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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 9659 OF 2015

1] Smt. Julie Amitabh Parekh]
having address at Flat Nos.1001 & 1002]
Satra Residency, Ahimsa Road, Khar]
(West), Mumbai.]
]

2] Master Aarnav Amitabh Parekh]]
Through his Guardian]
Smt. Julie Amitabh Parekh,]
having address at Flat Nos.1001 & 1002]
Satra Residency, Ahimsa Road, Khar]
(West), Mumbai.]
]

3] Master Aaren Amitabh Parekh]
Through his Guardian]
Smt. Julie Amitabh Parekh,]
having address at Flat Nos.1001 & 1002]
Satra Residency, Ahimsa Road, Khar]
(West), Mumbai.]
]

4] Smt. Pratima Arun Parekh]
having address at Flat Nos.1001 & 1002]
Satra Residency, Ahimsa Road, Khar]
(West), Mumbai.]

Versus

1] Reliance Asset Reconstruction]
Company Limited, 570, Rectifier House,]
Naigaum Cross Road, Wadala,]
Mumbai – 400 031]
]

2] Yes Bank Limited]
India Bulls Finance Centre]

Mr. Zal Andhyarujina a/w Mr Simil Purohit, Ms. Nikita Vardhan i/b Kanga & Co. for the Petitioners.

Mr. Gaurav Joshi, Senior Counsel a/w Ms. Neeta Jain and Mr. Nikhil Rajani i/b M/s V. Deshpande & Co. for Respondent No.1.

**CORAM: B. R. GAVAI &
SANDEEP K. SHINDE, JJ.**

DATE: 14th November, 2017

ORAL JUDGMENT: *(Per B.R. Gavai, J.)*

1] Petitioners, by way of present Petition, have assailed the order passed by the learned Chairperson of the Debt Recovery Appellate Tribunal, Mumbai (hereinafter referred to as “DRAT”), by which, while deciding the waiver application filed by the present Petitioners, learned Tribunal has directed the Petitioners to deposit 25% of the amount covered by notice issued under section 13(2), for allowing the waiver application.

2] Brief facts giving rise to the present Petition are as under:-

3] One Parekh Aluminex Limited was a principal borrower of the assigner Yes Bank. Late Amitabh Arun Parekh was a mortgagor and guarantor for the debt. Unfortunately, Mr. Amitabh Arun Parekh expired on 06/01/2013. Subsequently, notice under section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as “the SARFAESI Act”) came to be issued to the Petitioners who are undisputedly legal heirs of the said deceased Amitabh.

4] After the notice was issued to the Petitioners under Section 13(2), Petitioners made a representation to the Yes Bank. The Bank invited the Petitioners to visit the Bank for conducting inspection of documents to satisfy themselves with regard to possession of the documents, creating security interest in favour of the said Bank. Subsequently, it appears that Yes Bank assigned the debt in favour of 1st Respondent on 29/06/2013. The 1st Respondent, on 30/07/2013, took symbolic possession. The same was published on 09/08/2013. The orders were passed under Section 14 of the SARFAESI Act on

8/10/2013 by the learned Magistrate regarding physical possession. The Petitioners, therefore, moved the securitization application before the learned DRT. The securitization application came to be rejected by the learned DRT. Being aggrieved thereby, Petitioners preferred an appeal before the learned DRAT alongwith the application for waiver of pre-deposit, as required under the provisions of the SARFAESI Act. The learned DRAT passed a conditional order on 19/08/2015, thereby directing the Petitioners to deposit 25% of the amount due, as pre-condition for waiver. It was also directed that, if Petitioners fail to deposit the amount within a prescribed period, appeal shall stand dismissed automatically. Being aggrieved thereby, the present Petition has been filed.

5] It appears that, initially, the matter was moved before the Division Bench of this Court on 15/10/2015 on the ground that the auction was to take place on 05/11/2015. However, the learned Judges of the Division Bench refused to grant urgent circulation. It appears that the Petitioners have challenged the said order of the Division Bench of this Court dated 05/11/2015 before Their Lordships of the Apex Court. Their Lordships on 27/11/2015 passed the order

as under:-

“Upon hearing the counsel the Court made the following

O R D E R

It has been submitted by the learned counsel appearing for the petitioners that on 05.11.2015, when the property was sought to be auctioned, there was no buyer and, therefore, ultimately respondent no.1 itself purchased the property which, according to the learned counsel for the petitioner, is improper.

In view of the fact that the petition is still pending in the High Court and the Petitioners have approached this Court at an interlocutory stage, we do not deem it fit to entertain the petition, which is disposed of as such. However, we direct respondent no.1 not to sell, dispose of, alienate or create any third party right, title or interest in the property till next date of hearing before the High Court.

A copy of this order shall be communicated to the respondents forthwith.

The special leave petition is disposed of in the aforesaid terms.”

6] It appears that the matter was thereafter listed before various Division Benches of this Court from time to time. Respondents thereafter moved the matter before this Court for urgent hearing and, as such, the matter was fixed for hearing today.

7] We have extensively heard Mr. Zal Andhyarujina, learned Counsel for the Petitioners and Mr. Gaurav Joshi, learned Senior Counsel appearing on behalf of Respondent No.1.

8] Mr. Andhyarujina submits that definition of “borrower”, as defined under clause (f) of sub-section (1) of Section 2 of the SARFAESI Act, would reveal that legal heirs of the borrower are not included under the said definition. He submits that, a conjoint reading of all sub-sections of Section 13, would reveal that creditor is entitled to take action under the provisions of the said Act only against the borrower. He submits that the SARFAESI Act is a special Act and it applies notwithstanding anything contained in any of the provisions of the other Acts. He therefore submits that the order passed by the learned Chairperson by taking recourse to the provisions of Section 59A of the Transfer of Property Act is totally unsustainable.

9] The another argument advanced on behalf of the Petitioners is on the basis of Section 13(5-A) of the SARFAESI Act. It is submitted that Respondent No.1 had itself purchased the property in the auction

conducted by it, which is not permissible under the said provision. Mr. Andhyarujina also relied on the judgment of the Division Bench of this Court in *Kotak Mahindra Bank Ltd vs. Trupti Sanjay Mehta*¹.

10] Mr. Joshi, learned Senior Counsel appearing on behalf of Respondent No.1, submits that the issue is no more *res integra*. He submits that Division Bench of Andhra Pradesh High Court in the case of *G. Manohar vs. Indian Bank (ADB) Nagiri Branch, Chittor, Chittor District*² and Division Bench of Delhi High Court in the case of *Kamal Gupta vs. Bank of India*³, have categorically taken a view that the “borrower” under the provisions of section 2(1)(f) of the SARFAESI Act, would also include legal heirs of the borrower. He submits that, in that view of the matter there is no merit in the Petition and the Petition deserves to be dismissed.

11] For appreciating rival submissions, it would be necessary to refer to clauses (f), (zd) and (zf) of sub-section (1) of Section 2 and sub-section (2) of Section 2 of the SARFAESI Act, which read as

1 AIR 2016 (BOM) 123

2 2009(6) ALL MR (JOURNAL) 4

3 2007 (99) DRJ 444

under:-

2. Definitions.- (1) In this Act, unless the context otherwise requires,-

(a)..... to (e).....

(f) “borrower” means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of a asset reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance or who has raised funds through issue of debt securities;

(g)..... to (zc).....

(zd) “secured creditor” means-

(i) any bank or financial institution or any consortium or group of banks or financial institutions holding any right, title or interest upon any tangible asset or intangible asset as specified in clause (l);

(ii) debenture trustee appointed by any bank or financial institution; or

(iii) an asset reconstruction company whether acting as such or managing a trust set up by such asset reconstruction company for the securitisation or reconstruction, as the case may be; or

(iv) debenture trustee registered with the Board appointed by any company for secured debt securities; or

(v) any other trustee holding securities

on behalf of a bank or financial institution,
in whose favour security interest is created by
any borrower for due repayment of any
financial assistance;

(ze)

(zf) “security interest” means right, title or
interest of any kind, other than those
specified in section 31, upon property created
in favour of any secured creditor and
includes-

(I) any mortgage, charge,
hypothecation, assignment or any right, title
or interest of any kind, on tangible asset,
retained by the secured creditor as an owner
of the property, given on hire or financial
lease or conditional sale or under any other
contract which secures the obligation to pay
any unpaid portion of the purchase price of
the asset or an obligation incurred or credit
provided to enable the borrower to acquire
the tangible asset; or

(ii) such right, title or interest in any
intangible asset or assignment or licence of
such tangible asset which secures the
obligation to pay any unpaid portion of the
purchase price of the intangible asset or the
obligation incurred or any credit provided to
enable the borrower to acquire the tangible
asset or licence of intangible asset;”

(zg) to (zj).....

(2) Words and expressions used and not
defined in this Act but defined in the Indian
Contracts Act, 1872 (9 of 1872) or the
Transfer of Property Act, 1882 (4 of 1882) or
the Companies Act, 1956 (1 of 1956) or the

Securities and Exchange Board of India Act, 1992 (15 of 1992) shall have the same meanings respectively assigned to them in those Acts.”

It will also be relevant to refer to sub-section (1) of Section 13 of the said Act, which reads as under:-

“13. Enforcement of security interest.- (1) Notwithstanding anything contained in section 69 or section 69-A 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.”

12] No doubt that, as rightly pointed out by Mr. Andhyarujina, the term “borrower”, as defined in clause (f) of sub-section (1) of Section 2, means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of a asset reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance or who has raised

funds through issue of debt securities. We need not elaborately discuss the definition of “secured creditor” and “security interest”, as provided under clause (zd) and (zf) of sub-section (1) of Section 2 inasmuch as Mr. Andhyarujina fairly concedes that Respondent No.1 would be a 'secured creditor' within the meaning of clause (zd) and the assets which are subject matter of the Petition would be covered by the term “security interest” within the meaning of clause (zf) of sub-section (1) of Section 2.

13] Mr. Andhyarujina has also rightly pointed out that from sub-sections (2) onwards of Section 13, the legislature has used the word “borrower”. He therefore contends that the provisions have to be read in such a manner that it is only the borrower, as defined under clause (f) of sub-section (1) of Section 2, who could be proceeded against by the secured creditor. He submits that the Bank is not without remedy. However, the provisions of the Special Act can be invoked by the Bank only against the persons, permitted under the provisions of the said statute and since the Petitioner cannot be termed to be a “borrower” within the meaning of clause (f) of sub-section (1) of Section 2, the bank cannot proceed against the Petitioners under the provisions of

the SARFAESI Act.

14] By now, it is a settled position in law, that the provisions of a statute cannot be read in isolation. The Courts are required to read the provisions in harmony with each other and make an attempt to give effect to the legislative intent. Reliance in this respect could be placed on the following observations of Their Lordships of the Supreme Court in the case of *Municipal Corporation of the City of Ahmedabad vs. Ben Hiraben Manilal*¹:-

“The question involved being one of construction of a provision of a statute that construction must be so made as to be in conformity with the other provisions of that particular statute and the provisions must be read as a whole.”

It is equally settled that even while interpreting different parts of a particular section also, principles of harmonious construction have to be applied. The different parts of a section are required to be read together, so as to give effect to the true intention of the legislature. Reliance in this respect could be placed on the following observations of Their Lordships of the Supreme Court in the case of *The Balasinor Nagrik Co-operative Bank Ltd vs. Babubhai Shankerlal Pandya and*

1 AIR 1983 SC 537

*Others*¹.

“It is an elementary rule that construction of a section is to be made of all parts together. It is not permissible to omit any part of it. For, the principle that the statute must be read as a whole is equally applicable to different parts of the same section.”

15] Perusal of sub-section (1) of Section 13 of the SARFAESI Act, would reveal that the said Section begins with non-obstante clause, which provides that the provisions under the said Section can be invoked notwithstanding anything contained in Section 69 or 69A of the Transfer of Property Act. The provisions of sub-section (1) would reveal that the provisions are to be resorted to by any secured creditor for enforcement of any security interest without intervention of the Court or Tribunal in accordance with the provisions of the said Act. It could thus be seen that legislative intent is clear that the secured creditor is entitled to take recourse to the provisions contained in the said Act, for enforcing any security interest created in favour of such secured creditor notwithstanding anything contained in the provisions of Section 69 or 69A of the Transfer of Property Act. Perusal of the provisions contained in sub-section (2) onwards, would reveal that the

1 AIR 1987 SC 849

said provisions only provide for procedure for enforcing the security interest, as has been mentioned in sub-section (1) of Section 13.

16] We find that while deciding the present case, another rule of interpretation of statutes, which is required to be employed is Heydons' rule. The Constitution Bench of the Apex Court, consisting of 7 Hon'ble Judges, has succinctly described the said Rule in the case case of *Bengal Immunity Co. Ltd. vs. State of Bihar and Others*¹. It will be apposite to refer to the following observations of Their Lordships :-

(22) It is a sound rule of construction of a statute firmly established in England as far back as 1584 when – 'Heydon's case', (1584) 3 Co Rep 7a (V) was decided that -

“.....for the sure and true interpretation of all Statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:

1st. What was the common law before making of the Act,

2nd. What was the mischief and defect for which the common law did not provide,

3rd. What remedy the Parliament hath resolved and appointed to cure the

1 AIR 1955 SC 661

disease of the Commonwealth, and

4th. The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and 'pro privato commodo', and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, 'pro bono publico'".

In – 'In re, Mayfair Property Co.', (1898) 2 Ch 28 at p. 35(W) Lindley M.R. in 1898 found the rule "as necessary now as it was when Lord Coke reported 'Heydons' case (V)'. In – 'Eastman Photographic Material Co. vs Comptroller General of Patents, Designs and Trade Marks', 1898 AC 571 at p. 576 (X), Earl of Halsbury re-affirmed the rule as follows :

"My Lords, it appears to me that to construe the Statute in question, it is not only legitimate but highly convenient to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the later Act which provided the remedy. These three being compared I cannot doubt the conclusion."

It appears to us that this rule is equally applicable to the construction of Art. 286 of our Constitution. In order to properly interpret the provisions of that Article it is, therefore, necessary to consider how the matter stood immediately before the Constitution came into force, what the

mischief was for which the old law did not provide and the remedy which has been provided by the Constitution to cure that mischief.”

It could thus be seen that, while interpreting the provisions, one will have to examine as to what was the mischief noticed by the legislature and what remedy was provided by the legislature to cure the said mischief. It will be relevant to refer to the Statements of Objects and Reasons of the said Enactment for finding out what was the mischief which was noticed by the legislature, why it was found necessary to cure the said mischief and what remedy was provided by the legislature. The Statements of Objects and Reasons of the said Enactment, reads thus:-

“Statement of Objects and Reasons.- The financial sector has been one of the key drivers in India's efforts to achieve success in rapidly developing its economy. While the banking industry in India is progressively complying with the international prudential norms and accounting practices, there are certain areas in which the banking and financial sector do not have a level playing field as compared to other participants in the financial markets in the world. There is no legal provision for facilitating securitisation of financial assets of banks and financial institutions. Further, unlike international banks, the banks and financial institutions in India do not have power to take possession of securities and sell them. Our existing legal framework relating to commercial transactions has

not kept pace with the changing commercial practices and financial sector reforms. This has resulted in slow pace of recovery of defaulting loans and mounting levels of non-performing assets of banks and financial institutions. Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms have considered the need for changes in the legal system in respect of these areas. These Committees, inter alia, have suggested enactment of a new legislation for securitisation and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the Court. Acting on these suggestions, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance, 2002 was promulgated on the 21st June, 2002 to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. The provisions of the Ordinance would enable banks and financial institutions to realise long-term assets, manage problem of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction.”

(Emphasis supplied)

It could thus be seen that the legislature found that, there were certain areas in which the banking and financial sector in India did not have a level playing field as compared to other participants in the financial markets in the world. It was found that, there was no legal provision for facilitating securitisation of financial assets of banks and financial institutions. It was further found that, unlike international banks, the banks and financial institutions in India did not have power to take

possession of securities and sell them. The legislature found that, our existing legal frame work relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. It was found that, on account of that, there was slow pace of recovery of defaulting loans and mounting levels of non-performing assets of banks and financial institutions. The Statement of Objects and Reasons would further reveal that the Central Government had constituted three Committees; two under the Chairmanship of an eminent economist Mr. Narasimham who was also the Governor of Reserve Bank of India and the third under the Chairmanship of an eminent jurist Mr. Andhyarujina, for the purpose of examining banking sector reforms and for considering the need for changes in the legal system in respect of these areas. It could also be seen from the Statement of Objects and Reasons that, these Committees had suggested enactment of a new legislation for securitisation and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the Court. Acting on the suggestions of the said Committees, initially, an Ordinance was promulgated on 21st June, 2002 to regulate securitisation and reconstruction of financial assets and enforcement

of security interest and for matters connected therewith or incidental thereto. The Ordinance came to be translated into the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), which came into force with effect from 17/12/2002. The said Act was enacted to enable the banks and financial institutions to realise long-term assets, manage problems of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction. Para 2 of the Statement of Objects and Reasons, would show various measures that have been provided under the SARFAESI Act for giving effect to the legislative intent, as contained in para 1 of the Statement of Objects and Reasons.

17] It could thus be clearly seen that the legislature found that, as compared to international practices, India was lagging much behind in providing powers to the banks and financial institutions of taking possession of the secured assets and selling them for recovery of their dues. After noticing the said mischief, the legislature, in order to provide a remedy to cure the said defect, appointed three Committees

under the Chairmanship of an eminent economist and an eminent jurist. On the recommendations of these Committees, in order to provide a remedy to cure the mischief, the Central Government brought an Ordinance and thereafter the Parliament enacted the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002).

18] It could thus be seen that predominant purpose for legislating the said Act was to give a weapon in the hands of the banks for securing the assets, take possession thereof, sell them and reduce the non-performing assets by adopting measures for recovery or reconstruction.

19] It could further be seen that sub-section (2) of Section 2 of the said Act clearly provides that, words and expressions used and not defined in the said Act but defined in the Indian Contract Act, 1872 (9 of 1872) or the Transfer of Property Act, 1882 (4 of 1882) or the Companies Act, 1956 (1 of 1956) or the Securities and Exchange Board of India Act, 1992 (15 of 1992) shall have the same meanings respectively assigned to them in those Acts. Undoubtedly, the word

“mortgagor” has not been defined in the SARFAESI Act. However, by virtue of sub-section (2) of Section 2, since the term “mortgagor” has not been defined under the said Act but has been defined under the Transfer of Property Act, it shall have the same meaning to it as is in the Transfer of Property Act. The effect would be, as if the “mortgagor” as is defined under the provisions of the Transfer of Property Act, would be the “mortgagor” for the provisions contained in the SARFAESI Act. Since there is no definition of “mortgagor” and “mortgagee” in the SARFAESI Act, in view of sub-section (2) of Section 2 of the SARFAESI Act, the effect would be that, the reference to mortgagors and mortgagees made in the Transfer of Property Act would, by principle of incorporation, be a reference to the mortgagors and mortgagees under the provisions of the SARFAESI Act. Section 59A of the Transfer of Property Act, specifically provides that the mortgagors and mortgagees shall be deemed to include references to persons deriving title from them. In that view of the matter, the legal heirs of original borrower who is a mortgagor would also be deemed to be a mortgagor under the provisions of the SARFAESI Act.

20] Division Bench of the Delhi high Court in the case of *Kamal Gupta* (supra), relying on Section 59A of the Transfer of Property Act 1882 has, in clear terms, held that the word “borrower” defined in section 2(f) would mean the original borrower and after his death his legal representatives. The learned Judges of the Delhi High Court have also relied on the Judgment of the Apex Court in the case of *Samarendra Nath Sinha & Another vs. Krishna Kumar Nag*¹ for arriving at the said finding.

21] We find that upon harmonious construction of the provisions of sub-section (1) of Section 13 read with sub-section (2) of Section 2, view taken by Division Bench of Delhi High Court in the case of *Kamal Gupta* (supra) lays down the correct proposition of law and we are in complete agreement with the same.

22] Division Bench of Andhra Pradesh High Court has also taken the similar view, relying on the provisions of Section 59A of the Transfer of Property Act read with sub-section (2) of Section 2 of the said Act. In addition, Division Bench of the Andhra Pradesh High Court

¹ AIR 1967 SC 1440

has also relied upon the provisions of Section 37 of the SARFAESI Act for negating the contention which is raised by Mr. Andhyarujina in the present matter. The Division Bench of the Andhra Pradesh High Court has held that in view of provisions of Section 37 of the SARFAESI Act, the provisions of the SARFAESI Act are in addition to the provisions which are available to the secured creditor under the provisions of the other Enactments.

23] Insofar as the Judgment of Division Bench of this Court in *Kotak Mahindra Bank Ltd* (supra) is concerned, the said judgment has been stayed by the Hon'ble Supreme Court. Even otherwise, we find that the said judgment would not be applicable to the facts of the present case. Their Lordships of the Supreme Court in the case of *The Regional Manager and Another vs. Pawan Kumar Dubey*¹, have succinctly described as to what would amount to ratio decidendi. In that case, it has been held by Their Lordships as under:-

“It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion

¹ (1976) 3 SCC 334

based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts.”

It could be seen that Their Lordships have held that ratio decidendi of the case is what is decided by the Court on the facts of the case by applying the provisions of law in the said case. It has further been held that a slight distinction in facts with the application of the same principle of law may lead to totally diagonally opposite results. In the case of *Kotak Mahindra Bank Ltd* (supra), what fell for consideration before the learned Judges of the Division Bench was, as to whether the provisions of the SARFAESI Act are available to the non-banking financial institutions or not. While deciding the said issue, the obiter, as to what would mean to be a borrower, in our considered view, cannot be said to be a ratio decidendi.

24] We have hereinabove elaborately considered the provisions of the statute with respect to the facts as are available in the present case and have held that the term “borrower” would also include the legal representatives of the original mortgagor.

25] Insofar as the second argument of Mr. Andhyarujina with regard to the provisions of Section (5-A) of Section 13 is concerned, no doubt, that, as directed by Their Lordships of the Supreme Court vide Order dated 27.11.2015 passed in SLP No.32139 of 2015, Respondent No.1 is restrained from creating any third party right till the next date of hearing before the High Court.. However, we find that the argument on the said issue, is also without any substance. Sub-section (5-A) of Section 13 reads thus:-

“13(5-A) Where the sale of an immovable property, for which a reserve price has been specified, has been postponed for want of a bid of an amount not less than such reserve price, it shall be lawful for any officer of the secured creditor, if so authorised by the secured creditor in this behalf, to bid for the immovable property on behalf of the secured creditor at any subsequent sale.”

It could thus be seen that what is prohibited by the said Act is participation by secured creditor in the first auction. However, the said provision does not preclude the secured creditor from participating in the second or onward auctions, if the property was not sold in the first auction. A specific statement is made on an affidavit by Mr. Vinod Suryakant Pawaskar, the Head – Legal of Respondent No.1, stating therein that since the earlier public auctions held three times have failed for want of bidders, Respondent No.1 had no option

but to bid in the fourth auction. Though period of one year has elapsed from the date of filing of the said affidavit, no rejoinder is filed. Mr. Andhyarujina would rely on the order dated 27/10/2016 and particularly on para 3 of the said order. It could be noticed that the said order was passed by the Division Bench in Civil Application No.2803 of 2016 for amendment of the Petition. Learned Counsel for Respondent No.1 did not object to the amendment being carried out. The Court has also noticed that grant of pre-admission amendment is a matter of rule. In para 3 of the said order, only oral argument made on behalf of the Petitioner is recorded that it does not admit the allegations made in the affidavit in reply by Respondent No.1. It is stated that, as Respondent No.1 has consented to the amendment, Petitioner is not filing its affidavit in rejoinder.

26] Where a particular fact is stated on an affidavit, a non-denial thereto by counter affidavit, would deem such averment to be uncontroverted and, as such, admitted. We are therefore of the considered view that the statement made on an affidavit that since Respondent No.1 did not get a bidder on three occasions, it participated in the fourth bid, has gone unchallenged. The said fact

could have been countered by the Petitioners, either by filing specific affidavit or by any other mode of pleadings. The same having not been done, we find that the assertion by Respondent No.1 that in first three biddings, there was no bidder and, therefore, they participated in the fourth bid, has gone unchallenged. In that view of the matter, we find that the submission in that regard also deserves to be rejected.

27] In that view of the matter, we do not find any error in the view taken by the learned Tribunal, calling for interference by this Court under its extraordinary jurisdiction under Article 226 of the Constitution of India.

28] Petition is found to be devoid of merit and dismissed as such. Rule stands discharged.

29] At this stage, Mr. Andhyarujna presses for grant of protection, so as to enable the Petitioners to approach the Hon'ble Supreme Court. In the light of the view that we have taken, the prayer is rejected.

(SANDEEP K. SHINDE, J.)

(B. R. GAVAI, J.)