

***HON'BLE SRI JUSTICE SANJAY KUMAR**
&
***HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO**

+WRIT PETITION No.7802 of 2016

% Dated 22.08.2016

Between:

Smt. R.Vimala ... Petitioner

and

\$ State Bank of India,
Rep. by its Authorized Officer
and another Respondents

! Counsel for the petitioner : Sri J.U.M.V.Prasad,

^ Counsel for respondent No.1 : Sri M.Srikanth Reddy,

Counsel for respondent No.2 : Ms.T.Suneetha

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>HEAD NOTE : ---

? Cases referred: :

- [1] . 2010(8) SCC 110
2. 2011(2) SCC 782
3. 2006(6) ALT 695
4. 2006(6) ALD 778
5. 2002(4) SCC 638
6. (2006) 1 SCC 368
7. 2010(3)ALD 57(DB)
8. (2013) 10 SCC 83, at para-28,
9. (1997) 5 SCC 536
10. (2012) 11 SCC 651
11. 1998(8) SCC 1
12. AIR 1950 SC 163 (D)
13. The word (or) is interpreted in Mathew Varghese by the Apex Court as (and)
14. 1994 (3) SCC 440
15. 2014 (8) SCC 319
16. (2008) 15 SCC 517
17. (2007) 2 SCC 230
18. (2010) 8 SCC 24

19. 2016 (6) SCC 725
20. (2014) 5 SCC 610
21. (2014) 5 SCC 651
22. (2014) 5 SCC-660

**HON'BLE SRI JUSTICE SANJAY KUMAR
AND
HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO
WRIT PETITION No.7802 of 2016**

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ORDER: (Per Hon'ble Dr.Justice B.Siva Sankara Rao)

The writ petitioner is seeking a Writ of Mandamus to declare the impugned E-auction sale dated 14.03.2016, covered by E-auction sale notice dated 10.02.2016, that was published in Eenadu Telugu Daily News Paper dated 13.02.2016, claiming the same even in pursuance of unserved demand and possession notices respectively dated 20.05.2015 and 05.10.2015 as null and void; on the grounds that the said E-auction sale was held contrary to the mandate of the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'SARFAESI Act'). The writ petition is maintained against the State Bank of India, the secured creditor of Kurnool Branch, represented by its Authorized Officer as sole respondent originally and later as per orders in W.P.M.P.No.15879 of 2016 dated 20.04.2016, the auction purchaser is impleaded as 2nd respondent.

2-a. It is the factual matrix in nutshell that, the writ petitioner having availed house loan of Rs.16,88,000/- on 01.10.2008, for purchase of built up area of 1250 Sq.ft., with common area along with undivisible 1/15th share equal to 26 Sq.yards out of 390 Sq.yards site all consisting of Flat No.401, IV Floor, V.C.Homes, Survey No.151/A situated in Sankhal Bagh, N.R.Peta, Kurnool; paid installments regularly upto the year, 2011 and later committed default. For the defaults committed, it is her version that her husband left his job and was doing business all and sundry and wherein he

incurred debts and he left the city without disclosing whereabouts and some of the creditor Banks also filed criminal cases against them and after he was traced in the year, 2014 arrested in a criminal case of 2011 and later was released on bail. According to her, taking advantage of the things, the so called auction petitioner (2nd respondent), Smt.V.Prameela Reddy and one V.S.Reddy having an eye over her property supra colluded with the Bank and filed a suit with false claim for specific performance in O.S.No.79 of 2011, on the file of Principal District Judge, Kurnool. Her further version is that without any service of alleged demand notice dated 30.01.2011 under Section 13(2) and of possession notice dated 05.01.2012 under Section 13(4) of the SARFAESI Act, to proceed further including to take possession and without following the due procedure laid down under the Act; and even without service of alleged another demand notice dated 20.05.2015, issued the purported notice dated 05.01.2015.

2-b. According to her, the notice dated 05.01.2016 though received there is no service of the possession notice and there is no even affixture of possession notice supra at any conspicuous part of the property which are mandatorily contemplated by Act and the Rules made there under.

2-c. It is the contention therefrom that though the Bank was to obtain valuation certificate from any approved valuer and fix reserve price and thereafter issue sale notice by following the procedure contemplated by the provisions supra including by stating about possession and total description of the property to be sold, date of sale with reserve price etc. contents, which are material to redeem the property if any under Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 (for short 'Rules, 2002') and without even further publication under Rule 9(1) and without even 30 days time gap from date of publication to the date of sale, viz., from 13.02.2016

to 14.03.2016, which is a statutory mandate and also by fixing reserve price of 17,12,000/- though the property is worth more than Rs.40 lakhs. It is further averred that the Bank is aware of the *exparte* decree in the suit proceedings in O.S.No.79 of 2011 and of petition filed to set aside the *exparte* decree with delay condonation including to receive written statement in the suit that are pending and by charging exorbitant rate of interest and other sums in bringing the property to auction sale by violation of the provisions and the sale is liable to be set aside.

2-d. It is stated that for no Presiding Officer available at the Debt Recovery Tribunal, Hyderabad, to have the alternative remedy, she filed the writ petition seeking to set aside the auction sale as the effective remedy to protect her constitutional right to property and also sought for interim stay of all further proceedings pursuant to the E-auction sale dated 14.03.2016 pending disposal of the writ petition.

2-e. Among above contentions, it is the main contention that said auction sale dated 14.03.2016 is even contrary to the mandate of Rules 8(5) r/w 8(6) and 9(1) of the Rules, 2002 for no clear 30 days time gap from date of publication in Eenadu Telugu Daily of Kurnool Edition dated 13.02.2016 to the date of auction conducted on 14.03.2016.

3-a. The counter-affidavit filed by the ^{1st} respondent-Bank through its Chief Manager is with the contentions that from availability of statutory remedies under SARFAESI Act, 2002 to approach the Debt Recovery Tribunal under Section 17 of the Act, to impugn the auction sale, the writ petition is not maintainable to prevent the Bank from recovering the dues and thereby the writ petition is liable to be dismissed, vide, **Union Bank of India v.**

Satyawati Tondon^[1], **Kanaiyalal Lalchand Sachdev v. State of Maharashtra**^[2], **K.Balakrishna v. Debt Recovery Tribunal,**

Hyderabad^[3] and V.K.Shekhar v. Indian Bank^[4] and submitted from the expression in Director of Settlements, A.P. and others vs. M.R.Appa Rao^[5] that law laid down by the Apex Court is binding on the High Court under Article 141 of the Constitution of India. In fact, the law is well settled in holding that a judgment even of the Supreme Court should not be read as a statute in understanding the binding nature on subsequent decision making process vide Union of India Vs. Major Bajhadur Singh^[6].

3-b. It is also the contention that the Bank initiated recovery proceedings as per the Act and issued demand notice dated 20.05.2015 under Section 13(2) of the Act, demanding the petitioner and her husband to repay the outstanding dues of Rs.21,45,259/- that is also published in Andhra Jyothi and Hans India on 30.06.2015 and from the failure to pay, Bank issued possession notice dated 05.10.2015 under Section 13(4) of the Act and the possession notice was also published in the said newspapers on 10.10.2015 and it is after obtaining valuation of the property from the approved valuer, the reserve price was fixed by the Bank and as the petitioner failed to repay the debt even after issuance of possession notice, the Bank issued sale notice and also E-auction sale notice dated 10.02.2016 and cause published the same in Saakshi and Hans India newspapers on 13.02.2016 for the auction that was scheduled to be conducted on 14.03.2016. It is also the contention that Smt. V. Prameela Reddy, 2nd respondent herein became the highest bidder for Rs.18,02,000/- and she has paid 25% of the bid amount on that day and balance 75% on 29.03.2016 including vide cheque No.163386 for Rs.3,50,000/-, that the writ petitioner having borrowed, committed default in payment of the loan and thereby is not entitled to obstruct the recovery proceedings initiated by the Bank from what the Division Bench of this Court laid down in **Bhanu**

Constructions Co. Ltd Vs. Recovery Officer, DRT, Hyderabad ^[7]

under RDDBFI Act,1993 is defaulters cannot be allowed to procrastinate the Certified recovery proceedings of the Bank from any little procedural lapse, and the decree in O.S.No.79 of 2011 is not binding on the Bank as the claim of the plaintiff therein is subject to rights of the Bank shown as 2nd defendant therein.

3-c. It is the contention that the Bank followed the procedure and not violated any of the provisions or rules under the Act and there is in fact a clear 30 days gap between notices under Rule 8(6) to 9(1) of the Act and even the suit O.S.No.79 of 2011 decreed on 21.04.2014, the decree no way restrains the secured creditor Bank from proceedings under the Act, 2002 and thereby there are no merits in the writ petition and same is liable to be dismissed.

3-d. The contest of auction purchaser is besides bonafide purchaser for value in public auction, in the same lines of the Bank and thereby it no way requires repetition.

4. Heard the learned counsel for the writ petitioner, the learned counsel for the 1st respondent creditor Bank, represented by the Authorized Officer and the learned counsel for the 2nd respondent-auction purchaser. Perused the material on record.

5-a. The facts not in dispute from the above are that publication of the sale notice was on 13.02.2016 in Saakshi Telugu Newspaper and Hans India English Daily for the auction that was to be held on 14.03.2016 and accordingly the auction was conducted on 14.03.2016.

5-b. It is the case of the writ petitioner that there was no clear 30 days notice from the date of publication to the date of sale and the 30 days clear notice is mandatorily required to conduct the sale and on that ground itself the writ petition is maintainable, though there is an alternative remedy, more particularly in the writ petition, it is stated that there is no regular officer to the Debt Recovery Tribunal at

Hyderabad and there are no sittings and the writ petition is the only effective remedy even therefrom.

5-c. Whereas, it is the contention of 1st respondent Bank and 2nd respondent-auction purchaser that from the dates supra, there is a clear 30 days time gap as mandatorily contemplated by the Law and once procedure is claimed followed, the writ petition is not maintainable.

6. Now coming to the maintainability of the writ petition, once there is an allegation of violation of mandatory provisions and procedure under a statute, such statutory violation if at all shown from the above, the writ petition is maintainable as an exceptional case, irrespective of alternative remedy available. The expressions of the Apex Court referred to in the counter of the 1st respondent-Bank of **Satyawati Tondon (supra)**, **Kanaiyalal Lalchand Sachdev(supra)** though speak that an effective and efficacious alternative remedy provided is generally a bar to invoke writ jurisdiction which is a self restraint in exercise of the plenary jurisdiction. In fact the subsequent expression of the Apex Court in **General Manager, Sri Siddeshwara Cooperative Bank Limited and Anr. v. Iqbal & Ors** ^[8] which is also a case under the provisions of the SARFAESI Act, while referring to **Satyawati Tondon (supra)**, particularly at para-45 on rule of exhaustion of alternative remedy that it is only a rule of discretion and not one of compulsion. It was held categorically that no doubt, availability of an efficacious alternative remedy under Sections 17 and 18 of the Act by itself is not an absolute bar for exercise of the plenary powers by the extraordinary jurisdiction under Article 226 of the Constitution of India. The larger Bench of the Apex Court in **Mafatlal Industries Ltd. v. Union of India** ^[9], observed at page- 607, para-77: “77.... So far as the jurisdiction of the High Court under Article 226 or for that

matter, the jurisdiction of this Court under Article 32 is concerned, **it is obvious that the provisions of the Act cannot bar and curtail these remedies.** It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment.” The Apex Court in **Union of India v. Guwahati Carbon Ltd.**,^[10] at para-4 observed that under Article 226 of the Constitution of India, High Courts have vast powers, as the Apex Court has under Article 32 of the Constitution of India, but such powers can be exercised in those cases where the statutory authority has not acted in accordance with the provisions of the enactment in question or in defiance of the fundamental principles of judicial procedure or as resorted to invoke the provisions which are repelled or when an order has been passed in total violation of the principles of natural justice. It was observed further by referring to the expression in **Whirlpool Corporation v Registrar Of Trade Marks, Mumbai**^[11] at para-15 that under Article 226 of the Constitution of India, the High Court having regard to the facts of the case, has a discretion to entertain a writ petition or not, but the High Court has imposed upon itself certain restrictions and one of which normally is when an effective efficacious remedy is available. But the effective alternative remedy has been consistently held by this Court that by self is not to operate as a bar, in at least three contingencies, namely, where writ petition has been filed for the enforcement of any of the fundamental rights or where there has been violation of principles of natural justice or **where the orders or proceedings are wholly without jurisdiction or in variance of provisions of the Act concerned.** It was also for that conclusion referred to an earlier expression in **Rashid Ahmad v. Municipal**

Board of Kairana^[12], which says adequate alternative remedy in existence is only one of the factors to be considered by the writ Court before exercising its plenary jurisdiction. It is ultimately there from held in para-4 what is laid down supra that **the authority not acted in accordance with the provisions of the enactment in question, despite an alternative efficacious remedy is available, the writ Court can entertain and otherwise there is a self restraint for invoking plenary jurisdiction from efficacious alternative remedy available in general.**

7. Thus, when the very 30 days time kept mandatorily required not in dispute; and when same is stated violated, to decide the same as the main question in impugning the auction sale for the date of sale notice publication and date of sale not even in dispute, the writ petition is held maintainable from reading together of the expressions on the principles laid down therein supra.

8. Once the writ petition is maintainable as concluded supra, coming to merits, whether there is actual 30 days time from date of publication to date of auction sale viz., from 13.02.2016 to 14.03.2016 is the main question required to answer, leave about no demand notice is served personally, but for stating in the notice dt.05.01.2016 (which even at bottom show another date 05.10.2015), of demand notice was published on 30.06.2015 to pay within 60 days and there is also nothing of possession notice served personally and affixed at conspicuous part or place of the property, but for saying published on 10.10.2015 and only the sale notice dt.05.01.2016 stated served, on 08.01.2016, which is with no particulars of what is the valuation arrived and certified by any approved valuer and when obtained to fix reserve price, what is the reserve price fixed and what is the date of sale with reserve price etc. contents, which are material. For that, Rules 8 and 9 of the Security Interest (Enforcement) Rules, 2002 (for short, 'the Rules

2002') and Section 13 of the SARFAESI Act, read as under:

Rule 8: Sale of immovable secured assets—

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

(2) The **possession notice as referred to in sub-rule (1) shall also be published in two leading newspapers, one in vernacular language having sufficient circulation in that locality,** by the authorised officer.

(3) In the event of possession of immovable property is actually taken by the authorised officer, such property shall be kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as a owner of ordinary prudence would, under the similar circumstances, take of such property.

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

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

- (a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or
- (b) by inviting tenders from the public;
- (c) by holding public auction; or
- (d) by private treaty.

(6) **The authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5): Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers one in vernacular language having sufficient circulation in the locality by setting out the terms of sale,**

which shall include,—

- - (a) The description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;
 - (b) the secured debt for recovery of which the property is to be sold;
 - (c) reserve price, below which the property may not be sold;
 - (d) time and place of public auction or the time after which sale by any other mode shall be completed;
 - (e) depositing earnest money as may be stipulated by the secured creditor;
 - (f) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property.

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

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

(9). Time of sale, issues of sale certificate and delivery of possession, etc.—

(1) No sale of immovable property under these rules shall take place before the expiry of thirty days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub-rule (6) or/(and)^[13] notice of sale has been served to the borrower.

- - (2) The sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid or tender or quotation or offer to the authorised officer and shall be subject to confirmation by the secured creditor:

Provided that no sale under this rule shall be confirmed, if the amount offered by sale price is less than the reserve price, specified under sub-rule (5) of rule 9: Provided further that if the authorised officer fails to obtain a price higher than the reserve price, he may, with the consent of the borrower and the secured creditor effect the sale at such price.

(3) On every sale of immovable property, the purchaser shall immediately pay a deposit of twenty-five per cent of the amount of the sale price, to the authorised officer conducting the sale and in default of such deposit; the property shall forthwith be sold again.

(4) The balance amount of purchase price payable shall be paid by the purchaser to the authorised officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the parties.

(5) In default of payment within the period mentioned in sub-rule (4), the deposit shall be forfeited and the property shall be resold and the defaulting purchaser shall forfeit all claims to the property or to any part of the sum for which it may be subsequently sold.

(6) On confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorised officer exercising the power of sale shall issue a certificate of sale of the immovable property in favour of the purchaser in the form given in Appendix V to these rules.

(7) Where the immovable property sold is subject to any encumbrances, the authorised officer may, if he thinks fit, allow the purchaser to deposit with him the money required to discharge the encumbrances and any interest due thereon together with such additional amount that may be sufficient to meet the contingencies or further cost, expenses and interest as may be determined by him.

(8) On such deposit of money for discharge of the encumbrances, the authorised officer may issue or cause the purchaser to issue notices to the persons interested in or entitled to the money deposited with him and take steps to make the payment accordingly.

(9) The authorised officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in sub-rule (7) above.

(10) The certificate of sale issued under sub-rule (6) shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not.

Section 13 of the Act, reads as under:

13. Enforcement of security interest.—

(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower. 1[(3A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower: Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A.]

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:—

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or

sale for realising the secured asset;

2[(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset: 2[(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising 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 or 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.

(5) Any payment made by any person referred to in clause (d) of sub-section (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.

(6) Any transfer of secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditors shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

(7) Where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with

his rights and interests.

(8) If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset.

(9) In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors: Provided that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956): Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of section 529A of that Act: Provided also that the liquidator referred to in the second proviso shall intimate the secured creditors the workmen's dues in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator: Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator: Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

Explanation—For the purposes of this sub-section,—

(a) “record date” means the date agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding on such date;

(b) “amount outstanding” shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

(10) Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower.

(11) Without prejudice to the rights conferred on the secured creditor under or by this section, the secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in clauses (a) to (d) of sub-section (4) in relation to the secured assets under this Act.

(12) The rights of a secured creditor under this Act may be exercised by one or more of his officers authorised in this behalf in such manner as may be prescribed.

(13) No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor.

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9. It is the contention of the learned counsel for the Bank as well as the auction purchaser that the thirty days is inclusive of both days and not to exclude any one day between 13.02.2016 to 14.03.2016. The learned counsel relied upon **Directorate of Enforcement vs. Deepak Mahajan**^[14], wherein while interpreting Section 167(1&2)CrPC, Section 35 of the FER Act and Section 104 of the Customs Act, it was held that the procedure for arrest and remand and period of remand etc., by the special Act, are different to the general law of CrPC, the special law prevails over CrPC and in

interpretation of Statutes, provisions should be construed so as to the ends of justice and not to frustrate the same; though court cannot resort to judicial legislation but it can mould and creatively interpret the provisions by adopting such functional approach and go behind the words to remove the difficulties in implementation of the legislative intent that to be considered from the object and purpose of the enactment.

10. The other decision placed reliance is **Commercial Tax Officer, Rajasthan Vs. Binani Cements Ltd.**^[15], wherein it was held that general law yields to special law from the Latin Maxim- *Generalia Specialibus Non Derogant*-even both operate in the same field to the respective extent.

11. There is no dispute on the propositions of purposive interpretation as per object and intendment of the Act in question and prevailing of special law over general law to that extent from any irreconcilability, but for to reconcile any law and equity from the contention of the auction purchaser already paid the amount and property transferred in his favour and equity does not permit to set aside the sale by any technicalities. In fact, if at all there is any equity, it must weigh in favour of the borrower from the expression of the Apex Court in this regard in **N.Padmamma Vs.S.Ramakrishna Reddy**^[16] that the procedure laid down under the SARFAESI Act and the Rules made thereunder must be scrupulously followed by the creditor bank as it is the procedure laid down that results in deprivation of a person's constitutional and human right to property.

The Apex Court in regard to law and equity way back held in **Raghunatharai Bareja Vs. Panjab National Bank**^[17] that law is law and same is different from equity and in case of conflict between the two, it is the law which must prevail over equity in accordance with the Latin maxim- *Dura Lex Sed Lex*. In this regard the Apex

Court in **Afcons Infrastructure Ltd. Vs. Cherian Varkey Construction Company(P) Ltd.**^[18] held that interpretative tools could be used by the Courts to set right the situation by adding or substituting the words in the statute when plain and grammatical construction would lead to confusion, absurdity and repugnancy and otherwise not. In fact the Apex Court in its latest expression in **Narayan Vs. Babasaheb**^[19] held that when language of the provision is very clear, it should be interpreted in same sense and hardship or inconvenience is not a determining factor from the Latin Maxim- ***Dura Lex Sed Lex***.

12. From the above, coming back to Rule 9(1), it clearly speaks that no sale of immovable property under these rules shall take place before the expiry of thirty days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub-rule (6) and notice of sale has been served to the borrower. So there must be minimum thirty days gap.

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13. In this regard, it is necessary to refer Sections 35 to 37 of the SARFAESI Act.

As per Sec.35, the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

As per Sec.36, no secured creditor shall be entitled to take all or any of the measures under sub-section (4) of section 13, unless his claim in respect of financial asset is made within the period of limitation prescribed under the Limitation Act, 1963 (36 of 1963).

As per Sec.37, the provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and

Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) **or any other law for the time being in force.**

Thus, the provisions of the Act, shall not be in derogation but in addition to any other law for the time being in force (which include the General Clauses Act and Indian Limitation Act) unless same is inconsistent with any other law to say then the provisions of the Act prevails over the other law inconsistent to it.

In this regard, the Apex Court in **Mathew Varghese v. M.Amritha Kumar** [\[20\]](#) held at para-45 as follows:

[45] A close reading of Section 37 shows that the provisions of the SARFAESI Act or the rules framed thereunder will be in addition to the provisions of the RDDB Act. Section 35 of the SARFAESI Act states that the provisions of the SARFAESI Act will have overriding effect notwithstanding anything inconsistent contained in any other law for the time being in force. Therefore, reading Sections 35 and 37 together, it will have to be held that in the event of any of the provisions of RDDB Act not being inconsistent with the provisions of the SARFAESI Act, the application of both the Acts, namely, SARFAESI Act and RDDB Act, would be complementary to each other.

From the above, coming to Section 9 of the General Clauses Act and Section 12 of the Indian Limitation Act:

Section 9 of the General Clauses Act reads as under:

9. Commencement and termination of time—

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(1) In any [Central Act] or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word “from”, and, for the purpose of including the last in a series of days or any other period of time, to use the word “to”.

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(2) This section applies also to all [Central Acts] made

after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

- **Section 12 in The Limitation Act, 1963, reads as under:**

- 12. Exclusion of time in legal proceedings—

(1) In computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned, shall be excluded.

- (2) In computing the period of limitation for an appeal or an application for leave to appeal or for revision or for review of a judgment, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or reviewed shall be excluded.

(3) Where a decree or order is appealed from or sought to be revised or reviewed, or where an application is made for leave to appeal from a decree or order, the time requisite for obtaining a copy of the judgment 1[***] shall also be excluded.

(4) In computing the period of limitation for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.
Explanation.—In computing under this section the time requisite for obtaining a copy of a decree or an order, any time taken by the court to prepare the decree or order before an application for a copy thereof is made shall not be excluded.

Thus, in computing the 30 days, the day of publication in newspaper or the day of sale one to be excluded. Thereby the contention that 30 days to be counted is inclusive of both days is unsustainable on its face from what Rule 9(1) speaks of before the expiry of thirty days from the date of publication, no sale shall take place. So there must be clear 30 days in between from the date of publication to the date of sale and either the date of publication or date of sale to be

excluded in computing the 30 days. Once there must be clear 30 days gap, leave about the exclusion of either or other of the two days, there is no clear 30 days time from the publication dated 13.02.2016 to the date of sale of 14.03.2016 undisputedly.

14. In this context, it is also profitable to extract the relevant portions of the expression in **Mathew Varghese** supra.

“33.3 Be that as it may, the paramount objective is to provide sufficient time and opportunity to the borrower to take all efforts to safeguard his right of ownership either by tendering the dues to the creditor before the date and time of the sale or transfer, or ensure that the SECURED ASSET derives the maximum price and no one is allowed to exploit the vulnerable situation in which the borrower is placed.

34. At this juncture, it will also be worthwhile to refer to Rules 8(1) to (3) and in particular Sub-rule (3), in order to note the responsibility of the secured creditor vis--vis the secured asset taken possession of. Under Sub-rule (1) of Rule 8, the prescribed manner in which the possession is to be taken by issuing the notice in the format in which such notice of possession is to be issued to the borrower is stipulated. Under Sub-rule (2) of Rule 8 again, it is stated as to how the secured creditor should publish the notice of possession as prescribed under Sub-rule (1) to be made in two leading newspapers, one of which should be in the vernacular language having sufficient circulation in the locality and also such publication should have been made seven days prior to the intention of taking possession. Sub-rule (3) of Rule 8 really casts much more onerous responsibility on the secured creditor once possession is actually taken by its authorised officer. Under Sub-rule (3) of Rule 8, the property taken possession of by the secured creditor should be kept in its custody or in the custody of a person authorized or appointed by it and it is stipulated that such person holding possession should take as much care of the property in its custody as a owner of ordinary prudence

would under similar circumstances take care of such property. ***The underlining purport of such a requirement is to ensure that under no circumstances, the rights of the owner till such right is transferred in the manner known to law is infringed. Merely because the provisions of the SARFAESI Act and the Rules enable the secured creditor to take possession of such an immovable property belonging to the owner and also empowers to deal with it by way of sale or transfer for the purpose of realizing the secured debt of the borrower, it does not mean that such wide power can be exercised arbitrarily or whimsically to the utter disadvantage of the borrower.***

[35] Under Sub-rule (4) of Rule 8, it is further stipulated that the authorized officer should take steps for preservation and protection of secured assets and INSURE them if necessary till they are sold or otherwise disposed of. Sub-rule (4), governs all secured assets, movable or immovable and a further responsibility is created on the authorised officer to take steps for the preservation and protection of secured assets and for that purpose can even insure such assets, until it is sold or otherwise disposed of. Therefore, a reading of Rules 8 and 9, in particular, Sub-rule (1) to (4) and (6) of Rule 8 and Sub-rule (1) of Rule 9 makes it clear that simply because a secured interest in a secured asset is created by the borrower in favour of the secured creditor, the said asset in the event of the same having become a non-performing asset cannot be dealt with in a light-hearted manner by way of sale or transfer or disposed of in a casual manner or by not adhering to the prescriptions contained under the SARFAESI Act and the abovesaid Rules mentioned by us.

[36] Having analyzed the relevant statutory prescriptions under the SARFAESI Act, as well as, the Rules, 2002 it will be necessary to refer to the

decisions placed before us on the above aspects, before examining the manner in which the sale of the secured asset of the 1st and 2nd Respondents was dealt with by the 4th Respondent-Bank and by effecting the sale in favour of the Appellant herein.

[37]

[38] The completion of sale, it is stated, can be held to be so unless and until notice in writing requiring payment of the principal money has been served on the mortgagor. **Therefore, it was held that until the sale is complete by registration of sale, the mortgagor does not lose the right of redemption. It was also made clear that it was erroneous to suggest that the mortgagee would be acting as the agent of the mortgagor in selling the property.**

[39][52].

[53] **We, therefore, hold that unless and until a clear 30 days notice is given to the borrower, no sale or transfer can be resorted to by a secured creditor. In the event of any such sale properly notified after giving 30 days clear notice to the borrower did not take place as scheduled for reasons which cannot be solely attributable to the borrower, the secured creditor cannot effect the sale or transfer of the secured asset on any subsequent date by relying upon the notification issued earlier. In other words, once the sale does not take place pursuant to a notice issued under Rules 8 and 9, read along with Section 13(8) for which the entire blame cannot be thrown on the borrower, it is imperative that for effecting the sale, the procedure prescribed above will have to be followed afresh, as the notice issued earlier would lapse.** In that respect, the only other provision to be noted is Sub-rule (8) of Rule 8 as per which sale by any method other than public auction or public tender can be on such terms as may be settled between the parties in writing. As far as Sub-rule (8) is concerned, the parties referred to can only relate to the secured creditor and the borrower. It is, therefore, imperative that for the sale to be effected under Section 13(8),

the procedure prescribed under Rule 8 read along with 9(1) has to be necessarily followed, inasmuch as that is the prescription of the law for effecting the sale as has been explained in detail by us in the earlier paragraphs by referring to Sections 13(1), 13(8) and 37, read along with Section 29 and Rule 15. In our considered view any other construction will be doing violence to the provisions of the SARFAESI Act, in particular Section 13(1) and (8) of the said Act.”

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15. Further, **Mathew Varghese** supra has been followed in **J.Rajiv Subramaniyan vs. M/s Pandiyas**^[21] and the Apex Court in **Vasu P. Shetty vs M/S Hotel Vandana Palace**^[22], relying upon **Mathew Varghese** and **J.Rajiv Subramaniyan** supra held the requirement of clear 30 days gap from date of sale notice and publication to date of sale and any violation of such 30 days clear gap of notice and publication to date of sale, makes the sale null and void. It is in saying that “As noticed above, this Court also examined Rules 8 and 9 of the Rules, 2002. On a detailed analysis of Rules 8 and 9(1), it has been held that any sale effected without complying with the same would be unconstitutional and, therefore, null and void”.

16. In a recent Division Bench expression of this Court by us (SK,J & Dr.SSRB,J) in **W.P.No.15370 of 2015 dated 12.07.2016**, referring to **Mathew Varghese** supra held in this regard that there must be clear 30 days duration to say a clear 30 days time gap, the relevant observation reads as follows:- *“Apropos the statutory procedural prescriptions in Rules 8 and 9 of the Rules of 2002, the Supreme Court opined that the requirement under Rule 8(6) and Rule 9(1) contemplates a clear 30 days individual notice to the borrower and also a public notice by way of publication in the newspapers. In other words, per the Supreme Court, while the*

publication in a newspaper should provide 30 days clear notice, as Rule 9(1) also states that such notice of sale is to be in accordance with the proviso to sub rule 6 of Rule 8, 30 days clear notice to the borrower should be ensured as stipulated under Rule 8(6) as well. It was therefore held that the use of the expression 'or' in Rule 9(1) should be read as 'and' as that alone would be in consonance with Section 13(8) of the SARFAESI Act. This, according to the Supreme Court, was intended to provide an opportunity to the borrower to redeem his property in terms of Section 13(8) of the SARFAESI Act"

17. Having regard to the above, when there is no 30 days gap from date of publication on 13.02.2016 to date of sale held on 14.03.2016, the sale held is liable to be set aside by declaring as null and void.

18. Accordingly and in the result, the Writ Petition is allowed :

a) By declaring the E-auction sale dated 14.03.2016, covered by E-auction sale notice dated 10.02.2016, that was published in Eenadu Telugu Daily News Paper dated 13.02.2016 as null and void.

b) In this regard, coming to the rights of the auction purchaser, as laid down in **Mathew Varghese** supra, the auction purchaser is entitled to refund of the amount deposited by him along with interest at 18%p.a. from the date of each such deposit, from the secured creditor bank, so as to recover from the debtor as part of the amount of the secured loan due.

c) Needless to say that remedy is left open as laid down in **Mathew Varghese** supra for the secured creditor bank to proceed afresh for sale of the property by public auction or the like as per the due procedure under law, if the writ petitioner/Debtor fails to liquidate the debt as per the right of redeeming the debt available till transfer of the property by public auction and registration.

d) Copy of this order shall be marked to the District Registrar, Kurnool, of Kurnool District, for effecting necessary cancellation and changes in his records in terms of Section 31(2) of the Specific

Relief Act, 1963.

e) Pending miscellaneous petitions, if any, shall stand closed,
and

f) No order as to costs.

SANJAY KUMAR, J

Dr. B. SIVA SANKARA RAO, J

Date: 22.08.2016

Note: L.R.Copy to be marked.

b/o.Pab/Vvr

[\[1\]](#) 2010(8) SCC 110

[\[2\]](#) 2011(2) SCC 782

[\[3\]](#) 2006(6) ALT 695

[\[4\]](#) 2006(6) ALD 778

[\[5\]](#) 2002(4) SCC 638

[\[6\]](#) (2006) 1 SCC 368

[\[7\]](#) 2010(3)ALD 57(DB)

[\[8\]](#) (2013) 10 SCC 83, at para-28,

[\[9\]](#) (1997) 5 SCC 536

[\[10\]](#) (2012) 11 SCC 651

[\[11\]](#) 1998(8) SCC 1

[\[12\]](#) AIR 1950 SC 163 (D)

[\[13\]](#) The word (or) is interpreted in Mathew Varghese by the Apex Court as (and)

[\[14\]](#) 1994 (3) SCC 440

[\[15\]](#) 2014 (8) SCC 319

[\[16\]](#) (2008) 15 SCC 517

[\[17\]](#) (2007) 2 SCC 230

[\[18\]](#) (2010) 8 SCC 24

[\[19\]](#) 2016 (6) SCC 725

[\[20\]](#) (2014) 5 SCC 610

[\[21\]](#) (2014) 5 SCC 651

[\[22\]](#) 2014(5)SCC-660