamitra v Yadav Sadashiv Mule*, AIR 2004 SC 4377; *Foreshore Cooperative Housing Society Limited v Praveen D. Desai*, (2015) 6 SCC 412

ARCIL having bound itself to deferred payment terms could not possibly apply to the DRT for any order cancelling that sale. The DRT had no power or authority in law to order any such cancellation. Once possession was given to the Petitioner, the sale was absolute and only a Civil Court would have jurisdiction.

8. She further submits that ARCIL having conceded that a confirmed sale took place in favour of the Petitioner, it could not contend to the contrary before the DRT or the DRAT. It had no right to seek an order setting aside that sale without proof of fraud or material irregularity, neither of which has ever been contended by ARCIL. Ms. Sethna relies on the decision of the Supreme Court in *Valji Khimji & Co. v Official Liquidator of Hindusthan Nitroproducts*³⁰ to allege that since ARCIL had neither set up a case of fraud or material irregularity, it was precluded from assailing a confirmed sale. Further, she submits that since ARCIL had intentionally relinquished its known rights, its applications for setting aside the sale were barred.³¹

9. Ms. Sethna submits, in the alternative and without prejudice, that once Consent Terms were filed with the DRT, in effect these operated as an application by ARCIL of a withdrawal of its application to set aside the sale. No liberty was reserved to ARCIL to bring a subsequent application to set aside the sale. ARCIL, therefore, relinquished any right that it may have had to have the sale set aside and it is now estopped from urging to the contrary. The DRT was at best an executing Court. It had no right to

30 (2008) 9 SCC 299

31 *Kadiyala Rama Rao v Gutala Kahna Rao*, (2000) 3 SCC 87; *Superintendent of Taxes, Dhubri v Onkarmal Nathmal Trust*, AIR 1975 SC 2065.

unilaterally vary binding Consent Terms arrived at privately between the parties or to go behind these Consent Terms. In Ms. Sethna's submission, these Consent Terms operate as an estoppel or as constructive *res judicata*; the more so since no liberty was reserved to make a fresh application. Ms. Sethna relies on various decisions to submit that a consent decree is binding like any other and cannot simply be ignored.³² In this context, she also says that acting as an executing Court, the DRT could not go behind the Consent Terms which operated as a decree.³³ The Consent Terms provided for an event of default, giving ARCIL the right to put a nominee on the Petitioner's board, and, correctly read, showed that the both debenture series were fully secured. These Consent Terms were overlooked right through, says Ms. Sethna, and this failure of justice satisfies the jurisdictional question. We were somewhat dismayed by Ms. Sethna's attempts to take us through the Consent Terms in very minute detail, for this line of argument seemed to overlook something fundamental: that in our writ jurisdiction we could not possibly function as court of appeal and, in this case, a court of *third* appeal at that.

10. She also contended that the DRT had no jurisdiction to act as an executing Court at all. That jurisdiction, if ever it existed, ceased once the sale in favour of the Petitioner was confirmed or, at any rate, once possession of the property was delivered to the Petitioner against the payment of the upfront first instalment. It was also

32 *Parayya Allayya Hittalamani v Shri Parayya Gurulingayya Poojari*, (2007) 14 SCC 318; *Motilal Padampat Sugar Mills Co. Limited v State of Uttar Pradesh & Others*, AIR 1979 SC 621; *Shankar Sitaram Sontakke & Anr. v Balkrishna Sitaram Sontakke & Ors.*, AIR 1954 SC 352

33 *State of Punjab v Krishan Dayal Sharma*, AIR 1990 SC 2177; *Rajasthan Financial Corporation v Man Industrial Corporation Limited*, AIR 2003 SC 4273; *Pushpadevi Bhagat v Rajinder Singh*, AIR 2006 SC 2628

submitted that once ARCIL elected to conduct a private treaty sale, any subsequent actions of the parties would not operate to confer on the DRT a jurisdiction which it did not otherwise possess.

11. Ms. Sethna's next submission is that so long as the Consent Terms were not themselves set aside, the sale could not independently be set aside in the manner that was purported to be done. Under the deferred payment terms, the second tranche was not due till October 2010. Once the debenture instruments were issued, ARCIL's remedies laying the exercise of their rights under those debenture instruments, as further circumscribed by the Consent Terms. There was no question of going behind either the terms of the debenture documents or the Consent Terms. It is Ms. Sethna's submission that either under the SARFAESI Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("**the RDDB Act**") the DRT has no authority to make and order of sale on a deferred payment basis. It cannot be vested with a continuing obligation to monitor performance in relation to any particular terms and conditions of sale such as the issuance of debentures. Central to Ms. Sethna's formulation is that ARCIL suppressed the fact of the quite considerable UPSIDC dues of nearly Rs. 18 crores at the time of the auction sale. When these matters came to light, UPSIDC insisted on payment of its entire dues upfront. This left the Petitioner with little choice but to initiate a litigation with UPSIDC, and that in turn led to a considerable delay. The Petitioner cannot, Ms. Sethna submits, be foisted with the consequences of this inevitable delay, one that was entirely due to suppression of relevant facts at the time of the sale by ARCIL itself. She says that ARCIL made repeated applications to set aside the sale between 2009 and 2011. There were three such attempts. All of these were nothing but an attempt to transact on the property

with another developer. There was also, she says, a considerable delay on account of the workers' agitation, theft of property, blunder and lock-outs. An amount of Rs. 50 crores has been deposited by the Petitioner with the Official Liquidator of the Delhi High Court in 2007. Nothing has been disbursed towards the dues from that amount till date.

12. In any case, in her view, Article 127 of the Limitation Act, 1963 operates as a bar any application for setting aside the auction sale. Possession was delivered to the Petitioner in October 2007 after the sale in its favour was confirmed by the DRT against payment of agreed upfront cash consideration. The next payment instalment, i.e., under the deferred payment terms, was due only in October 2010. Any action to set aside the sale was required to be brought within 60 days of the date of possession. Ms. Sethna relies on the decision of the Supreme Court in *Annapurna v Mallikarjun*.³⁴ In her submission, any application for setting aside the sale, even if such an action was possible, had to be brought within 60 days of 27th October 2007 when possession was delivered to the Petitioner. Any action thereafter, according to her was time-barred.

13. We will leave aside for the moment a somewhat emotive plea by Ms. Sethna that ARCIL has been browbeating the Petitioner and hindering it in the performance of its contractual obligations, and that it has been *mala fide* transacting on the property with a rival bidder. We do not believe that these submissions are relevant for the purposes of a determination of this matter. This is, after all, as we repeatedly pointed out to Ms. Sethna, not a substantive appeal, but a Writ Petition invoking the discretionary remedy of this Court

34 (2004) 6 SCC 397

under Articles 226 and 227 of the Constitution of India. Within that framework, there are well established restrictions on what this Court can and cannot do in the exercise of that discretion. Such pleas of being browbeaten or coerced have no place and no role in the writ jurisdiction of this Court.

14. This is substantially the framework of Ms. Sethna's submissions.

15. The threshold argument by Mr. Cooper for ARCIL is that the challenge in this Petition being to concurrent findings of fact rendered by three tribunals, this Court should not exercise its discretion under Article 226 and 227 of the Constitution of India. In the context, Mr. Cooper relies on the decision of Supreme Court in *Gurdev Kaur v Kaki*,³⁵ in which the Supreme Court said that findings of facts, however wrong or even inexcusable, cannot be interfered with in a second appeal. The rationale behind this principle, one that finds statutory voice in Section 100 of the Code of Civil Procedure, 1908, is that there should be a judicial authority possessed of jurisdiction to maintain and, where necessary, to establish throughout its jurisdiction uniformity in law but this jurisdiction is not to be exercised to create a legal environment of constant uncertainty. We are bound by this decision.

16. Ms. Sethna's other submissions are refuted in terms by Mr. Cooper for ARCIL. Briefly stated, his submission is that the sale in favour of the Petitioner was a conditional sale subject to the compliance of certain terms and conditions. It was not an absolute sale and did not confer an absolute title on the Petitioner. The terms

35 AIR 2006 SC 1975

and conditions were contained in the order 16th October 2007, passed by the Recovery Officer as also in the Consent Terms of 13th November 2009. The mere handing over of possession to the Petitioner did not result in a waiver of ARCIL's right to seek compliance of the terms and conditions including payment of balance sale consideration. Possession was handed over as part of the unconditional undertaking issued by the Petitioner in its letter of 16th October 2007 to honour the terms and conditions of the sale. This letter of 16th October 2007 is not disclosed in the Petition. It is produced by ARCIL.³⁶ Mr. Cooper insists that possession was given to the Petitioner not in confirmation of the sale but because the Petitioner requested it; ARCIL consented, since otherwise ARCIL would have to expend a huge amount for several years towards security and other charges.

17. Mr. Cooper also says that the record reflects that the Petitioner sought repeated extensions of time from 2009 to 2011 but defaulted in compliance with its terms and conditions of sale including the non-payment of the balance sale consideration; non-issuance of debentures; non-procurement of the no objection certificates from UPSIDC and the non-clearance of its claim; non-exchange of debenture certificates with allotment letters within stipulated time; failing to insure the fixed assets; failing to register the debenture trust deeds and more. The last extension of time sought by the Petitioner expired on 15th February 2011. It was for this reason that the Petitioner was restrained by the Recovery Officer by his order of 18th February 2011 from creating third party rights. The Petitioner did not challenge this order for more than a year. Its appeal from that order of the Recovery Officer finally failed. No debentures as required by the terms and conditions of the

36 ARCIL Compilation, Vol. I, *p.* 53.

sale or the Consent Terms were ever issued; what flowed from the Petitioner was useless paper. No security was ever created and the Petitioner was in breach of the Consent Terms in many ways, not least of which was its failure to keep the property insured, and its utterly false statement that it had done so. The NCDs were redeemable on 25th October 2010, three years from the possession date of 25th October 2007. Even the Consent Terms confirm this. It was only after that date that ARCIL demanded payment. But the revised debentures sent on by the Petitioner, all still unsecured, purported to unilaterally extend the dates of redemption and conversion. The Consent Terms also required the creation of further security; this too was never done. The Petitioner cannot, he submits, and we believe quite correctly, claim a 'concluded' or 'completed' sale while being in wholesale default of its purchase obligations. Either the Consent Terms are binding or they are not; and the Petitioner cannot have it both ways. It cannot on the one hand say they are binding and have received the imprimatur of the Court, and then say that that very Court never had the fundamental jurisdiction in the first place. The Consent Terms are critical to the construct of Ms. Sethna's case; and those Consent Terms were only possible in a Court and not outside it.

18. As to the issue of the sale being a private contract or private treaty between ARCIL and the Petitioner without the intervention of the DRT and being contrary to provisions of the DRT or SARFEASI Act and the applicable provisions of Income Tax Act, 1961 Mr. Cooper submits that this is the first time that these contentions have been raised by the Petitioner. They are clearly an afterthought. This is meant only to defeat the order of 25th July 2014 passed by the Recovery Officer forfeiting the Petitioner's payment of Rs.267.75 Crores. Before the Recovery Officer in fact,

and curiously, the Petitioner contended that the Recovery Officer had no jurisdiction but that it was only the Chairperson of the DRT who did have both seizin and jurisdiction. This objection was rejected by all three tribunals below who held that it was the Recovery Officer who had authority to sell the property and to set aside that sale. The fact that the required terms and conditions were never fulfilled is established, Mr. Cooper submits, by the Consent Terms themselves. There can also be no dispute about this non-compliance because the Petitioner itself made repeated applications seeking extensions of time for this very purpose. In fact, ARCIL's first application was not to set aside the sale, but to enforce it. The Petitioner responded, and it was in that context that the Consent Terms came to be filed. It was when the Petitioner continued to be in breach that ARCIL applied to have the sale cancelled. There is a steady pattern of non-compliance, exemplified, for instance and by way of illustration, by the purported issue of debentures after the maturity date and the failure to keep insured the property in question. The Petitioner said it had been burgled; in fact it has been stripped to the bone.

19. Mr. Cooper says that the entire edifice of the Petitioner's case is based on a fundamentally flawed supposition that the sale in favour of the Petitioner was an entirely private sale without the intervention of the Recovery Officer. This is demonstrably incorrect, Mr. Cooper says.

20. We agree. For it is a matter of record that by his order of 8th August 2002, the Chairperson of the DRAT granted the power to the Receiver to sell the properties in question by way of either public auction or by private treaty. Several attempts at sale by public auction were made. All failed. The Receiver appointed by the

Recovery Officer submitted modified terms and conditions of sale for the approval and sanction of the Recovery officer. On 10th November 2006, the Recovery Officer sanctioned these special terms and conditions on which the DRT-appointed Receiver was to invite private offers from various prospective bidders. They were about 19 prospective bidders, including Crosslinks. The Petitioner is admittedly a nominee of Crosslinks. Mr. Cooper also points out that the offers were invited from all the bidders who had participated in the public auction. The Receiver received different offers in response to the sale under these special terms and conditions. The highest of these was one Adzon Media Private Limited at Rs.600 Crores. Crosslinks's bid then was Rs.459 Crores. It was the second highest. In a later meeting, the parties were asked to revise and enhance their offers. This was done. Crosslinks enhanced its offer from Rs.459 crores straightaway to Rs.765 crores and thus became the highest bidder. Adzon, the previous highest bidder, increased its offer too, to Rs.650 crores. In between there were two others, both below the revised offer made by the Crosslinks. It was in these circumstances that the DRT-appointed Receiver submitted a report to Recovery Officer, and it was on this report the Recovery Officer, after a thorough analysis, declared and confirmed Crosslinks as the highest bidder by his order dated 12th February 2007. This sale was subsequently sanctioned by the Recovery Officer in favour of the Petitioner as a nominee of Crosslinks by an order dated 16th October 2007. Thus, it is clear that the sale is not, as Ms. Sethna would have it, an entirely private sale or a private arrangement between ARCIL and the Petitioner. It is most emphatically a Court-directed sale, one in which other bidders also participated. The Presiding Officer's order dated 7th November 2007, allowing the Receiver to sell the properties by a so-called 'private treaty' under supervision and orders of the Recovery Officer, makes this

abundantly clear. Indeed, we are inclined to observe that given that there were multiple bidders who were invited to participate, and did in fact participate, including in revising their offers, this was not a completely private treaty sale at all, but some sort of hybrid sale that combined elements of both a public auction and a private sale.

21. Once we accept Mr. Cooper's view, then, in fact, the remaining arguments canvassed by Ms. Sethna must necessarily fade into irrelevance. It would not ordinarily have been necessary to go any further than this, but since the matter has been strenuously canvassed before us, we will deal with the remaining contentions.

22. We find some of Ms. Sethna's submissions to be contrary to the record. We are, for instance, unable to comprehend how it could possibly be argued that the sale in favour of Petitioner was never challenged before the Presiding Officer of the DRT. In fact, several bidders did indeed challenge that sale. They filed appeals. In all of these, it seems from the record that not only was the sale to the Petitioner under challenge, but so too was its validity on the ground that this was beyond the provisions of the DRT Act. These objections were negated by the Presiding Officer by his order of 7th November 2007 allowing the sale in favour of the Petitioner.

23. It appears to us beyond doubt that the sale in favour of the Petitioner was not, as Ms. Sethna would have us hold, a private sale entirely outside court, but was very much a Court-ordered sale with its terms and conditions having been approved by the Recovery Officer. We cannot understand how such a jurisdictional issue can be raised now by this Petitioner. After all, it participated in the auction without protest. It raised its offer when asked to do so. The sale and its terms and conditions were approved and found to be

according to law by the Recovery Officer and by the DRT. The Petitioner defended the confirmation of the sale in its favour before those authorities at various times. We cannot see how the Petitioner can now do this complete *volte face* and contend to the contrary.

24. We are also unimpressed by the next submission by the Petitioner that once the sale was confirmed in its favour by the Recovery Officer, he became '*functus officio*' and could not have set aside the sale; and, further, that once the Petitioner had purported to issue debentures against the balance consideration, the Recovery Officer's jurisdiction ended. As we have noted, this was a Court-sanctioned sale on special terms including *inter alia* as to deferred payment. The sale was in pursuance of a Recovery Certificate obtained in proceedings properly brought by ICICI Bank. We do not see how officers and forums can be said to come and go like this or to have jurisdiction at one stage only to not have it *ab initio* at a later stage. Till such time as the Recovery Certificate, which is in that sense akin to a decree of a Civil Court, was marked satisfied, the Recovery Officer in execution of that Recovery Certificate continued to have jurisdiction. In this, Mr. Cooper is, in our view, correct in his submission that this is in fact the exclusive jurisdiction of the Recovery Officer in view of Sections 17 and 18 of the DRT Act. No civil court and no company court could ever have gone into the questions of liability and recovery. That law is now well-settled.³⁷ Further, Rule 9 of the Second Schedule to the Income Tax Act, 1961, which is applicable to the sale in view of Section 29 of the DRT Act, expressly says that all questions that arise between the Recovery Officer and the defaulter or its representatives relating to the execution, discharge or satisfaction of a certification or relating to a confirmation or setting aside of a sale held in execution of such

37 *Allahabad Bank v Canara Bank*, AIR 2000 SC 1535

a certificate are to be determined not by a suit but by an order of the Recovery Officer before whom such question arises. In our view, the impugned order is faultless in this regard. We note, in particular, the observation that the Petitioner repeatedly sought time extensions to comply with the terms and conditions of the sale and that it is therefore now not open to the Petitioner to challenge that sale as being without jurisdiction.

25. Indeed, we find all these submissions on jurisdiction to be self-defeating and contradicted by the Petitioner's own conduct. No such objection was raised when Crosslinks submitted its bid or revised it, and the Petitioner is only Crosslinks's nominee. No such objection was taken at the time of possession. Indeed, the Petitioner *demand*ed possession, and that could only be in pursuance of the sale in its favour, one that was under terms and conditions approved by the Recovery Officer and accepted by the Petitioner or its nominator. The Petitioner repeatedly sought extensions of time from the Recovery Officer and the DRT to comply with its obligations under these terms and conditions, and that too could only be if the Recovery Officer and the DRT had the necessary jurisdiction. No such plea was taken when the Petitioner attempted its negotiation with UPSIDC, again an issue that is directly traceable to a jurisdictionally-competent sale under the supervision and orders of the Recovery Officer. The very jurisdiction that the Petitioner now questions as never having existed is the one under which it purported to take possession of the property and then to strip it bare. The genesis of the Petitioner's involvement is, to begin with, a proceeding for recovery before the DRT. The entire structure of this argument is deeply flawed and, in our considered view, fundamentally dishonest.

26. It is also an argument without basis in law. Mr. Cooper is correct in saying that a court's right to set aside a sale does not end on confirmation of that sale. The present case is on surer footing, for the sale had a term of deferred payment and the Court, viz., the Recovery Officer, retained jurisdiction till that payment was made and the Recovery Certificate satisfied.³⁸

27. Ms. Sethna's submission that since ARCIL is a securitization company governed by the SARFAESI Act it cannot have recourse to the DRT for cancelling the sale is also a submission entirely devoid of merit. Securitization companies are included in the amended definition of 'financial institutions' under Section 2(h)(ia) of the DRT Act. Therefore, it can have recourse to the RDDB Act in addition. Every bank or financial institution (as defined) is free to move under the RDDB/DRT Act as also under the NPA/SARFAESI Act. Both are complementary.³⁹

28. In our view, no question of limitation arises either. Article 127 of the Limitation Act is premised on the case falling under Order 21 Rr 89-91 of the Code of Civil Procedure, 1908. Those provisions are inapplicable to a case where a sale has been set aside on account of a default on the part of the purchaser in complying with the terms and conditions of the sale. Further, it appears to us that the sale would be governed primarily by Clause 21 of the Terms and Conditions read with Rule 57 of the Second Schedule to the Income Tax Act, 1961.

38 *Divya Manufacturing Co P Ltd v Union Bank of India & Ors.*, AIR 2000 SC 2346.

39 *Transcore v Union of India*, (2008) 1 SCC 125.

29. The issues about 'non-disclosure' of UPSDIC dues and the consequences of a workers' agitation are, to our mind, nothing but a diversion. The sale terms are clear. It was on an 'as is where is' and 'as is what is' basis, coupled with a 'no complaint' and 'no recourse' condition. Clause 25 of the approved Terms and Conditions of sale made it the absolute and sole obligation of the Petitioner to obtain UPSIDC consent and to clear all dues. The sale was sanctioned in favour of the Petitioner on 16th October 2007. For the next five years, till 18th February 2011, the Petitioner failed to clear those dues. It can hardly be heard to complain now. The fact that there were several workmen of Daewoo was also known to all. Those workmen had intervened in the Appeals filed by unsuccessful bidders before the Presiding Officer of the DRT. They supported at first the Petitioner's offer. This finds mention in the order of 28th September 2009.

30. We must observe that this does not appear to us to have been attempt to revive the unit or a genuine offer to rehabilitate the unit and provide employment to the workmen of Daewoo. It appears to us to have been little more than an attempt to get possession and control of a huge tract of land and turn it to real estate development. The record indicates that at no point was any attempt made to run the plant. The existing facilities were totally gutted, down to the wiring and window frames being removed and the entire structure being stripped bare and rendered unusable. Significant too is the fact that the Petitioner sought change of user from industrial to residential, another factor that is not brought out in the Petition at all.

31. Mr. Talekar's reports are telling. They show how the the fixed assets were allowed to be pilfered and destroyed. All of this is

relevant in the context of the plea now made, which is to urge that the sale in the Petitioner's favour was null and void; that the Petitioner is under no further obligation to bring in any more money; and that the order of forfeiture of what Ms. Sethna describes as upfront poundage should, for those reasons, be quashed. In Court, we repeatedly asked her if her clients would bring in the balance even now due. Her response was that her instructions were to say no; but to also say that if the upfront payment was returned (i.e., not forfeited), the Petitioner would have no further quarrel. We find this wholly unacceptable. The Petitioner took the property under an order of a Court, without then questioning it. It took it subject to terms and conditions. It accepted those conditions. It sought time, repeatedly, to fulfil those conditions. It did not. It says that Consent Terms filed in that very Court were binding, but also now says that that very Court had no jurisdiction *ab initio*. If there is an estoppel, it must run against the Petitioner, not in its favour.

32. This leaves the question of Mr. Talekar's reports. He was appointed under the interim order of this Court. He made two site visits and has placed on record two reports. The first report is dated 29th September 2014 and the second report is dated 29th October 2015. In paragraph 10 of the first report, Mr. Talekar noted the condition in which he found the subject property: no power supply to many units, uncleaned and not maintained, electric cable stripped of all but their shielding, empty electric boards, a damaged chimney and so on. So much for the Petitioner's contention of having 'invested' in the plant. Mr. Talekar's first assignment was from 19th August 2014 to 26th August 2014. His second report notes that on 23rd October 2015, when inspection was to be offered to third party purchasers pursuant to this Court's interim order, that inspection

was obstructed by the Petitioner's staff resulting in a cancellation of the inspection. That has been the Petitioner's approach throughout: dilatory, obstructive, non-cooperative and persistently in default. Mr. Talekar was engaged in this second assignment from 19th October 2015 to 22nd October 2015. We find his work meticulous and sufficient for our purposes. His costs are to be quantified, and we quantify these at Rs.1,10,000, computed at Rs.10,000 per day for 11 days. These costs will be paid to Mr. Talekar by the Petitioner within two weeks from today.

33. In the facts and circumstances of the case, we believe we would be utterly remiss in our duty if we failed to impose costs in a matter such as this. We cannot escape the finding, established by this voluminous record, that the Petitioner has played fast and loose not only with the Recovery Officer, the DRT and the DRAT but also with this Court. The Petition is wanting in candour. It is deliberately mischievous. There is clear suppression. The Petition is a gross abuse of the process of the Court, and this has been the steady pattern of the Petitioner's conduct from the very beginning. We see no sign at all of the Petitioner ever being honest and *bona fide* in fulfilling its obligations and complying with the terms and conditions of the sale. It is apparent that the attempt always was to offer a high price to gain the top slot as a successful bidder, and then to persistently delay completion of the sale by payment of the balance consideration. To this end, there were constant applications for time extensions, appeals, writ petitions and more, all seeking to delay matters. Wholly incorrect statements were made include about the issuance of the necessary debentures and about the property being kept insured, as also of the so-called 'investment' made by the Petitioner in the unit. What emerges from this is a picture of the Petitioner trying by every means possible to grab this

enormous tract of land, turn it to a residential development project, no doubt at a huge profit to itself, without satisfying workers' dues or the dues of UPSIDC and without satisfying the Recovery Certificate in execution of which the sale was conducted in the first place. The attempt seems to have been to get this land at nothing but the initial upfront price. We believe it is about time that litigants learnt the price of dishonesty in court, and learnt, too, that the days when this Court would, for whatever reason, take a lenient view are very firmly in the past. We have our eyes to the future. That includes the economic, financial and developmental future of the country. That concern is ill-served by litigants who clog up the courts and consume judicial time pursuing false cases. Gone are the days when the frivolous, the mendacious and the duplicitous could expect indulgence without consequence from our courts. This is now an age when such litigants meet their nemesis in this Court. Enough is enough.

34. There is no merit in the Petition. It deserves to be dismissed, and it is. It also deserves to be visited with costs, and it is. These costs quantified at Rs. 10 lakhs payable to ARCIL. This is over and above the costs payable to Mr. Talekar.

35. The pending Notice of Motion No.345 of 2015 does not survive and is disposed of as such.

(S. C. DHARMADHIKARI, J)

(G.S. PATEL, J.)