

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.08.2017

C O R A M

The Honourable **Mr.JUSTICE S. MANIKUMAR**  
and  
The Honourable **Ms.JUSTICE V. BHAVANI SUBBAROYAN**

Writ Petition No.8020 of 2017

P. Magudeeswaran

...

Petitioner

Vs

The Authorised Officer  
Lakshmi Vilas Bank  
Coimbatore Main Branch  
LVB Platinum Jubilee Building  
68 Oppanakara Street  
Coimbatore 641 001.

...

Respondent

Writ Petition filed under Article 226 of Constitution of India, to issue a Writ of certiorari to call for the records pertaining to notice dated 30/12/2016 bearing No.LVB/185/GEN/116/2016-17 issued by the respondent Bank with scheduled property and to quash the same as illegal and arbitrary.

For Petitioner

...

Mr.R.Nandha Kumar

For respondent

...

Mr.A.V.Radhakrishnan

**ORDER**

(Order of the Court was made by **S.Manikumar, J.**)

M/s. Sri Venkateswar Motors, engaged in Automobile business, in selling two wheelers and an authorised dealer for TVS Motor Company Ltd., has approached Lakshmi Vilas Bank, Coimbatore Main Branch, Coimbatore, and availed the following credit facilities,

|                                     |     |                |
|-------------------------------------|-----|----------------|
| Open Cash Credit as Working Capital | ... | Rs.250 lakhs   |
| Term loan                           | ... | Rs.28.17 lakhs |
| Open Cash Credit                    | ... | Rs.20 lakhs    |
| Term loan                           | ... | Rs.5.62 lakhs  |
| Open Cash Credit                    | ... | Rs.20 lakhs    |

2. For the purpose of availing loan, immovable properties have been offered as security, by creating equitable mortgage, by depositing title deeds, with the respondent Bank. Sri Venkateswar Motors, could not repay the amount, in time. Declaring the loan account as Non-Performing Asset, respondent Bank, has issued a notice, dated 20/5/2016, under Section 13 (2) of the SARFAESI Act, 2002, demanding a sum of Rs.3,21,96,388/-. The petitioner has approached the Bank,

seeking time to repay. According to the petitioner, instead of considering the representation, Bank has issued a possession notice, dated 30/7/2016, under Section 13 (4) of SARFAESI Act, 2002 and took symbolic possession of eight different immovable properties mortgaged and offered as security.

3. Pursuant to the possession notice, dated 30/7/2016, once again, the petitioner, vide letter, dated 29/8/2016, approached the Bank, seeking three months time, to review the loan account, by sale of some of the properties, offered as security, and in the said letter, dated 29/8/2016, the borrower has specifically mentioned that the Bank need not proceed against the commercial property, situated on the main road where the petitioner is running the business. It is the case of the petitioner that Bank did not consider the said request, but issued a sale notice, dated 1/9/2016, fixing the auction, on 14/10/2016.

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4. According to the petitioner, the extent of the commercial property, situated at the prime location of Coimbatore City, brought for auction, measures a total extent of 3,020 sq.feet of land, building, to an

extent of 1700 sq.feet, constructed therein, with ground and first floor. In the sale notice, Bank has referred to an extent of 3020 sq.feet, but, according to the petitioner, the extent of construction therein, is about 7,980 sq.feet, which has been suppressed, in all the notices, issued by the Bank.

5. Writ petitioner has further submitted that sale, as scheduled, on 14/10/2016, did not take place and therefore, another sale notice, dated 4/11/2016, was issued by the Authorised Officer of Lakshmi Vilas Bank, fixing the auction, on 6/12/2016, at 11.30 a.m. Publication in “Tamil” and “English” newspapers, viz., Dinamani and The New Indian Express, respectively, have been effected, on 3/11/2016.

6. Writ petitioner has further contended that the actual value of the property is more than Rs.4.5 crores, whereas, the upset price fixed by the Bank, at Rs.2,21,50,000/-, is low. The petitioner, received a letter, dated 30/12/2016, stating that the commercial property, situate at Vadapalli main road, has been purchased by Lakshmi Vilas Bank, for a sum of Rs.2,21,60,000/-, pursuant to the e-auction notice, dated

1/11/2016. The Bank has directed the petitioner to vacate the premises, within seven days, from the date of the receipt of the letter, dated 30/12/2016. According to the petitioner, upset price was fixed at Rs.2,21,50,000/- and that the property has been purchased, on 7/12/2016, for Rs.2,21,60,000/-, just by adding Rs.10,000/- over and above, the upset price.

7. Contending inter alia that the writ petitioner was not informed of the sale refixed to some other date, i.e., on 7/12/2016 and that the auction price of Rs.2,21,60,000/-, was just an addition of Rs.10,000/-, over and above the upset price, market value of the scheduled property, situated at Vadavalli main road, fixed by the Bank, was prejudicial to the interest of the borrower, and further contending that if any auction has to be conducted, there should have been a service of notice on the borrower, as contemplated in the statutory rules, which according to the petitioner, not followed, instant writ petition has been filed for a writ of certiorari, to call for the records, pertaining to notice, dated 30/12/2016, bearing No.LVB/185/GEN/116/2016-17.

8. Opposing the prayer, sought for, in the writ petition, Authorised Officer of Lakshmi Vilas Bank, Coimbatore, in his counter affidavit has set out the details of the loan borrowed, deposit of title deeds, properties offered as collateral security, statutory notices, issued under the SARFAESI Act, 2002. Added further, the Authorised Officer of Lakshmi Vilas Bank, Coimbatore, has submitted that valuation of the mortgaged property, has been done through a panel valuer, who has submitted his valuation report, on 6/8/2016.

9. According to the Authorised Officer, market value of the property is Rs.2,21,50,000/-, guideline value is Rs.1,34,31,804.00 and that the forced sale value is Rs.1,88,00,000/-. Authorised Officer of Lakshmi Vilas Bank, Coimbatore, has admitted that the petitioner has sent a letter, dated 29/8/2016, seeking three months time, to regularise the accounts, but the Bank did not consider the same. According to the Bank, as on 19/8/2016, a sum of Rs.3,35,65,486.98 was due and payable, by the writ petitioner and guarantor, and that the petitioner did not renew the Open Cash Credit facilities, by submitting necessary papers.

10. Authorised Officer of Lakshmi Vilas Bank has further submitted that auction sale notice, dated 1/9/2016, fixing the date of auction, on 14/10/2016, was circulated in the newspapers, viz., “The New Indian Express” and “Dinamani”, dated 2/9/2016, respectively, and that the same, is in accordance with the provisions of the Act, but the auction could not take place, as there were no bidders. Therefore, Bank was constrained, to issue another auction notice, dated 2/11/2016, by fixing the last date of submission of tenders as 5/12/2016, and opening of tenders, on 6/12/2016.

11. According to the Bank, notice, dated 2/11/2016, has been sent to the writ petitioner and others. Publication was effected, on 3/11/2016, in English and Tamil dailies. The Authorised Officer of Lakshmi Vilas Bank, Coimbatore, in his counter affidavit, has contended that after discussion, the Recovery Department, Corporate Office, of the respondent Bank, decided to buy one of the mortgaged properties, which the Bank is entitled, as per Section 6 (f) & (g) of the Banking Regulation Act, 1949 and the provisions envisaged under Section 13 (5) (5A) to (5C) of SARFAESI Act, 2002, in order to reduce the dues, from the loan

account of the petitioner, and to use the property for Bank purpose. Accordingly, the Recovery Department, gave permission by sending mail, dated 5/12/2016. The Assistant Vice President of the respondent Bank, by way of General Notice, dated 5/12/2016, appointed Mr.R.Ravichandran, Chief Manager of the respondent Bank and authorised him, to purchase the property. The Authorised Officer of Lakshmi Vilas Bank, Coimbatore, has submitted that due to the sudden demise of the Hon'ble Chief Minister of Tamil Nadu, auction could not take place, on 6/12/2016. For the above said administrative reason, auction was postponed, to 7/12/2016.

12. On 7/12/2016, the secured creditor was the only bidder. As the amount offered was more than the reserve price, sale was concluded. Sale certificate was issued in the name of Lakshmi Vilas Bank and that the same has been registered. Thereafter, a letter, dated 30/12/2016, was issued to the borrower/writ petitioner, to vacate and handover the property to the Bank.

13. The Authorised Officer of the respondent Bank has further submitted that, still a sum of Rs.1,46,03,033.48 is due and payable by the writ petitioner and others. The petitioner has sent a letter, dated 6/1/2017 and sought 90 days time to settle the dues. Under Section 13 (5) (5A) to (5c) of SARFAESI Act, 2002, Bank is entitled to participate in the auction and thus, following the procedure, sale has been effected.

14. For the above said reasons, the respondent Bank has prayed to dismiss the writ petition.

15. Earlier, vide order, dated 27/7/2017, we directed the respondent Bank, to produce the records, pertaining to the sale, said to have been effected, on 7/12/2016.

16. Responding to the above, a typed set of papers, dated 21/6/2017, containing photo copies of the documents, was submitted.

17. On this day, Mr.A.V.Radhakrishnan learned counsel appearing for the Bank produced the files.

18. We have perused the same.

19. Material on record, including the typed set of papers, filed by the Bank shows that Notice, dated 2/11/2016, has been sent to the petitioner and guarantor, respectively. Details of postal acknowledgment enclosed, in the typed set of papers are extracted hereunder:-

P. Magudeswaran  
D.No.9 (old)/New No.11/2A  
Thirumurugan Nagar  
Maruthamalai Main Road  
Vadavalli  
Coimbatore 641 041.

M.Tamil Selvi  
Proprietrix  
M/s. Kugan Motors  
6/19 Thirumurugan Nagar  
Maruthamalai Main Road  
Vadavalli, Coimbatore 641 041.

The said letters have been acknowledged on 5/11/2016.

20. One of the conditions mentioned in the auction notice, dated 2/11/2016, of the Authorised Officer of Lakshmi Vilas Bank, Coimbatore, and published, on 3/11/2016, in the newspapers is that,

“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. The terms and conditions in respect of EMD is 10% of the upset price. Payment of the purchase money etc., are not applicable to the officer of the secured creditor and the purchase price shall be adjusted to the amount of the claim of the secured creditor.”

21. The last date for tender was 5/12/2016. The Assistant Vice President of Lakshmi Vilas Bank, by way of General Notice, dated 5/12/2016, has appointed one R.Ravichandran, Chief Manager of the respondent Bank, among other things, for buying the property.

22. Perusal of the same, shows that K.Ezhilarasu, Assistant Vice President/Authorised Officer, has issued a letter, dated 5/12/2016, permitting Mr.R.Ravichandran, the Chief Manager, to submit the tender, to the Authorised Officer of Lakshmi Vilas Bank, Coimbatore Branch, who is none other than, Mr.K.Ezhil Arasu, Assistant Vice President of the Bank.

Thus, from the material on record, it is evident that the auctioneer himself has authorised a representative of the Bank, to participate in the auction. Files produced before us, do not disclose that the Recovery Department has authorised Mr.R.Ravichandran, Chief Manager, to submit tender form to the authorised Officer. But, the Authorised Officer/auctioneer, in the capacity of Vice President, has nominated Mr.R.Ravichandran, Chief Manager, to submit a tender, at Rs.221.60 lakhs, for the Bank's own use/resale.

23. Be that as it may, for the reasons stated supra, auction sale fixed, on 6/12/2016, could not take place, but public notice, dated 5/12/2016, has been issued by the Authorised Officer, postponing the auction of immovable properties, belonging to M/s. Sri Venkateswar Motor Group Accounts, to 7/12/2016, at 11.30 p.m., on the same terms and conditions.

24. Proceeding, dated 7/12/2016, issued by the Assistant Vice President/Authorised Officer, is reproduced hereunder:-

“The undersigned issued the sale notice dated 1/11/2016, inviting tenders from public towards sale of immovable properties belonging to Mr.P.Magudeshwaran, Mrs.Tamilselvi and Mrs.Pushparani wherein the auction sale was fixed on 6/12/2016, at Coimbatore Main Branch, Coimbatore, at 11.30 a.m. Due to administrative reasons, the sale was postponed to 7/12/2016 at 11.30 a.m., with the same terms and conditions.

The upset price fixed is as follows:-

| <i>Item No.</i> | <i>Upset price</i> | <i>Item No.</i> | <i>Upset price</i> |
|-----------------|--------------------|-----------------|--------------------|
| I               | 33,00,000.00       | V               | 37,00,000.00       |
| II              | 48,00,000.00       | VI              | 29,50,000.00       |
| III             | 36,00,000.00       | VII             | 48,00,000.00       |
| IV              | 2,21,50,000.00     | VIII            | 41,50,000.00       |

No bidders have approached the Bank for participating in the Auction sale and submitted tenders within the stipulated period and with the required 10% EMD amount mentioned in the sale notice.

It is observed that the secured asset was earlier brought for sale vide auction sale notice dated 1/9/2016 and no bidders participated in it

and hence, the said auction sale was deferred for want of bidders.

As per the amended provisions of SARFAESI Act, Secured Creditor Bank can bid for purchase of the assets for any subsequent sale. The Auction Sale Notice dated 1/11/2016 also stipulated that "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."

Sri.R.Ravichandran, Chief Manager, Staff No.1493, P.A.No.601 of Lakshmi Vilas Bank Ltd., Coimbatore Main Branch has approached with a letter dated 5/12/2016 nominating him to participate and bid for the secured asset listed in Item IV above, i.e., land admeasuring 6.93 cents situated at SF No.2/2 & 1/1, Site No.10, Thirumurugan Nagar, Vadavalli Village, Coimbatore & Commercial Building constructed thereon bearing Door No.10 on behalf of the Secured Creditor LAKSHMI VILAS BANK LIMITED. As per the terms & conditions of auction notice in respect of deposit of EMD i.e., 10% of the upset price, payment of purchase money etc., are not

made applicable to the officer of the Secured Creditor.

The participation of Secured Creditor THE LAKSHMI VILAS BANK LIMITED through an officer nominated for the purpose of bidding and purchase/selling of secured assets is as per the newly introduced amendment of the SARFAESI Act, 2002, wherein it is expressly laid down under the below mentioned Sections of SARFAESI Act, 2002, which is reproduced herein below:-

Section - 13 (5-A) states:

"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."

Section 13 (5-B) states:

"Where the Secured Creditor, referred to in sub-Section (5-A), is declared to be the purchaser of the immovable property at any subsequent sale, the amount of purchase price shall be

adjusted towards the amount of the claim of the Secured Creditor for which the auction of enforcement of security interest is taken by the Secured Creditor, under sub-Section (4) of Section 13.

It is observed that the Secured asset was earlier brought for sale vide auction sale notice dated 1/11/2016 and no bidder participated in the auction. Hence the participation of an officer of the Secured Creditor is in conformity with the amended Section 13 (5) (A) of SARFAESI Act. Hence, the officer Sr.R.Ravichandran, Chief Manager of Lakshmi Vilas Bank Ltd., Coimbatore Main branch namely the Secured Creditor who has been duly empowered by the competent authority is allowed to participate in the auction sale.

Sri.R.Ravichandran, Chief Manager of the Secured Creditor LAKSHMI VILAS BANK LIMITED, Coimbatore Branch has quoted the bid amount of Rs.2,21,60,000/- which is above the upset price. Hence, the Secured Creditor LAKSHMI VILAS BANK LIMITED is declared to be the purchaser of the land admeasuring 6.93 cents situated at SF No.2/2 & 1/1, Site No.10, Thirumurugan Nagar, Vadavalli Village, Coimbatore & Commercial

building constructed thereon bearing Door No.10. The purchase price shall be adjusted towards the amount of claim for which the auction of enforcement of security interest is taken by the secured creditor.

The Secured Creditor shall, on adjusting the purchase price to the amount of claim, report to the Authorised Officer to issue certificate of sale."

25. As regards the procedure to be followed, by a creditor for bringing the secured asset for auction and whether, mandatory requirement in Rule 9(1) of the Security Interest (Enforcement) Rules, 2002, has to be followed, we deem it fit to consider few decisions,

(i) In ***Ram Kishun Vs. State of Uttar Pradesh***, reported in **{(2012) 11 SCC 511}**, paragraphs 13, 14 and 28 relevant for the purpose of mandatory requirement, we deem it fit to consider the same,

"13. Undoubtedly, public money should be recovered and recovery should be made expeditiously. But it does not mean that the financial institutions which are concerned only

with the recovery of their loans, may be permitted to behave like property dealers and be permitted further to dispose of the secured assets in any unreasonable or arbitrary manner in flagrant violation of the statutory provisions.

14. A right to hold property is a constitutional right as well as a human right. A person cannot be deprived of his property except in accordance with the provisions of a statute. (Vide *Lachhman Dass v. Jagat Ram and State of M.P.* v. *Narmada Bachao Andolan*). Thus, the condition precedent for taking away someone's property or disposing of the secured assets, is that the authority must ensure compliance with the statutory provisions.

28. In view of the above, the law can be summarized to the effect that the recovery of the public dues must be made strictly in accordance with the procedure prescribed by law. The liability of a surety is coextensive with that of the principal debtor. In case there are more than one surety the liability is to be divided equally among the sureties for unpaid amount of loan. Once the sale has been confirmed it cannot be set aside unless a

fundamental procedural error has occurred or sale certificate had been obtained by misrepresentation or fraud.”

43. The above principles laid down by this Court also makes it clear that though the recovery of public dues should be made expeditiously, it should be in accordance with the procedure prescribed by law and that it should not frustrate a Constitutional Right, as well as the Human Right of a person to hold a property and that in the event of a fundamental procedural error occurred in a sale, the same can be set aside.”

(ii) In *G.M.Sri Siddeshwara Co-operative Bank Ltd & Anr Vs. Sri Ikbali & Ors*, reported in **2013 (10) SCC 83**, the Hon'ble Supreme Court held as follows:-

17. Rule 9 provides for the detailed procedure with regard to sale of immovable property including issuance of sale certificate and delivery of possession. Sub-rule (1) of Rule 9 states that no sale of immovable property shall take place before the expiry of 30 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 notice of sale has been served to the borrower. Sub-rule (2) provides that sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid. This is subject to confirmation by the secured creditor. There is a proviso appended to sub-rule (2) which provides that no sale under this rule shall be confirmed if the amount offered by sale price is less than the reserve price but this is relaxable in view of the second proviso appended to sub-rule (2). Sub-rule (3) lays down that on every sale of immovable property, the purchaser shall immediately make the deposit of 25% of the amount of the sale price. In default of such deposit, the property shall forthwith be sold again. Sub-rule (4) provides that the balance amount of purchase price payable shall be paid by the purchaser 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. Sub-rule (5) makes a provision that if the balance amount of purchase price is not paid as

required under sub-rule (4), then the deposit shall be forfeited and the property shall be resold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold. According to sub-rule (6), on confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorised officer exercising 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 the 2002 Rules.

18. A reading of sub-rule (1) of Rule 9 makes it manifest that the provision is mandatory. The plain language of Rule 9(1) suggests this. Similarly, Rule 9(3) which provides that the purchaser shall pay a deposit of 25% of the amount of the sale price on the sale of immovable property also indicates that the said provision is mandatory in nature. As regards balance amount of purchase price, sub-rule (4) provides that the said amount shall be paid by the purchaser on or before the fifteenth day of confirmation of sale of immovable property or such extended period as may be agreed upon in

writing between the parties. The period of fifteen days in Rule 9(4) is not that sacrosanct and it is extendable if there is a written agreement between the parties for such extension. What is the meaning of the expression 'written agreement between the parties' in Rule 9(4)? 2002 Rules do not prescribe any particular form for such agreement except that it must be in writing. The use of term 'written agreement' means a mutual understanding or an arrangement about relative rights and duties by the parties. For the purposes of Rule 9(4), the expression "written agreement" means nothing more than a manifestation of mutual assent in writing. The word 'parties' for the purposes of Rule 9(4) we think must mean the secured creditor, borrower and auction purchaser.

**23. There is no doubt that Rule 9(1) is mandatory but this provision is definitely for the benefit of the borrower.** Similarly, Rule 9(3) and Rule 9(4) are for the benefit of the secured creditor (or in any case for the benefit of the borrower). It is settled position in law that even if a provision is mandatory, it can

always be waived by a party (or parties) for whose benefit such provision has been made.

The provision in Rule 9(1) being for the benefit of the borrower and the provisions contained in Rule 9(3) and Rule 9(4) being for the benefit of the secured creditor (or for that matter for the benefit of the borrower), the secured creditor and the borrower can lawfully waive their right. These provisions neither expressly nor contextually indicate otherwise. Obviously, the question whether there is waiver or not depends on facts of each case and no hard and fast rule can be laid down in this regard. “

(iii) In *Mathew Varghese Vs. M. Amritha Kumar & Others*, reported in (2014) 5 Supreme Court Cases 610, the Hon'ble Apex Court held as follows:-

"23. In order to examine the correctness of the impugned Judgement of the Division Bench, a serious look into Section 13, in particular sub-section (8) of the SARFAESI Act along with Rules 8 and 9 of the Rules, 2002 is required. We, therefore, deem it appropriate to extract Sections 29(zc), 2(zf), 13(1) and (8) of the

SARFAESI Act, as well as Rule 8 sub-rules (1), (3), (5) and (6) and also Rule 9(1) which are as under:

'2(zc) 'secured asset' means the property on which security interest is created;

2(zf) 'security interest' means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in Section 31;

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.

(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.

## **26.2. The Secured Interest Rules, 2002**

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.

(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.

(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.

**9. Time of sale, issue 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 notice of sale has been served to the borrower.”

27. Under Section 13(1), it is provided that any security interest created in favour of the SECURED CREDITOR may be enforced without the intervention of the Court and Tribunal by such creditor in accordance with the provisions of this Act. The non-obstante clause in the opening set of expressions contained in Section 13(1), as pointed out by Mr. Singh, learned Senior Counsel for the borrowers, is restricted to Section 69 or Section 69A of the T.P. Act. Apart from noting the said statutory impediment, to be noted in Section 13(1), the more important feature to be noted is that a free hand is given to the SECURED CREDITOR for the purpose of enforcing any security interest created in favour of SECURED CREDITOR, without the

intervention of the Court or Tribunal. The only other relevant aspect contained in the said sub-section is that such enforcement should be in accordance with the provisions of this Act. A reading of Section 13(1), therefore, is clear to the effect that while on the one hand any SECURED CREDITOR may be entitled to enforce the SECURED ASSET created in its favour on its own without resorting to any court proceedings or approaching the Tribunal, such enforcement should be in conformity with the other provisions of the SARFAESI Act.

28. Keeping the said stipulation contained in Section 13(1) in mind, it will have to be examined as to what are the other statutory requirements to be fulfilled when enforcement of a right created in favour of any SECURED CREDITOR in respect of a security interest is created. As we are concerned with the sale of property mortgaged by the borrowers, for the present we leave aside any other form or mode of enforcement, except the one relating to the equitable mortgage created in favour of the Bank. For that purpose, we find that sub-section (8) of Section 13 would be relevant.

29. A careful reading of sub-section (8), therefore, has to be made to appreciate the legal issue

involved and the submissions made by the respective counsel on the said provision.

29.1. A plain reading of sub-section (8) would show that a borrower can tender to the SECURED CREDITOR the dues together with all costs, charges and expenses incurred by the SECURED CREDITOR at any time before the date fixed for sale or transfer. In the event of such tender once made as stipulated in the said provision, the mandate is that the SECURED ASSET should not be sold or transferred by the SECURED CREDITOR. It is further reinforced to the effect that no further step should also be taken by the SECURED CREDITOR for transfer or sale of the SECURED ASSET. The contingency stipulated in the event of the tender being made by a debtor of the dues inclusive of the costs, charges, etc., would be that such tender being made before the date fixed for sale or transfer, the SECURED CREDITOR should stop all further steps for effecting the sale or transfer. That apart, no further step should also be taken for transfer or sale.

29.2. When we analyze in depth the stipulations contained in the said sub-section (8), we find that there is a valuable right recognized and asserted in favour of the borrower, who is the owner of the SECURED ASSET and who is extended an

opportunity to take all efforts to stop the sale or transfer till the last minute before which the said sale or transfer is to be effected. Having regard to such a valuable right of a debtor having been embedded in the said sub-section, it will have to be stated in uncontroverted terms that the said provision has been engrafted in the SARFAESI Act primarily with a view to protect the rights of a borrower, inasmuch as, such an ownership right is a Constitutional Right protected under Article 300A of the Constitution, which mandates that no person shall be deprived of his property save by authority of law.

29.3. Therefore, de hors, the extent of borrowing made and whatever costs, charges were incurred by the SECURED CREDITOR in respect of such borrowings, when it comes to the question of realizing the dues by bringing the property entrusted with the SECURED CREDITOR for sale to realize money advanced without approaching any Court or Tribunal, the SECURED CREDITOR as a TRUSTEE cannot deal with the said property in any manner it likes and can be disposed of only in the manner prescribed in the SARFAESI Act.

29.4. Therefore, the creditor should ensure that the borrower was clearly put on notice of the date and time by which either the sale or transfer will be effected in order to provide the required opportunity to the borrower to take all possible steps for retrieving his property or at least ensure that in the process of sale the SECURED ASSET derives the maximum benefit and the SECURED CREDITOR or anyone on its behalf is not allowed to exploit the situation of the borrower by virtue of the proceedings initiated under the SARFAESI Act. More so, under Section 13(1) of the SARFAESI Act, the SECURED CREDITOR is given a free hand to resort to sale of the property without approaching the Court or Tribunal.

30. Therefore, by virtue of the stipulations contained under the provisions of the SARFAESI Act, in particular, Section 13(8), any sale or transfer of a SECURED ASSET, cannot take place without duly informing the borrower of the time and date of such sale or transfer in order to enable the borrower to tender the dues of the SECURED CREDITOR with all costs, charges and expenses and any such sale or transfer effected without complying with the said

statutory requirement would be a constitutional violation and nullify the ultimate sale.

31. Once the said legal position is ascertained, the statutory prescription contained in Rules 8 and 9 have also got to be examined as the said rules prescribe as to the procedure to be followed by a SECURED CREDITOR while resorting to a sale after the issuance of the proceedings under Section 13(1) to (4) of the SARFAESI Act. Under Rule 9(1), it is prescribed that no sale of an immovable property under the rules should take place before the expiry of 30 days from the date on which the public notice of sale is published in the newspapers as referred to in the proviso to sub-rule (6) of Rule 8 or notice of sale has been served to the borrower. Sub-rule (6) of Rule 8 again states that the authorized officer should serve to the borrower a notice of 30 days for the sale of the immovable SECURED ASSETS. Reading sub-rule (6) of Rule 8 and sub-rule (1) of Rule 9 together, the service of individual notice to the borrower, specifying clear 30 days time gap for effecting any sale of immovable SECURED ASSET is a statutory mandate. It is also stipulated that no sale should be effected before the expiry of 30 days from the date on which the public notice of sale is published in the

newspapers. Therefore, 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, while the publication in newspaper should provide for 30 days clear notice, since Rule 9(1) also states that such notice of sale is to be in accordance with proviso to sub-rule (6) of Rule 8, 30 days clear notice to the borrower should also be ensured as stipulated under Rule 8(6) as well. Therefore, 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.

32. The other prescriptions contained in the proviso to sub-rule (6) of Rule 8 relates to the details to be set out in the newspaper publication, one of which should be in 'vernacular language' with sufficient circulation in the locality by setting out the terms of the sale. While setting out the terms of the sale, it should contain the description of the immovable property to be sold, the known encumbrances of the SECURED CREDITOR, the secured debt for which the property is to be sold, the reserve price below which the sale cannot be

effected, the time and place of public auction or the time after which sale by any other mode would be completed, the deposit of earnest money to be made and any other details which the authorized officer considers material for a purchaser to know in order to judge the nature and value of the property.

33. Such a detailed procedure while resorting to a sale of an immovable SECURED ASSET is prescribed under Rules 8 and 9(1). In our considered opinion, it has got a twin objective to be achieved.

33.1. In the first place, as already stated by us, by virtue of the stipulation contained in Section 13(8) read along with Rules 8(6) and 9(1), the owner/borrower should have clear notice of 30 days before the date and time when the sale or transfer of the SECURED ASSET would be made, as that alone would enable the owner/borrower to take all efforts to retain his or her ownership by tendering the dues of the SECURED CREDITOR before that date and time.

33.2. Secondly, when such a SECURED ASSET of an immovable property is brought for sale, the intending purchasers should know the nature of the property, the extent of liability pertaining to the said property, any other encumbrances pertaining to the said property, the minimum price below which one

cannot make a bid and the total liability of the borrower to the SECURED CREDITOR. Since, the proviso to sub-rule (6) also mentions that any other material aspect should also be made known when effecting the publication, it would only mean that the intending purchaser should have entire details about the property brought for sale in order to rule out any possibility of the bidders later on to express ignorance about the factors connected with the asset in question.

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."

(iv) In *J. Rajiv Subramaniyan and Another Vs. Pandiyas and Others*, reported in **(2014) 5 Supreme Court Cases 651**, the Hon'ble Supreme Court, held as follows:-

"12. This Court in the case of *Mathew Varghese Vs. M. Amritha Kumar* {(2014) 5 SCC 610}, examined the procedure required to be followed by the banks or other financial institutions when the secured assets of the borrowers are sought to be sold for settlement of the dues of the banks/financial institutions. The Court examined in detail the provisions of the SARFAESI Act, 2002. The Court also examined the detailed procedure to be followed by the bank/financial institutions under the 2002 Rules. This Court took notice of Rule 8, which relates to sale of immovable secured assets and Rule 9 which relates to time of sale, issue of sale certificate and delivery of possession etc. With regard to Section 13(1), this Court observed that Section 13(1) of SARFAESI Act, 2002 gives a free hand to the secured creditor, for the purpose of enforcing the secured interest without the

intervention of Court or Tribunal. But such enforcement should be strictly in conformity with the provisions of the SARFAESI Act, 2002. Thereafter, it is observed as follows:-"

.....A reading of Section 13(1), therefore, is clear to the effect that while on the one hand any SECURED CREDITOR may be entitled to enforce the SECURED ASSET created in its favour on its own without resorting to any court proceedings or approaching the Tribunal, such enforcement should be in conformity with the other provisions of the SARFAESI Act."

13. This Court in Mathew Vaghese's case, further observed that the provision contained in Section 13(8) of the SARFAESI Act, 2002 is specifically for the protection of the borrowers in as much as, ownership of the secured assets is a constitutional right vested in the borrowers and protected under Article 300-A of the Constitution of India. Therefore, the secured creditor as a trustee of the secured asset cannot deal with the same in any manner it likes and such an asset can be

disposed of only in the manner prescribed in the SARFAESI Act, 2002. Therefore, the creditor should ensure that the borrower was clearly put on notice of the date and time by which either the sale or transfer will be effected in order to provide the required opportunity to the borrower to take all possible steps for retrieving his property. Such a notice is also necessary to ensure that the process of sale will ensure that the secured assets will be sold to provide maximum benefit to the borrowers. The notice is also necessary to ensure that the secured creditor or any one on its behalf is not allowed to exploit the situation by virtue of proceedings initiated under the SARFAESI Act, 2002.

14. Thereafter, in paragraph 30, this Court observed as follows:-

“30. Therefore, by virtue of the stipulations contained under the provisions of the SARFAESI Act, in particular, Section 13(8), any sale or transfer of a secured asset, cannot take place without duly informing the borrower of the time and date of such sale or transfer in

order to enable the borrower to tender the dues of the secured creditor with all costs, charges and expenses and any such sale or transfer effected without complying with the said statutory requirement would be a constitutional violation and nullify the ultimate sale.”

15. 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 the present case, there is an additional reason for declaring that sale in favour of the appellant was a nullity. Rule 8(8) of the aforesaid Rules is as under:-

“8 (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.”

17. It is not disputed before us that there were no terms settled in writing between the parties that the sale can be affected by Private Treaty. In fact, the

borrowers - respondent Nos. 1 and 2 were not even called to the joint meeting between the Bank - Respondent No.3 and Ge-Winn held on 8th December, 2006. Therefore, there was a clear violation of the aforesaid Rules rendering the sale illegal.

18. It must be emphasized that generally proceedings under the SARFAESI Act, 2002 against the borrowers are initiated only when the borrower is in dire-straits. The provisions of the SARFAESI Act, 2002 and the Rules, 2002 have been enacted to ensure that the secured asset is not sold for a song. It is expected that all the banks and financial institutions which resort to the extreme measures under the SARFAESI Act, 2002 for sale of the secured assets to ensure, that such sale of the asset provides maximum benefit to the borrower by the sale of such asset. Therefore, the secured creditors are expected to take bonafide measures to ensure that there is maximum yield from such secured assets for the borrowers. In the present case, Mr. Dhruv Mehta has pointed out that sale consideration is only Rs.10,000/- over the reserve price whereas the property was worth much more. It is not necessary for us to go into this question as, in our opinion, the sale is null and void being in violation of the provision of Section 13 of

the SARFAESI Act, 2002 and Rules 8 and 9 of the Rules, 2002 Rules.”

26. Though Mr.A.V.Radhakrishnan, learned counsel for the Bank submitted that affixture of the subsequent public notice, dated 5/12/2016, postponing auction, on 7/12/2016 has been made, files produced before us, do not disclose proof. The Security Interest (Enforcement) Rules, 2002, has been amended by Notification in G.S.R.No.1046(E), with effect from 03.11.2010.

27. Reading of the proviso, to Rule 9(1) of the Security Interest (Enforcement) Rules, 2002, makes it clear that it is not only affixture, which is contemplated under Rule, but the authorised officer shall serve, a notice on the borrower/guarantor, as the case may be, and also to publish notice of sale. All are mandatory. Admittedly, in the case on hand, auction notice, dated 04.11.2016, has been issued. Auction fixed on 06.12.2016, did not take place.

28. Proviso to Rule 9(1) has been inserted, with effect from 3<sup>rd</sup> November, 2016, which states that if sale of immovable property by anyone of the methods specified by sub-rule (5) of Rule 8 fails and sale is required to be conducted again, the authorised officer shall serve, affix and publish notice of sale of not less than fifteen days to the borrower, for any subsequent sale.

29. Sub-Rule 5 of Rule 8 of the Security Interest (Enforcement) Rules, 2002, states that 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.

30. At this juncture, we deem it fit to consider, as to how, the expression "not less many days", has been considered by the Courts.

(i) In *Ramanasari v. Muthusami Naik* reported in *ILR 30 Mad. 248*, this Court, held as follows:

"The second point was that the sale was not bad sine in computing the not less than seven days which, in fixing the day of sale under Section 18 of the Rent Recovery Act, must be allowed from the time of public notice, one, if not both, of the 'terminal' days may be included. It was argued that day of sale meant day, and that seven periods of 24 hours were to be computed from the hour of the day on which the notice was published. We do not think that the section can be so construed, and for the purpose of computing the time, we do not think any distinction can be drawn between 'day' and 'time' 'Not less than' means the same as 'clear' and seven whole days must elapse between the day of the notice and the day fixed for sale. We think the same construction must be placed on the words 'not less than' in Section 18 of the Rent Recovery Act as was placed on the words in the enactment under consideration in *McQueen v. Jackson* [(1903) 2 K.B. 163].

Even if we could adopt the appellant's contention that 'time' meant hour of the day, we should be disposed to hold that the time would have to be computed by excluding the day on which notice was published and the day on which the sale was fixed to take place."

(ii) The words "not being less than one month", came up for consideration in *Pioneer Motors (Pvt.) Ltd., v. The Municipal Council, Nagercoil* reported in *AIR 1967 SC 684*, and the Hon'ble Supreme Court, held as follows:

"The words " not being 'less than one month " do imply that clear one month's notice was necessary to be given, that is, both the first day and the last day of the month had to be excluded. To put it in the language used by Maxwell on Interpretation of Statutes, 10th Edition, p. 351 :-

"..when..... not less than' so many days are to intervene, both the terminal days are excluded from the computation,"

That does not seem to have been done in the present case. But in order to decide whether this portion of the proviso is a mandatory provision, it is convenient to see the object for which it has been enacted. Under s. 78, the procedure is laid down for the levying of a. new tax, which

has to be done by a resolution. But in the proviso, it is stated that before such a resolution can be passed, a notice to that effect has to be published in the official gazette and also in one Malayalam or Tamil newspaper having circulation within the municipality. Then comes the period for inviting objections. The object of notifying in the Gazette and Local Newspaper is both to give notice to the public and particularly to the persons who are likely to be taxed and to invite their objections. For this purpose, the proviso requires a reasonable period of not less than one month to be given. The object of the provision is to give reasonable time and opportunity and it is given as a guidance that reasonable time would be a month. The use of the words "I reasonable period" before the words ,not being less than one month " is significant. If sufficient time has been given for the invitation of the objections which only just falls short of the period mentioned in the proviso, then it would serve the object of the legislature. The provision in regard to time in the context must be held to be directory and not mandatory.

The cases under the Income-Tax Act like the **Commissioner of Income-Tax v. Ekbal and Co., [1945]13 I.T.R. 154**, where the notice under Section 22(2) of the Income-tax Act (which requires the furnishing of a return within such period not being less than thirty days) of 30 days only was held to be bad, because it was not a notice of thirty

clear days, were so decided because that notice is the basis of the jurisdiction to tax, and a legal notice is an obligation imposed in order to tax an individual and it is a mandatory provision. Similarly, cases under Rent Act, will also not apply. In **Thompson v. Stimpson [1960] 3 All E.R. 500**, the law required that not less than four weeks' notice shall be given for vacation of premises on a weekly tenancy and only one week's time was given. It was held there that it was a bad notice. It was further held that four weeks' notice was a condition precedent and the words had been used which had been interpreted in the past as providing for four clear weeks and also it was construed as four clear weeks, so that there might be certainty in the matter. In other cases, that were relied upon and which related to taxing statutes, the **Municipal Council, Cuddapah v. The Madras Southern Mahratta Railway Ltd., [(1929) I.L.R. 52 Mad. 779]**, **The Borough Municipality of Amalner v. The Pratap Spinning, Weaving and Manufacturing Co. Ltd., I.L.R. [1952] Bom. 918** and **Kalu Karim v. Municipality of Broach (1927) I.L.R. 5r Bom. 764**, it was held that taxing statutes have to be strictly construed and requirements which are precedent to the imposition of the tax have to be complied with before tax can be legally imposed. In every case the words have to be construed in the context taking into consideration the language used and the object to be achieved. As we have said

above, the use of the words " not being less than one month " implies the giving of a clear month excluding both the first and the last day of the month. There is no dispute as to the meaning of that expression alone which has been so construed and the observations of Lord Parker in **Thompson v. Simpson [1960] 3 All E.R. 500**, will apply. But the question that arises in the present case is: what is the exact significance of these words when used in the context of the other words used in the proviso. The power of the municipality to levy the tax does not depend upon a period prescribed for notice for objections. The power to tax is derived from the Statute; the provisions relating to the length of notice inviting objections and publication are merely procedural. The object of the notification is to inform the future rate payers and to invite objections from them. The proviso itself uses words " reasonable time". Reading " reasonable time " and " not being less than one month" together, it is clear that the time given must be reasonable and the legislature has only added a guide so that periods shorter than a month may not be fixed. In the present case the whole of the period except one day has been fixed and in view of the other facts it must be regarded as reasonable and to have complied with the provision which is directory in its later part."

(iii) In *Jai Charan Lal v. State of U.P.*, reported in *AIR 1968 SC 5*, the expression, "not earlier than thirty days", came up for consideration. The contention and the answer of the Hon'ble Apex Court, are reproduced hereunder,

"The next contention is that the District Magistrate had to convene the meeting for the consideration of the motion on a date which was not earlier than thirty days from the date on which the notice under sub-section (2) was delivered to him. As the notice was delivered to the, District Magistrate on October 26, the learned counsel contends that the date fixed for the meeting, namely, November 25 was earlier than thirty days because according to him the 30th day should be excluded in addition to the date on which the notice was handed. In other words, the learned counsel wishes to exclude both the terminal days, i.e., October 26 and November 25 and wants to count thirty clear days in between. He contends that the expression "not earlier than thirty days" is equal to the expression "not less than thirty days" and, therefore, thirty clear days must intervene between the two terminal days. In support of his contention the learned counsel relies upon a ruling reported in **A.I.R. 1957 A.P. 229 [Sin.Haradevi v. State of Andra and nother]**, in which the expression "not earlier than three days" was equated to the expression "not less than three

days" that is to say, three clear days. He also relies upon certain other rulings which deal with the expression "not less than so many days". In our judgment the expression "not earlier than thirty days" is not to be equated to the expression, "not less than thirty days". It is no doubt true that where the expression is "not less than so many days" both the terminal days have to be excluded and the number of days mentioned must be clear days but the force of the words "not earlier than thirty days" is not the same. "Not earlier than thirty days" means that it should not be the 29th day, but there is nothing to show that the language excludes the 30th day from computation. In other words, although October 26 had to be excluded the date on which the meeting was to be called need not be excluded provided by doing so one did not go in breach of the expression "not earlier than thirty days.". The 25th of November was the 30th day counting from October 26 leaving out the initial day and therefore it cannot be described as earlier than thirty days. In other words, it was not earlier than thirty days from the date on which the notice under sub-section (2) was delivered to the-District- Magistrate. Thus, reading is also borne out by the other expression "not later than thirty-five days" which is used in the section. In this Court, the expression "not later than 14 days" as used in rule 119 under Representation of the People Act, was held to mean the same thing as "within a

period of fourteen days". In that expression the number of days, it was held, should not exceed the number fourteen. In the sub-section we are dealing with the number of days that should not exceed thirty-five days. On a parity of reasoning not earlier than thirty days would include the 30th day but not the 29th day because 29th day must be regarded as earlier than thirty days. If the provision were "not earlier than thirty days and not later, than thirty days" it is obvious that only the 30th day could be meant. This proves that the fixing of the date of the meeting was therefore in accordance with law. We respectfully disapprove of the view taken in the Andhra Pradesh case."

(iv) The manner in which, the period prescribed, has been considered by a Hon'ble Division Bench of the Delhi High Court, in the case of **Bharat Kumar Dilwali Vs. Bharat Carbon and Ribbon Manufacturing Co. Ltd. & Ors. [(1973)43 CC 197]**, dealing with a provision of Section 171, of the Companies Act, 1956. It was held:-

"The language used in Section 171 of the 1956 Act is entirely different. It does not speak of 21 days after the service is effected. On the other hand, it requires 21 days' notice. The expression "not less than 21 days' notice" used in Section 171 normally implies a notice of 21 whole or clear

days. Part of the day, after the hour at which the notice is deemed to have been served, cannot be combined with the part of the day before the time of the meeting on the day of the meeting, to form one day. Each of the 21 days must be a full or a calendar day, so that the notice can be said to be "not less than 21 days' notice."

The words "not being less than one month", occurring in the proviso to section 78 of the Travancore District Municipalities Act, came up for consideration before the Supreme Court in *Pioneer Motors (P.) Ltd. v. Municipal Council, Nagercoil*. The Supreme Court held that the said words implied that clear one month's notice was necessary to be given, that is, both the first day and the last day of the month had to be excluded. The Supreme Court noticed with approval the observation of Lord Parker C.J. in *Thompson v. Stimpson*, in which case no notice to quit any premises was valid under the statute unless it was given "not less than four weeks" before the date on which it was to take effect. It was held that the length of notice required was four clear weeks, i.e., a period of four weeks excluding the day from which it ran and the day on which the notice expired. The reasoning on which the judgment was based was that the person for whose benefit the delay was prescribed must be given the benefit of the entire period.

Some of the English decisions, cited supra, are worth reproduction,

"In **Chambers v. Smith**, 67 Revised Reports 231, every writ was to be made returnable on some day "not being less than 15 days" after the service thereof. It was held that the date of the issue of the writ as well as that of the service thereof were to be excluded providing an interval of clear 15 days. In **re Railway Sleepers Supply Company 1885 (29) Ch. D. 204** an interval of "not less than fourteen days". which under section 51 of the (English) Companies Act, 1862 was required to elapse between the meetings passing and confirming a special resolution of a company was held to mean an interval of 14 days, exclusive of the respective days of the meeting. Chitty J. cited in that case, with approval **Lord Tenterden's test in Webb v. Fairmaner**, (3 M&W 473, 477(a) and **Young v. Higgon**, (5 M&W 48, 54), which was to reduce the time to one day. Using the words of the learned Judge, supposing the statute in our case had said a notice of 'not less than one day'; if the notice was served, say on the 1st of January, the meeting could not properly be held on the 2nd of January, for one day must intervene, therefore, the 3rd of January would be the earliest day and adding twenty more days to make up the twenty one, the meeting could not be held before the 23rd. Chitty, J. had also observed that the general rule of law in the computation of time was that fractions of a day were not reckoned, in other

words, to render the day of sort of indivisible point. In **Mcqueen v. Jackson, 1903 (2) K.B. 163**, less time than fourteen days from the day on which the summons were not be made returnable, was held to mean that 14 clear days must elapse between the date of service and that of return. In **re Hector Whaling Ltd., (1935) All E.R. Rep. 302, (1936 Ch. 208)**, the words 'not less than 21 day's notice', in section 117(2) of the English Companies Act, 1929 were construed to mean, not less than twenty one clear days, exclusive of the day of service of the notice and exclusive of the day on which the meeting is held."

(v) In **M.N.Abdul Rawoof v. Pichamuthu** reported in **2000 (3) SCC 121**, 'not less than Rs.1200/-' in proviso, to Section 3(3)(iii) of the Tamil Nadu Debt Relief Act, 1979, came up consideration. The Hon'ble Apex Court held that, held that,

"if the annual rental value of the property, which is owned by a debtor is not less than Rs. 1,200/- then he would be covered under Sub-clause (iii) of proviso to Section 3(3) and he would not be deemed to be a debtor. Not less than 1,200/- means that the minimum aggregate annual rental value should be at least 1,200/-. If the aggregate rental value was less than 1,200/- only then the respondents would have been regarded as not being covered by the proviso to Section

3(3). The High Court, in our opinion, was therefore, not correct in arriving at the conclusion that even though the annual rental value was Rs. 1,200/- the respondents were entitled to the benefit of the said proviso and would be regarded as debtors within the meaning of that Act.”

We deem it fit to reproduce the decisions in **K.P. Varghese v. ITO : [1981] 131 ITR 597 (SC)** and **CIT, Calcutta v. Braithwaite & Co. Ltd. : [1993] 201 ITR 343 (SC)**, considered in **M.N.Abdul Rawoof's** case (cited *supra*), as follows:

“9. In **K.P. Varghese v. ITO : [1981] 131 ITR 597 (SC)** this Court was required to interpret Section 52 of the Income-tax Act, 1961 where in Sub-section (2) the Income-tax Officer would get jurisdiction to acquire a capital asset if the fair market value of that asset exceeded the full value of consideration 'by an amount of not less than 15 per cent of the value declared ...' Analysing this provision it was held that according to Sub-section (2) the difference between the fair market value and the consideration declared will have to be 15 per cent or more to enable the Income-tax Officer to exercise jurisdiction under that section. To the same effect is the decision of this Court in **Karnail Singh v. Darshan Singh : 1995(1)SCALE86** . Section 4 of the Punjab Gram Panchayat Act, 1952 enables the Government to declare any village or the group or contiguous villages to constitute one or more

sabha area if they had population of 'not less than 500.' Interpreting this provision it was held that what was required for the exercise of powers under said Section 4 was that there should be a minimum population of 500. In other words, the expression population of not less than 500 was interpreted to mean that minimum population should be 500.

.....

11. Similarly, in **CIT, Calcutta v. Braithwaite & Co. Ltd.** : [1993]201ITR343(SC) where the Court had to consider the expression 'of a period not less than 7 years' it was held that the period cannot be even one minute less than 7 years.”

31. According to the Bank, sale could not be effected, on 5/12/2016. There was only one bidder, viz., the secured creditor. Sale was adjourned to 7/12/2016, due to administrative reasons, as per the terms and conditions of auction notice.

32. Proviso, to Rule 9 (1) of the Rules, makes it clear that if sale fails, for any reason, which could be due to any unavoidable circumstances like the one stated supra, the sale is required to be conducted again and the authorised officer shall serve, affix and publish notice of sale of not less than 15 days, to the borrower, for any

**subsequent sale.** In the light of the judgments, cited supra, as per the proviso to Rule 9(1) of the Rules, inserted with effect from 03.11.2016, 15 days clear notice is required to the borrower, which on the facts and circumstances of the case, has not been done.

33. Mere publication of notice of sale in newspapers alone is not sufficient. Notice of sale, has to be served on the borrower. In the case on hand, notice for sale, fixed on 6/12/2016 is stated to have been served. But when the sale could not take place, on 6/12/2016, Bank has adjourned the same to 7/12/2016, and that there is no notice on the borrower. The word 'or' used in Rule 9 (1), has to be read as 'and' which requires sufficient notice to the public, as well as to the borrower.

34. The procedure regarding service, affixture and public notice of sale, as contemplated in Sub-Rule (1) of Rule (9) of the Security Interest (Enforcement) Rules, 2002, has to be repeated, when sale has to be effected on any subsequent date, but with a clear notice of sale of not less than 15 days to the borrower. When the statute contemplates a procedure, which has been now declared as mandatory, the same has to

be done, in the manner and not otherwise. On this aspects, few decisions can be considered,

(i) In ***T.Ramamoorthy v. The Secretary, Sri Ramakrishna Vidyalaya High School, etc. & Others*** reported in **1998 Writ. LR 641**, at Paragraph 6, held as follows:

"If the statutory provision enacted by the Legislature prescribed a particular mode for terminating the service or dismissing the teaching or a non-teaching staff of a school, it can and has to be done not only in that manner alone, but it cannot be done in any manner too. This principle that where a power is given to do a certain thing in a certain way, things must be done in that way and not otherwise and that the other method of performance is necessarily precluded, is not only well settled, but squarely applies to this case also in construing the scope of the power as also its exercise by the management under Section 22 of the Act."

(ii) In ***U.P. State Bridge Corpn. Ltd. v. U.P. Rajya Setu Nigam S. Karamchari Sangh***, [(2004) 4 SCC 268], the Hon'ble Supreme Court, at Paragraph 12, held as follows:

“12. Although these observations were made in the context of the jurisdiction of the civil court to entertain the proceedings relating to an industrial dispute and may not be read as a limitation on the Court's powers under Article 226, nevertheless it would need a very strong case indeed for the High Court to deviate from the principle that where a specific remedy is given by the statute, the person who insists upon such remedy can avail of the process as provided in that statute and in no other manner.”

(iii) In ***Captain Sube Singh v. Lt. Governor of Delhi*** [(2004) 6 SCC 440], the Hon'ble Supreme Court, at Paragraph 29, held as follows:

“29. In *Anjum M.H. Ghaswala*, a Constitution Bench of this Court reaffirmed the general rule that when a statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the statute itself. (See also in this connection *Dhanajaya Reddy v. State of Karnataka*.)

The statute in question requires the authority to act in accordance with the rules for variation of the conditions attached to the permit. In our view, it is not permissible to the State Government to purport to alter these conditions by issuing a notification under Section 67(1)(d) read with sub-clause (i) thereof.”

(iv) The Hon'ble Supreme Court in ***State of Jharkhand v. Ambay Cements*** reported in **2005 (1) CTC 223**, at Paragraph 27, held as follows:

"27. Whenever the statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory. It is the cardinal rule of the interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It is also settled rule of interpretation and where a statute is penal in character, it must be strictly construed and followed. Since the requirement, in the instant case of obtaining prior permission is mandatory, therefore, non-compliance

of the same must result in cancelling the concession made in favour of the grantee-the respondent herein."

(v) In *Pandit D Aher v. State of Maharashtra* reported in **2007 (1)**

**SCC 437**, the Hon'ble Supreme Court, at Paragraph 19, held as follows:

"When an employee, by reason of an alleged act of misconduct, is sought to be deprived of his livelihood, the procedure laid down under the sub rules are required to be strictly followed. It is now well settled that a judicial review would lie even if there is an error of law apparent on the face of the record. If statutory authority uses its power in a manner not provided for in the statute or passes an order without application of mind, judicial review would be maintainable. Even an error of fact for sufficient reasons may attract the principles of judicial review."

सत्यमेव जयते

35. Though Mr.A.V.Radhakrishnan, learned counsel for the Bank submitted that sale has been effected properly and procedure as contemplated under the SARFAESI Act, 2002 and the Rules framed thereunder, have been followed, going through the material on record, we are of the view that the same is not substantiated.

36. While entertaining the instant writ petition, we were conscious of the fact that sale effected on 7/12/2016, cannot be indirectly questioned in a collateral proceedings dated 30/12/2016, by which, the respondent Bank has directed the writ petitioner, to vacate and handover possession, within seven days from the date of notice.

37. But having regard to the facts and circumstances of the case, and the statutory violations, the manner in which, in the case on hand, sale has been effected, wherein, the Bank itself has purchased the property for its own use/resale, as stated in the intimation letter, dated 5/12/2016, we were constrained to call for the records and thus convinced that there is a patent violation of the statutory rules by the bank to purchase the property, for its own use/resale. At this juncture, we also make it clear that the instant writ petition should not be quoted, as a precedent, where there is an effective and alternative remedy provided for, in the statute. As Bank itself has purchased the property, this Court has considered the case, on the aspect of fairness, in the action of the Bank, the secured creditor and when the auctioner himself

has nominated the proposed purchaser, who had quoted only a nominal price, of Rs.10,000/- just above the upset price, on the adjourned date of auction.

38. In the instant writ petition, the petitioner has sought for a Writ of certiorari, to call for the records, pertaining to notice, dated 30/12/2016, bearing No.LVB/185/GEN/116/2016-17, issued by the respondent Bank with scheduled property and to quash the same as illegal and arbitrary. On the facts and circumstances of this case, this Court is of the view that there is a clear violation of statute and the Constitutional right under Article 300-A and hence, the Court has to mould the relief sought for. On this aspect, this Court deems it fit to consider few decisions,

(i) In ***Pasupuleti Venkateswarlu v. The Motor & General Traders*** reported in **1975 (1) SCC 770**, at Paragraph 4, the Hon'ble Apex Court held as follows:

“We feel the submissions devoid of substance. First about the jurisdiction and propriety vis a vis circumstances which come into being Subsequent to the commencement of

the proceedings. It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief for the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fairplay is violated, with a view to promote substantial justice--subject, of course, to the absence of other disentitling factors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial Court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion, even as situations for applications of this equitable rule are myraid. We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious cognisance of events and developments subsequent to the institution of the proceeding

provided the rules of fairness to both sides are scrupulously obeyed.”

(ii) In *State of Rajasthan Vs. Hindustan Sugar Mills Ltd.*, reported in **AIR 1988 SC 1621 = 1988(3) SCC 449**, the Hon'ble Supreme Court, held that High Court in exercise of powers under Article 226 of the Constitution of India, has the prerogative power to mould the relief in a just and fair manner, as required by the demands of the situation.

(iii) In *Priyanka Overseas Pvt. Ltd., v. Union of India* reported in **1991 Supp. (1) SCC 102**, the Hon'ble Supreme Court, while observing that a party cannot be permitted to take advantage of his own wrong and on the facts and circumstances of the case, moulded the relief accordingly.

(iv) In *Hindalco Industries Ltd., v. Union of India* reported in **1994 (2) SCC 594**, the Supreme Court, at paragraph 7, held as follows:

“7. It is settled law that it is no longer necessary to specifically ask for general or other relief apart from the specific relief asked for. Such a relief may always be given

to the same extent as if it has been asked for provided that it is not inconsistent with that specific claim which the case raised by the pleadings. The court must have regard for all the relief and look at the substance of the matter and not its forms. It is equally settled law that grant of declaring relief is always one of discretion and the court is not bound to grant the relief merely because it is lawful to do so. Based on the facts and circumstances the court may on sound and reasonable judicial principles grant such declaration as the facts and circumstances may so warrant. Exercise of discretion is not arbitrary. If the relief asked for is as of right, something is included in his cause of action and if he establishes his cause of action, the court perhaps has been left with no discretion to refuse the same, But when it is not as of right, then it is one of the exercise of discretion by the court. In that event the court may in given circumstances grant which includes 'may refuse' the relief. It is one of exercising judicious discretion by the court. Same consideration would apply to the causes under the Act and the Tribunal has such discretion. The Tribunal, while keeping justice, equity and good conscience at the back of its mind, may when compelling equities of the case oblige them, shape the relief consistent with the facts and circumstances established in the given cause of action. Any uniform rigid rule, if be laid, it itself turns out to be

arbitrary. If the Tribunal thinks just, relevant and germane, after taking all the facts and circumstances into consideration, would mould the relief, in exercising its discretionary power and equally would avoid injustice. Likewise when the right to remedy under the Act itself arises on the presence or absence of certain basic facts, at the time of granting relief, may either grant the relief or refuse to grant the same. It would be one of just and equitable exercise of the discretion in moulding the ancillary relief. It is not as of right. In *Associated Provincial Picture Houses Ltd. case* under Sunday Entertainments Act, 1932, the licensing authority while granting permission to exhibit cinematographs, imposed certain conditions, prohibiting the children under age of 15 years to be admitted in the theatre. It was challenged as being arbitrary. Dealing with the discretionary power of the licensing authority, the Court of Appeal held that the law recognised certain principles on which discretion must be exercised but within the four corners of those principles. The discretion is not absolute one. The exercise of such a discretion must be a real exercise of the discretion. If in any statute conferring the jurisdiction, there are to be found, expressly or by implication, matters to which the authorities exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those

matters. Conversely, if the nature of the subject- matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, they must disregard those matters. Expressions have been used in cases where the powers of local authorities came to be considered relating to the sort of thing that may give rise to interference by the court. Bad faith, dishonesty - those, of course, stand by themselves, unreasonableness, attention given to extraneous circumstances, disregard of public policy, and things like that have all been referred to as being matters which are relevant for consideration. The discretion must be exercised reasonably. A person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said to be acting unreasonably."

39. In the light of the above decisions and discussion, we hold that auction conducted, on 7/12/2016, is in violation of the statutory provisions, stated supra, and that the same would not confer any right on

the Bank, directing the writ petitioner, to vacate and handover possession, within seven days. Auction is set aside.

40. In the result, **writ petition is allowed**, setting aside the Notice bearing No.LVB/185/GEN/116/2016-17, dated 30/12/2016, issued by the respondent Bank. Though notice has been ordered on 27/7/2017, for impleading M/s. Reliance ARC Limited, Mumbai and Reliance ARC Ltd., Chennai, in view of the above decision, W.M.P.No.20847 of 2017 is closed.

Index: Yes  
Internet: Yes  
mvs/skm

(S.M.K.,J) (V.B.S.,J)  
17<sup>th</sup> August 2017

S.MANIKUMAR,J

A N D

V.S.BHAVANI SUBBAROYAN,J

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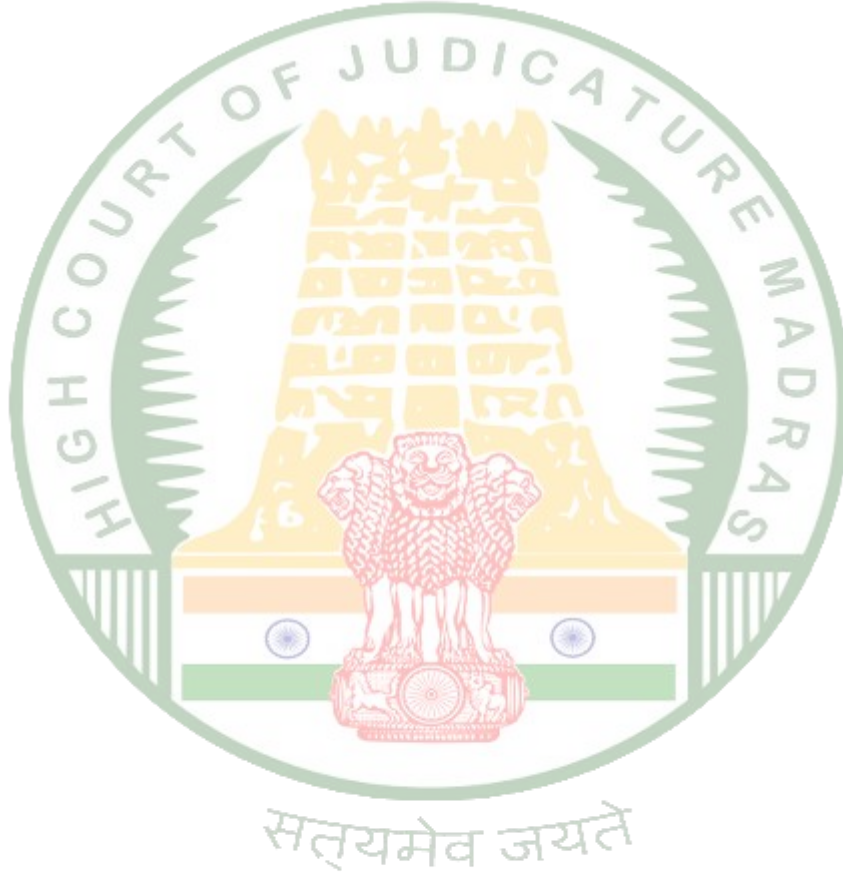
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To

The Authorised Officer  
Lakshmi Vilas Bank  
Coimbatore Main Branch

LVB Platinum Jubilee Building  
68 Oppanakara Street  
Coimbatore 641 001.

W.P.No.8020 of 2017



17/8/2017

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