

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 18.08.2017

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Writ Petition No.3789 of 2017
and
W.M.P.No.3846 of 2017

Padmavathy

.. Petitioner

Versus

1. The Authorised Officer
Dhanalakshmi Bank Ltd.,
Peenya Branch
Peenya, 1st Cross, 1st Stage
Bangalore

2. R.Ananda Kumar

3. The Registrar
Debt's Recovery Appellate Tribunal
Chennai.

... Respondents

Writ petition has been filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorarified Mandamus calling for the records of the DRAT with respect to the order dated 30.01.2017 passed in RA(SA) 78 of 2012 and quash the same as being violative of the orders of the High Court in W.P.No.10912 of 2008 as well as the judgement of the Hon'ble Supreme Court and the provisions of the Act and consequently direct the bank to accept the payment of Rs.16.86 lakhs as full and final payment of the petitioner and release the title deeds.

For Petitioner : M/s.Ananda Gomathy

For Respondent-1 : Mr.W.S.Jayaprakash

For Respondent-2 : Mr.A.Ramesh Manikandan

ORDER

(Order of the Court was delivered by V.BHAVANI SUBBAROYAN, J.)

Challenging the order passed by the Debt Recovery Appellate Tribunal, Chennai, in RA(SA) 78 of 2012 dated 30.01.2017, the petitioner has filed this Writ Petition.

2. Brief facts of the case of the petitioner as averred in the Writ Petition are as follows:-

(i) The petitioner is an 83- year old lady, who stood as a guarantor to the facilities extended to his son's company viz., Space Mount Inc. Bangalore, for which, her residential property at Salem was given as a security. Since her son and daughter-in-law met with an accident and hospitalised for three months, the business failed and they could not repay the dues to the Bank as per the terms and conditions. Classifying the loan account as NPA, the respondent bank issued a notice under Section 13(2) of the SARFAESI Act demanding a sum of Rs.16,73,211.36.

(ii) The petitioner gave a proposal dated 07.11.2006 and offered to make payment of Rs.12 lakhs, but the bank vide letter dated 28.03.2007, agreed to accept, a sum of Rs.15.25 lakhs in full, and release the documents, without any stipulation of time, for making payment towards the loan account. In the mean time, the bank took possession of the property on 27.02.2007 and published possession notice on 25.06.2007 in English paper as well as Vernacular newspaper.

(iii) After the possession notice, the petitioner started to make payment and paid a sum of Rs.1,00,000/- on 03.12.2007, Rs.1,00,000/- on 08.12.2007 and Rs.5,00,000/- on 28.12.2007 respectively and on 24.03.2008, the petitioner wrote to the bank and requested to accept the balance amount, under the OTS scheme and offered to pay interest, for the amount of Rs.15.25 lakhs. However, the bank replied that the property had already been auctioned for Rs.22 lakhs. Thereafter, on 04.04.2008, the petitioner paid the balance amount of Rs.8.25 lakhs towards full quit of the OTS, and also filed S.A.No.61 of 2008 before the Debt Recovery Tribunal, Coimbatore, challenging the sale conducted by the respondent bank.

(iv) In the mean time, the respondent bank obtained an order under Section 14 of the SARFAESI Act 2002 to evict the petitioner from her property. The petitioner approached this Court in W.P.No.10912 of 2008, in which an interim order was passed on 29.04.2008 directing the petitioner to deposit a sum of Rs.1.50 lakhs by 09.06.2008, towards interest, for the

delayed period of payment of OTS, and the balance interest, upto the end of April 2008. Accordingly, the petitioner has deposited a sum of Rs.1,60,972/- towards the aforesaid interest. Consequently, this Court remanded the matter back to the DRT, with an observation that the petitioner would not be dispossessed from the property, until the disposal of the Securitization Appeal, and also permitted the petitioner to raise all the grounds available to challenge the sale.

(v) The petitioner contested the matter before the Debt Recovery Tribunal, Madurai, by pointing out several infirmities on the part of the respondent bank, in conducting the proceedings under the SARFAESI Act, both as regards possession and the way in which, the sale was conducted, with infirmities. The petitioner also challenged the action of the respondent bank in issuing the possession notice and sale notice, by raising the following additional grounds, in addition, to the grounds taken earlier, :-

- a. The possession notice was not at all served to the petitioner;
- b. The possession notice in vernacular has been published in English in a vernacular paper;
- c. The sale notice dated 25.02.2008 had not been affixed on a conspicuous part of the property;
- d. The sale notice issued by the first respondent dated 25.02.2008 advertised that the sale was fixed ie., on 29.02.2008, within a period of four days from the date of the sale notice, which is violative of Rule 9;
- e. The terms of sale notice clearly stated that the balance 75% of the bid amount was to be paid in fifteen days from the date of sale and did not reserve any rights on the part of the Authorised Officer for extension of time for payment of the balance amount, but the terms were flouted;
- f. The sale notice dated 25.02.2008 did not acknowledge the payment made by the petitioner subsequent to the notice of demand issued under Section 13(2) of SARFAESI Act and did not mention anything about the amount due and payable by the borrower, which is

mandatory as per Rule 8 (6) (B) of the Security Interest Enforcement Rules;

- g. The successful auction purchaser had taken out a Demand Draft at Salem for 10% of the EMD which was taken the previous date of the auction while so, the second bidder, who is none other than an employee of the auction purchaser's father had purchased a Demand Draft for 10% of the EMD from the Peenya Branch of the respondent bank itself on the date of the auction that too only for the bid amount, which would show the collusion between the auction purchaser and the respondent bank;
- h. The auction purchaser had written to the bank on 29.02.2008 seeking time till 21.03.2008 to pay the balance 75% whereas the terms of the auction sale did not contemplate extension of time for payment of the balance amount. The respondent bank had also replied on 29.02.2008 itself granting time to the auction purchaser till 21.03.2008 for payment of the balance and stated clearly that on failure, the EMD of 25% would be forfeited; and
- i. The auction purchaser had filed a counter to the Securitization Appeal wherein he had sworn an affidavit that he had deposited the said sum of Rs.15,50,750/- with the bank even on 21.03.2008 and that it was the bank which did not give credit to the said sum and chose to credit it only on 19.04.2008. However at a later date, the auction purchaser filed a typed set which contained a letter which smirks of malafides and is nothing but stark collusion between the bank and which was undated granting time to the auction purchaser until 19.04.2008 to pay the balance amount of Rs.15,50,750/-.

(vi) It is the contention of the petitioner, in the instant Writ Petition, that though the above grounds were urged, without even looking into the vital fact that the Securitization Application had been filed on 04.04.2008, within time, much before the sale was confirmed in favour of the auction purchaser, the Debt Recovery Tribunal, Madurai, dismissed the petitioner's Application holding that the Application has been

filed belatedly, after the confirmation of sale and also quoting delay on the part of the petitioner to pay. Therefore, challenging the order of the Debt Recovery Tribunal, Madurai, the petitioner has preferred RA(SA) 78 of 2012 before the Debt Recovery Appellate Tribunal, Chennai. The said Appeal was dismissed by the Appellate Tribunal holding that the petitioner had not kept up her payment promises and there was no violation of the statute.

(vii) Citing a decision of the Hon'ble Supreme Court in Vasu P.Shetti, the petitioner has averred that the delay in making payment cannot legalise a statutory violation. Therefore, the petitioner is before this Court challenging the order of the Debt Recovery Appellate Tribunal on the grounds that the Debt Recovery Appellate Tribunal has not considered the directions issued by this Court in W.P.No.10912 of 2008, directing the petitioner to pay the delayed period interest, which was also complied with and therefore, delay in paying the OTS amount, could only be adjudicated to the limited extent of as to whether, the petitioner is entitled to OTS or whether she had to pay the entire dues. It is the contention of the petitioner that the Debt Recovery Appellate Tribunal, simply chose to ignore the submission of the petitioner that even in the event of the Tribunal finding her ineligible for OTS, still she was willing to pay the outstanding dues and redeem her property. It is the contention of the petitioner that the Tribunal has not even whispered a word about such submission, in its order and that the Debt Recovery Appellate Tribunal has failed to appreciate that the SARFAESI Act is an Act depriving a person of their property and therefore, the provisions of the Act are to be strictly construed, and should be followed always to the benefit, of the person losing his right.

3. The brief averments made in the counter of the first respondent bank are as follows:-

(i) The respondent bank would submit that the respondent agrees with the contentions of the petitioner that the petitioner has mortgaged her property, in favour of the first respondent Bank, as a collateral security, for a loan of Rs.15 lakhs, borrowed by her daughter-in-law, for her business, in the name and style of M/s. Space Mount Inc, to which, the petitioner and her son Mr.Chandrasekhar, were the co-applicants. The first respondent bank would state that the first respondent has made it clear in its letter dated 28.03.2007 to the petitioner to pay OTS of Rs.15.25 lakhs immediately, and refuted the contention of the petitioner that she was making prompt payment, in accordance with the terms of OTS. The respondent also stated that the cheque dated 20.03.2007 for Rs.15 lakhs towards the part payment of OTS was bounced/returned unpaid on 15.06.2007. The respondent has sent a letter on 18.06.2007 to the petitioner

informing her, that OTS sanction dated 28.03.2007 stood cancelled with immediate effect, and advised the petitioner to pay Rs.19,16,517.72, the amount outstanding, as on 18.06.2007 failing which, the bank would initiate proceedings under SARFAESI Act.

(ii) Further, the respondent bank has contended that pursuant to the Demand Notice under Section 13(2) and Possession Notice under Section 13(4), they issued a sale notice dated 19.07.2007 under Rule 8 (6) of Security Interest (Enforcement) Rules, stating that the property would be sold on or after 20.08.2007. The tender sale notice, in English and Vernacular language Newspapers, was published on 27.10.2007, fixing the tender sale on 03.12.2007 was issued.

(iii) The respondent would state that on 03.12.2007, the petitioner intervened the bank from proceeding further, by sending a letter to the first respondent bank, admitting that the liability as Rs.22.5 lakhs with interest, and since she has defaulted to pay the OTS amount sanctioned by the Bank, the Bank has cancelled the OTS. In the said letter, the petitioner has requested the bank to grant one month time to pay the entire dues to the bank and she undertook that she would not interrupt the Bank proceedings further, to auction the property and thereupon, she would handover the lock and key of the property to the bank, if she defaults.

(iv) The respondent would further state that the petitioner had paid Rs.1,00,000/- on 03.12.2007, Rs.1,00,000/- on 10.12.2007 and Rs.5,00,000/- on 28.12.2007 respectively, and also promised to pay the balance, on or before 02.01.2008. According to the bank, these payments were not under OTS, but in furtherance of her letter dated 03.12.2007, which meant to be part-payment of the outstanding dues, as agreed by her, in the said letter. The petitioner sent a letter on 25.01.2008 to the Deputy General Manager of the first respondent bank, asking the addressee, to which office, she has to remit, the balance amount of Rs.8.25 lakhs, as if that was all the amount, which remained to be paid. The first respondent bank sent a reply on 30.01.2008 making it clear that the auction to be held on 03.12.2007 was postponed on the petitioner's representation on 03.12.2007 requesting a month's time ie., on or before 03.01.2008 promising to remit the entire outstanding amount. The bank also advised the petitioner to pay a sum of Rs.15.22 lakhs and interest forthwith, failing which the bank will take necessary action by auctioning the property.

(v) Since there was no payment forthcoming from the petitioner, the first respondent bank once again issued Newspaper publication in English and Vernacular languages on

25.02.2008 fixing the auction date on 29.02.2008. The respondent bank would state that there was no need for the bank to wait for the 30 days notice period, as the petitioner, by letter dated 03.12.2007, had agreed to the bank that if she fails to make the full payment within 30 days, the bank can go ahead with the auction. The auction sale was conducted on 29.02.2008 and confirmed in favour of Mr.R.Anadakumar, the second respondent herein, who offered Rs.22.01 lakhs, for the said property. The second respondent paid 25% of the bid amount ie., Rs.5,50,250/- and requested further time till 21.03.2008 to pay the balance 75% of the bid amount ie., Rs.16,50,750/-. The bank also agreed to the same.

(vi) Subsequently, the first respondent bank initiated measures under Section 14 of the SARFAESI Act and obtained an order from the District Magistrate, Salem, to take physical possession under No.K.Dis.10201/2008 dated 18.03.2008. The petitioner sent a letter dated 24.03.2008 to the Chairman and Managing Director of the first respondent Bank offering to pay the balance OTS amount with subsequent interest. The first respondent issued a telegram dated 03.04.2008 calling upon the petitioner to pay the outstanding balance of Rs.15,80,087/- on or before 05.04.2008, thereby, offering one more opportunity to her to redeem the mortgage, even at that late stage. However, the petitioner effected only a partial payment of Rs.8.25 lakhs. Therefore, the first respondent bank received the balance amount of 75% from the auction purchaser and issued a sale certificate to him on 19.04.2008. Thereafter, the Revenue Authorities proceeded to take physical possession on 23.04.2008, which was postponed on the assurance of the petitioner that she would hand over possession on 02.05.2008. The first respondent bank after deducting the cost and charges, returned a sum of Rs.9 lakhs and Rs.4,95,045.56 to the petitioner.

(vii) In the meanwhile, the petitioner approached this Court in W.P.No.10912 of 2008 and obtained an order of interim stay in M.P.No.1 of 2008 and as per the orders of this Court, the respondent did not evict the petitioner; and the petitioner was allowed to raise all the points questioning legality of the auction and to bring to the notice of the Tribunal her OTS payment. The Tribunal rejected the submissions made by the petitioner and passed an order. Payment of Rs.1,60,972/- was not made to the bank and if she maintains that she has paid, it is subject to strict proof.

(viii) The respondent would also state that the Debt Recovery Appellate Tribunal, in its order has stated as follows:-

"It was the fault of the appellant not to keep up the promises. Rather the petitioner/appellant made interventions only

on crucial dates with the bank and prolonged these steps, but never paid the agreed amount. The appellant offered to pay Rs.15.25 lakhs on 29.03.2007, but paid it on 04.04.2008. Whereas on 03.12.2007 itself, the amount as agreed to be paid by the appellant herself was Rs.22.05 lakhs. There appears to be no substance in challenging the legality of the notices in this manner."

(ix) It is the submission of the respondent bank that the question, regarding the mandatory requirement of publishing the subsequent notices has been carried out by the respondent or not has been decided by the Hon'ble Apex Court in Vasu P.Shetty vs. Hotel Vandana Palace & Others, wherein the Hon'ble Apex Court observed that "the moot question is, even if there were delaying tactics adopted by the borrower in respect of first two auctions, whether the conduct of the borrower would amount to waiving the mandatory requirement of publishing subsequent notice dated 27.04.2006 fixing the date of auction as 08.05.2006 ?, Our answer is negative. The aforesaid conduct cannot be taken as waiver to the mandatory condition of 30 days notice for auction as well as other requirement." The respondent would further state that the case on hand stands on different footing. In the decision cited supra, there was no waiver, but in the case on hand, the petitioner herself admitted that the bank can go ahead with the auction sale, if she does not pay the amount within 30 days and the same would amount to waiver of further procedural requirements including the requirement, as to the notice period of 30 days.

(x) It is the case of the respondent that the petitioner had authorised the bank to go ahead with the auction if she failed to pay within 30 days, which by necessary implication is a conscious abandonment of her right of redemption. It is further stated that the respondent bank, being a custodian of public money, is duty bound to protect the interest of the public and towards such objective, it has to resort to the sale of secured asset, in the manner known to law to realize the dues owed to it by borrowers/guarantors, if no repayment is forthcoming from them. It is further stated that the NPA level is mounting up and the banks can ill-afford to show indulgence to recalcitrant and defaulting borrowers or their guarantors, merely because they are old in age or the mortgaged property is their dwelling house etc., especially when the money involved belongs to the public and the public interest is superior to private interest and for the above reasons, prayed for dismissal of the above Writ Petition.

4. The second respondent / auction purchaser has also filed a counter statement. The auction purchaser submitted that the properties brought on auction sale were immovable properties to the extent of 1950 sq.ft and 127.50 sq.ft totally an extent of 2077.50 sq.ft. The tender notice was published on 25.02.2008 and the time of opening of tender on 29.02.2008 at 11.30 a.m, he offered 22.01 lakhs for the said property and paid 25% of the sale, viz., a sum of Rs.5,50,250/- and requested time till 21.03.2008 to pay the balance amount and he paid, as legally, the balance amount on April 2008. Because the petitioner dragged on the case from 2008, he was awaiting for possession from 2008. On 19.05.2011, the second respondent got the sale certificate from the first respondent and the same was registered, as document No.1909 of 2011 dated 20.05.2011 in the office of the District Registrar of Salem (West) and also paying all the revenue taxes and hence, he is waiting for physical possession of the properties. As per the orders of the Debt Recovery Appellate Tribunal, dated 30.01.2017, he is not able to secure the possession. He submitted that the writ petition is not maintainable and for the above reasons, sought for dismissal of the petition.

5. The learned counsel for the petitioner would vehemently argue that there was no affixture of possession notice in the conspicuous part of the property and the second sale notice was not served on the borrower, but only published in the newspaper. She would further submit that judicial notice has to be taken whether Dinaboomi is a leading paper, circulated in Salem. She would further submit that there was no mention about the extension of time given to the auction purchaser, when the mandatory provision says that the remaining 75% of the bid amount has to be paid within 15 days from the date of auction, but in the documents and counter affidavits filed by the first and second respondents, it is stated that balance 75% of the bid amount was paid on 19.04.2008. The learned counsel for the petitioner would further argue that when there are lapses on the part of the bank, in following the Rules, which are mandatory, bank cannot contend that the petitioner has waived her right, relying on the letter written by the petitioner to the bank on 03.02.2007, and that would amount to irregularities committed by the bank, which vitiates the auction sale. The learned counsel for the petitioner would further argue that as per then existing Law, for extension of time, there should be mutual agreement between the parties and the borrower has to give consent for extension of time to the auction purchaser. The payment of balance amount was not made as per Rules. In support of the above contentions, the learned counsel for the petitioner cited the following decisions, viz., (i) (2014) 5 Supreme Court Cases 660 "(Vasu P.Shetty vs. Hotel Vandana Palace and others)" (ii) Judgment of this Court dated 30.07.2009 made in W.P.No.127

of 2009 between "M.Chokalingam and the Authorised Officer, Indian Bank, Chennai and another"; (iii) AIR 2009 Ori 147 (Swastik Agency and 2 ors. Vs. State Bank of India, Main Branch and 3 ors); (iv) 2012 (5) CTC 1 "Hemalatha Ranganathan vs The Authorised Officer" and prayed that the writ petition be allowed.

6. The learned counsel for the respondents would strenuously argue that the petitioner by her letter dated 01.03.2007 has acknowledged possession notice and proposed to settle the dues under OTS within 20 days from the date of receipt of the confirmation letter. Hence, the petitioner has lost her right to redeem the property. He would further submit that as per then existing Law, the time may be extended for 15 days and as per the amendment, time may be extended for 30 days from the auction notice. He would also submit that the conduct of the borrower and the delay in settling the OTS should also be taken into consideration. In support of his contention, the learned counsel for the bank has cited the following decisions, viz., (i) CDJ 2014 SC 428 "Mathew Varghese vs. M.Amritha Kumar and Others; (ii) CDJ 2013 SC 732 "General Manager, Sri Siddeshwara Co-operative Bank Ltd., and another vs. Sri Ikbali and others"; (iii) (2014) 5 Supreme Court Cases 660 "(Vasu P.Shetty vs. Hotel Vandana Palace and others)" (iv) (2014) 2 DRTC 561 (DRAT, Delhi) Shiv Kumar Aggarwal & Others v. Development Credit Bank Ltd., and Others " and prayed this Court to dismiss the Writ Petition.

7. We have considered the submissions of the learned counsel for the petitioner, learned counsel for the first respondent as well as the learned counsel for the second respondent and also perused the materials on record pertaining to the Writ Petition.

8. Though the petitioner has raised a specific plea regarding affixture of notice, which is mandatory, as per the SARFAESI Act, there is no whisper about the procedure adopted by the respondent bank, while affixing notice, in the conspicuous place of the petitioner's property.

9. In "Mathew Varghese vs. M.Amritha Kumar and Others" reported in CDJ 2014 SC 428, Section 13(8) and 37 of the SARFAESI Act, Section 69 (A) of the Transfer of property Act, 1882, Rule 15 of Income Tax Rules, 1962 and Rules 8 and 9 of the Security Interest (Enforcement) Rules, 2002 have been discussed by the Hon'ble Supreme Court.

10. In the judgment cited supra, regarding newspaper publication, it has been held as follows:-

"29. 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 authorised officer considers material for a purchaser to know in order to judge the nature and value of the property.

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. 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. 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. 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."

11. As per the Gazette Notification dated 3rd November, 2016, the following amendment is made to Rule 8 of the Security Interest (Enforcement) Rules, 2002, which emphasis that all notices should be served upon the borrower through electronic mode of service, in addition to the other modes, which is as follows:-

"6. In the principal rules, in rule 8, -
(i) after sub rule (2), the following sub-rule shall be inserted, namely:-
"(2A) All notices under these rules may also be served upon the borrower through electronic mode of service, in addition to the modes prescribed under sub-rule(1) and sub-rule (2) of rule 8."
(ii) in sub-rule (5), for clause (c), the following clause shall be substituted, namely:-
"(c) by holding public auction including through e-auction mode; or;
(iii) in sub-rule (8), for the words "between the parties in writing", the words "between the secured creditor and the proposed purchaser in writing", shall be substituted."

12. For better understanding, Rule 8 is extracted hereunder:-

8. Sale of immovable secured assets.-

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

(2) 13[The possession notice as referred to in sub-rule (1) shall also be published,

as soon as possible but in any case not later than seven days from the date of taking possession, in two leading newspaper] one in vernacular language having sufficient circulation in that locality, by the authorised officer.

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

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

(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 stipulated by the secured creditor; (f) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property.

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

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

13. The learned counsel for the petitioner submitted that the borrower's efforts to thwart the sale of the secured property (which prevented auction-sale of the secured property by the secured creditor), cannot be taken as waiver of the mandatory requirements under Rules 8 and 9 of 2002 Rules, which did not absolve secured creditor from its obligation to follow the mandatory requirements of 2002 Rules, at time of third auction, by serving proper 30 days' notice for auction on borrower and complying with other requirements and in support of his contention, the learned counsel cited a decision of the Hon'ble Supreme Court reported in "(2014) 5 Supreme Court Cases 660 (Vasu P.Shetty vs. Hotel Vandana Palace and others)" wherein, the Hon'ble Supreme Court held as follows:-

Respondent 1 (borrower) defaulted in repayment of loan to the tune of Rs 1.84 crores taken from Syndicate Bank. The Bank proceeded to sell the mortgaged property by publishing the notice for auction on 11-9-2004 fixing the date of auction as 15-10-2004. The reserve price of property was fixed at Rs 3.50 crores. At this stage, the borrower filed a writ petition in the High Court challenging the auction-notice just 3 days before the proposed sale i.e. on 12-10-2004. The High Court did not grant stay against the scheduled auction, but it granted stay against the confirmation of sale. It was stated that in view of this partial stay

order by the High Court, nobody came forward to participate in the auction and the exercise went into futility. This writ petition was ultimately dismissed by the High Court.

Thereafter, the Bank made a second attempt for sale of the mortgaged property and issued a fresh notice of auction on 9-3-2005, fixing the date of auction as 21-3-2005. In this auction, mortgaged property could fetch the highest offer in the sum of Rs 2.25 crores only and the Bank asked the borrower to convey its consent for the sale at Rs 2.25 crores. At this, the borrower expressed its intention for one-time settlement (OTS) with the Bank at Rs 2.13 crores. The Bank sanctioned the borrower's proposal with a stipulation that it would make the payment within the stipulated time. However, instead of making the payment, extensions were sought by the borrower and ultimately, the OTS did not fructify.

Now the Bank took steps for auction for the third time and auction-notice dated 27-4-2006 was published, for the auction of property on 8-5-2006. Challenging this auction-notice, the borrower filed a writ petition but withdrew the same with the liberty to avail the alternate remedy under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the SARFAESI Act). In the auction held on 8-5-2006, the bid of the appellant at Rs 2.16 crores being the highest was accepted and on receiving the entire consideration, a sale deed was executed in favour of the appellant."

"The borrower challenged the said sale by filing an application before the Debts Recovery Tribunal (DRT). This application was dismissed. The borrower then filed a writ petition before the High Court and same was also dismissed by the Single Judge of the High Court. The borrower appealed against this order before the Division Bench of the High Court. The Division Bench found several

infirmities in the conduct of the impugned auction-sale especially the infraction of the mandatory requirements under Rules 8(5) and 8 (6) of the Security Interest (Enforcement) Rules, 2002 (the 2002 Rules) and set aside the sale of the property in favour of the appellant. Aggrieved, the appellant/auction-purchaser and the Bank had filed the present appeals.

The infringement of mandatory provisions of Rules 8 and 9 of the 2002 Rules was not disputed by the parties but still it was contended by the appellants that the sale was valid because of the reason that the delay was entirely attributable to the borrower who by its conduct had waived the said mandatory requirements of the 2002 Rules.

In this backdrop, the question that arose before the Supreme Court was: whether the borrower by its conduct (dilatory tactics) in the present case had waived the mandatory provisions of Rules 8 and 9 of the 2002 Rules.

Answering in negative and dismissing the appeals, the Supreme Court.

Rule 9 of the 2002 Rules is mandatory in nature. As laid down in *Ikbal*, (2013) 10 SCC 83, though Rule 9 is mandatory, that provision is for the benefit of the borrower. It is a 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 the benefit of the borrower), the secured creditor and the borrower can lawfully waive their rights. These provisions neither expressly nor contextually indicate otherwise. Obviously, the question whether there is waiver or not depends on the facts of each case and no hard-and-fast rule can be laid down in this regard.

(Para 16)

There is no conflict between the two sets of judgments, namely, Mathew Varghese, (2014) 5 SCC 610 followed in J. Rajiv Subramaniyan, (2014) 5 SCC 651 on the one hand and Ikbali, (2013) 10 SCC 83 on the other hand. All three cases hold that Rules 8 and 9 of the 2002 Rules are mandatory. However, Ikbali case proceeds further to lay down the principle that since these provisions are for the benefit of the borrower, the borrower can always waive those procedural requirements. This latter aspect never fell for consideration in the earlier two judgments. Further, it is expressly clarified in Ikbali case itself that the question whether there is a waiver or not depends on the facts of each case and no hard-and-fast rule can be laid down in this regard.

(Paras 18

and 19)“

It is further held that

10. The High Court took into consideration provisions of sub-rules (5) and (6) of Rule 8 as well as Rule 9 of the Rules which are as under:

“8. Sale of immovable secured assets.-(1)-(4)

.....

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.

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

Provided that no sale under this rule shall be confirmed, if the amount offered by sale price is less than the reserve price, specified under sub-rule (5) of Rule 9:

Provided further that if the authorised officer fails to obtain a price higher than the reserve price, he may, with the consent of the borrower and the secured creditor effect the sale at such price.

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

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

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

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

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

Provided that if after meeting the cost of removing encumbrances and contingencies there is any surplus available out of the

money deposited by the purchaser such surplus shall be paid to the purchaser within fifteen days from the date of finalisation of the sale.

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

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

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

14. In yet another judgment cited by the learned counsel for the petitioner, in the case of Swastik Agency and 2 ors. Vs. State Bank of India, Main Branch and 3 ors reported in AIR 2009 Ori 147, the Orissa High Court held as follows:-

"STATUTORY PROVISIONS-APPLICABLE:

9. It may also be necessary to refer to the relevant statutory provisions, particularly the Rules applicable in the instant case. The relevant Rules are as under:

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

xxx xxx xxx(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 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....

xxx xxx xxx9. (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.

10. Thus, it is evident from the aforesaid statutory provisions that 'possession notice' is mandatorily required to be published in two leading newspapers having wide circulation in the concerned area and one of them must be in vernacular language. After having the valuation report, the authority has to then take a decision as to whether the property is to be sold as a whole or in part and accordingly reserve price is to be fixed. It further provides the various modes of alienation of the property. It includes inviting tenders, holding public auction and even by private negotiation. Notice of sale is to be served upon the borrower. In case property is to be disposed of by auction, 'notice of auction sale' is also to be published in two leading newspapers having wide circulation in the said locality and one of them is to be in vernacular language.

RECOVERY OF PUBLIC DUES:

11. 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 statutory provisions.

12. In *Lachhman Dass v. Jagat Ram and Ors.* (2007) 10 SCC 448, the Hon'ble Supreme Court held that 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 statute.

13. ...

14. ...

15. ...

In the matter of sale of public property, the dominant consideration is to secure the best price for the property to be sold. This can be achieved only when there is maximum public participation in the process of sale and everybody has an opportunity of making an offer. Public auction after adequate publicity ensures participation of every person who is interested in purchasing the property and generally secures the best price. But many times it may not be possible to secure the best price by public auction when the bidders join together so as to depress the bid or the nature of the property to be sold is such that suitable bid may not be received at a public auction. In that event, any other suitable mode for selling of property can be by inviting tenders. In order to ensure that such sale by calling tenders does not escape attention of an intending participant, it is essential that every endeavour should be made to give wide publicity so as to get the maximum price.

16. Therefore, it becomes an legal obligation on the part of the authority that property be sold in such a manner that it may fetch the best price. Thus essential ingredients of such sale remain a correct valuation report and fixing the reserve price. In case proper valuation has not been made and the reserve price is fixed taking into consideration the inaccurate valuation report the intending buyers may not come forward treating the property as not worth purchase by them. As a moneyed person or a big businessman may not like to involve himself in small sales/deals."

SETTING ASIDE AUCTION SALE - AFTER CONFIRMATION:

29. In *Navalkha & Sons v. Sri Ramanya Das and Ors.* : [1970]3SCR1 , the Apex Court while dealing with the confirmation of sale by Court held that there must be a proper valuation report, which should be communicated to the Judgment debtor and he should file his own valuation report and the sale should be conducted in accordance with law and after confirmation of sale and issuance of sale certificate, Court cannot interfere unless it is found that some material irregularity in the conduct of sale has been committed. The Court further held that it should not be a forced sale. A valuer's report should be as good as the actual offer and the variation should be within limit. Such estimate should be done carefully and bids by the seasoned auctioneer. The Court further held as under:

The condition of confirmation by the Court operates as a safeguard against the property being sold at inadequate price whether or not it is a consequence of any irregularity or fraud in the conduct of the sale. In every case it is the duty of the Court to satisfy itself that having regard to the market value of the property the price offered is reasonable. Unless the Court is satisfied about the adequacy of the price the act of confirmation of the sale would not be a proper exercise of judicial discretion....

Therefore, valuer is to apply its mind to this aspect and the conduct of sale should not amount to material irregularity.

34. In Dr. Rajbir Singh Dalal v. Chaudhari Devi Lal University, Sirsa and Anr. : (2008)9SCC284 ; and Divya . and Anr. v. Union Bank of India and Ors. : AIR2000SC2346 , the Apex Court held that a confirmed sale can be set aside in all circumstances. However, in Valji Khimji and Company v. Official Liquidator of Hindustan Nitro Product (Gujarat) Ltd. and Ors. : (2008)9SCC299 , the Court held that auction sale should be set aside only if there is a fundamental error in the procedure of auction e.g. not giving wide publication or on evidence that property could have fetched more value or there is somebody to offer substantially increased amount and not only a little over the auction price, that can by itself suggest that any fraud has been done in holding the auction properly or involvement of any kind of fraud.

PROCEDURE - PRESCRIBED IN LAW - TO BE FOLLOWED:

38. When the statute provides for a particular procedure, the authority has to follow the same and cannot be permitted to act in contravention of the same. It has been hitherto uncontroverted legal position that, where a statute requires to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim 'Expressio unius est exclusio alterius', meaning thereby that if a statute provides for a thing to be done in a particular, then it has to be done in that manner and in no other manner and following other course is not permissible."

15. The bank has not given any sufficient time to the petitioner by taking a stand that since at the intervention of the borrower, the first sale was not fruitful and that the same was deferred and no sale was conducted on that day. The respondent bank would also take a stand that they have given second notice of sale, by publication on 25.02.2008, giving only

4 days time for the auction sale, stating that adhering to 30 days notice is not mandatory for effecting second publication, which, cannot be sustained.

16. On perusal of the sale notice dated 25.02.2008, published in Dinaboomi, it is seen that the said notice was given in Tamil Language, in a vernacular newspaper Dinaboomi (Tamil daily), and not as contended by the petitioner, in English language and the date of notification was 25.02.2008, thus giving 4 days notice and the auction was conducted on 29.02.2008. The upset price was fixed as Rs.22 lakhs and EMD as Rs.2,20,000/-.

17. Insofar as publication of notice in a vernacular newspaper, which has wide circulation in the area is concerned, the prime intention of the legislature is that, such paper publication in the vernacular language, in a newspaper having circulation in the locality is only to give wide publicity, so as to reach the borrower/mortgagor regarding the proposed auction sale, which will enable the borrower to know that his property is auctioned, on a particular date, and also to give the borrower/guarantor an opportunity to redeem the property, if by any means the borrower is unaware of the action taken by the respondent bank. This is a beneficial legislation, similar to the Land Acquisition Act, 1894 which provides for publication in a vernacular newspaper under Section 4(1) and 6 Declaration of the said Act. So it is the duty of bank to give publication, as contemplated under Rule 8 (6) of the Security Interest (Enforcement) Rules, 2002, which is mandatory.

18. In this case, notice has been published in a vernacular newspaper, viz., Dinaboomi. Hence, this Court has to decide whether the said vernacular newspaper is having wide circulation or not in Salem District. For which, while searching the Internet, the list of papers circulated in Salem, (which were listed according to the Annual Statements submitted by publishers for 2007-08) are given follows:-

"CLAIMED CIRCULATION OF BIG, MEDIUM AND SMALL NEWSPAPERS

(Source: Annual Statements submitted by publishers for 2007-08)

BIG DAILIES

S.No.	Title	Registration Number	Language	Periodicity	Place of publication	Claimed Circulation
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TAMIL NADU

1	DAILY THANTHI	1004	TAMIL	DAILY	CHENNAI	283337
2	DAILY THANTHI	11890	TAMIL	DAILY	TIRUNELVELI	96165
3	DAILY THANTHI	8117	TAMIL	DAILY	COIMBATORE	77066

4 DECCAN CHRONICLE TNENG/2005/14987 ENGLISH DAILY CHENNAI 298021
5 DINAKARAN 30424 TAMIL DAILY CHENNAI 226062
6 DINAKARAN 33699 TAMIL DAILY COIMBATORE 139684
7 DINAKARAN MADURAI EDITION 33700 TAMIL DAILY MADURAI 125383
8 DINAKARAN SALEM EDITION 33800 TAMIL DAILY SALEM
98431
9 DINAKARAN TRICHY EDITION 33753 TAMIL DAILY TIRUCHY 139893
10 DINAMALAR 33722 TAMIL DAILY MADURAI 130993
11 DINAMALAR 53772 TAMIL DAILY COIMBATORE 99484
12 DINAMALAR 11853 TAMIL DAILY TIRUCHIRAPPALLI 83981
13 THE HINDU 1001 ENGLISH DAILY CHENNAI 1275553
14 THE HINDU BUSINESS LINE 55320 ENGLISH DAILY CHENNAI 159068
15 THE NEW INDIAN EXPRESS 1002 ENGLISH DAILY CHENNAI 80076

MEDIUM DAILIES

TAMIL NADU

1 AKASH JYOTI TNHIN/2007/22714 HINDI DAILY CHENNAI 25185
2 DAILY STAR 5731 TAMIL DAILY CHENNAI 28500
3 DAILY THANTHI 21634 TAMIL DAILY VELLORE 36813
4 DAILY THANTHI 24426 TAMIL DAILY CHENNAI 28994
5 DAILY THANTHI 30406 TAMIL DAILY SALEM 61210
6 DAILY THANTHI 1005 TAMIL DAILY MADURAI 56982
7 DINAKARAN TNTAM/2002/09056 TAMIL DAILY NAGERCOIL 32937
8 DINAKARAN 49477 TAMIL DAILY TIRUNELVELI 63946
9 DINAKARAN 42803 TAMIL DAILY VELLORE 60855
10 DINAMALAR 55316 TAMIL DAILY VELLORE 27761
11 DINAMALAR 1223 TAMIL DAILY TIRUNELVELI 34855
12 DINAMANI 3459 TAMIL DAILY CHENNAI 41024
13 ERGO TNENG/2007/24553 ENGLISH DAILY CHENNAI 49500
14 MAALAI MALAR 42526 TAMIL DAILY CHENNAI 39432
15 TAMIL SUDAR TNTAM/2006/20408 TAMIL DAILY MADURAI 28940
16 TAMIL SUDAR TNTAM/2006/16482 TAMIL DAILY CHENNAI 27830
17 THANTHI DAILY 71849 TAMIL DAILY THANJAVUR 49933
18 THE DAILY THANTHI 64586 TAMIL DAILY NAGERCOIL 66838
19 THE DAILY THANTHI 1006 TAMIL DAILY TIRUCHIRAPPALLI 50894
20 THE DAILY THANTHI 55395 TAMIL DAILY ERODE 31262
21 THE ECONOMIC TIMES 55339 ENGLISH DAILY CHENNAI 50898
22 WORLD SEYTHIKAL TNBIL/2007/22124 BILINGUAL DAILY CHENNAI 35043

SMALL DAILIES

TAMIL NADU

1 ANDHRA JYOTI TNTEL/2006/17401 TELUGU DAILY CHENNAI 4173
2 ATHIRSTAM TNTAM/2003/15041 TAMIL DAILY VELLORE 556
3 ATHIRSTAM 63699 ENGLISH DAILY COIMBATORE 1198
4 ATHIRSTAM TNTAM/2001/04004 TAMIL DAILY SALEM
1148

5 ATHIRSTAM 63974 TAMIL DAILY TIRUCHIRAPPALLI 1200
6 ATHIRSTAM 42753 TAMIL DAILY MADURAI 1956
7 BUSINESS STANDARD 70127 ENGLISH DAILY CHENNAI 7682
8 DAKSHIN PRAKASH TNHIN/2005/16268 HINDI DAILY CHENNAI 5408
9 DESA MALAR 53795 TAMIL DAILY MADURAI 1500
10 DINAMALAR 33618 TAMIL DAILY CHENNAI 19946
11 DINAMALAR TNTAM/2000/00446 TAMIL DAILY NAGERCOIL 14887
12 DINAMALAR TNTAM/2000/01889 TAMIL DAILY SALEM
23457
13 DINAMALAR 42567 TAMIL DAILY ERODE 16872
14 DINAMANI TNTAM/2003/12849 TAMIL DAILY TIRUCHY 7461
15 DINAMANI TNTAM/2005/20949 TAMIL DAILY VELLORE 12287
16 DINAMANI 1194 TAMIL DAILY MADURAI 15312
17 DINAMANI 53675 TAMIL DAILY COIMBATORE 23594
18 DINAMANI TNTAM/2006/19603 TAMIL DAILY TIRUNELVELI 8957
19 EENADU TNTEL/2002/07580 TELUGU DAILY CHENNAI 11919
20 FINANCIAL EXPRESS 37821 ENGLISH DAILY CHENNAI 9792
21 KAALAI KADHIR TNTAM/2000/00249 TAMIL DAILY SALEM
23197
22 MAALAI MALAR 30446 TAMIL DAILY COIMBATORE 10870
23 MAALAI MALAR 49473 TAMIL DAILY NAGERCOIL 5255

24 MAALAI MALAR 42597 TAMIL DAILY MADURAI 6722
25 MAALAI MALAR 33746 TAMIL DAILY SALEM
7301
26 MAALAI MALAR 42628 TAMIL DAILY TIRUCHY 5874
27 MAALAI MALAR ERODE EDITION 53600 TAMIL DAILY ERODE 3991
28 MAALAI SUDAR 61868 TAMIL DAILY CHENNAI 11848
29 MADURAI MALAI MURASU 5960 TAMIL DAILY MADURAI 7413
30 MADURAI MANI 24402 TAMIL DAILY MADURAI 14832
31 MAKKAL KURAL 24383 TAMIL DAILY CHENNAI 13135
32 MALAI MURASU 1487 TAMIL DAILY TIRUNELVELI 6814
33 MALAI MURASU 5843 TAMIL DAILY CHENNAI 9996
34 NEWS TODAY 33810 ENGLISH DAILY CHENNAI 20813
35 RAJASTHAN PATRIKA TNHIN/2006/17675 HINDI DAILY CHENNAI 6237
36 SUBALAKSHMI TNTAM/2007/20417 TAMIL DAILY TIRUNELVELI 15300
37 SUBALAKSHMI TNTAM/2007/20418 TAMIL DAILY SALEM
15380
38 SUBALAKSHMI TNTAM/2006/19764 TAMIL DAILY CHENNAI 15480
39 SUBALAKSHMI TNTAM/2006/20742 TAMIL DAILY MADURAI 15450
40 TAMIL SUDAR TNTAM/2007/20448 TAMIL DAILY SALEM
18400
41 TAMIL SUDAR TNTAM/2007/22127 TAMIL DAILY TRICHY 21075
42 TAMIL SUDAR TNTAM/2007/20743 TAMIL DAILY TIRUNELVELI 22585
43 TAMIZH MURASU 68292 TAMIL DAILY TRICHY 8310
44 THAMIZH MURASU TNTAM/2005/17802 TAMIL DAILY VELLORE 4565
45 THAMIZH MURASU 67729 TAMIL DAILY TIRUNELVELI 4186
46 THAMIZH MURASU TNTAM/2005/20986 TAMIL DAILY NAGERCOIL 2577
47 THANJAI MALAI MURASU 5842 TAMIL DAILY TRICHY 7975
48 THE DAILY THANTHI TNTAM/2001/03707 TAMIL DAILY DINDIGUL 24498

49 THE MAIL 67463 ENGLISH DAILY CHENNAI 1200
50 THE MUSALMAN 1265 URDU DAILY CHENNAI 21969
51 THE NEW INDIAN EXPRESS 1196 ENGLISH DAILY MADURAI 9214
52 THE NEW INDIAN EXPRESS 53674 ENGLISH DAILY COIMBATORE 10346
53 THE NEW INDIAN EXPRESS TNENG/2003/12847 ENGLISH DAILY TIRUCHY
4737
54 THE SHIPPING POST TNENG/2007/19436 ENGLISH DAILY CHENNAI 1894
55 THEEKKATHIR 55328 TAMIL DAILY MADURAI 14293
56 THEEKKATHIR TNTAM/2007/20903 TAMIL DAILY COIMBATORE 12655
57 THEEKKATHIR 8245 TAMIL DAILY CHENNAI 12652
58 THINA BHOOMI 61508 TAMIL DAILY COIMBATORE 12634
59 THINA BOOMI 55306 TAMIL DAILY CHENNAI 16790
60 THINA BOOMI TNTAM/2001/04003 TAMIL DAILY SALEM
11272
61 THINA BOOMI 66774 TAMIL DAILY TIRUNELVELI 13053
62 THINA BOOMI TNTAM/2003/15101 TAMIL DAILY VELLORE 5860
63 THINA BOOMI 61511 TAMIL DAILY TRICHIRAPPALLI 14567
64 THINA BOOMI 61494 TAMIL DAILY MADURAI 15177
65 THINA MURASU 55424 TAMIL DAILY NAGERCOIL 20550
66 TRINITY MIRROR 62432 ENGLISH DAILY CHENNAI 6500

19. From the perusal of the above report taken from Internet, it is seen that Dinaboomi (Thina Boomi), Salem Edition, was listed under 'small dailies' and had 11,272 circulations only and not under 'medium or big dailies'. Hence, vernacular newspaper Dinaboomi (Thina Boomi) cannot be considered as a paper having wide circulation in Salem District, which has population of 3,016,346 (during 2001 census) and 3,482,056 (during 2011 Census). Hence, in such circumstances, the contention of the learned counsel for the petitioner that in the present case publication has not been effected as contemplated under the Act, cannot be brushed aside.

20. It is also the contention of the learned counsel for the petitioner that if publication was effected, in a leading vernacular newspaper, then there would be more number of participants in the auction and that the secured asset would derive maximum price. The said contention is also accepted, since in this case, the second respondent himself at paragraph-4 of his counter affidavit filed before the Debt Recovery Tribunal, Madurai, has submitted that he has quoted the offer price and submitted the tender for Rs.22,01,000/- and there were only two bidders and one for Rs.22,01,000/- and the other for Rs.22,00,000/- and he was the highest bidder.

21. As per the respondent's contention, only two persons participated in the auction and the highest bidder Mr.R.Anandakumar, second respondent herein, has paid Rs.5,50,250/- on 29.02.2008. Subsequently, on 18.03.2008, the District Magistrate has passed an order to take charge of the

property and handover the same to the respondent bank. On 24.03.2008, the petitioner sent a letter to the DGM seeking to pay Rs.8.25 lakhs along with delayed interest. On 03.04.2008, the bank sent a letter to the petitioner that the property was auctioned for Rs.22 lakhs and the bidder has paid 25% of the auction amount, and the petitioner's earlier OTS was cancelled and further, the petitioner was requested to pay Rs.15.80 lakhs on or before 05.04.2008, if not, the Authorized Officer will go ahead with the auction sale. Giving a final opportunity, telegram was sent to the petitioner to pay Rs.15.80 lakhs. The petitioner remitted Rs.8.25 lakhs on 04.04.2008 and simultaneously, approached DRT, Coimbatore, in S.A.No.61 of 2008. On 10.04.2008, the balance 75% of bid amount ie., Rs.16,50,750/- was accepted. Since there was no interim order from DRT restraining the bank from proceeding further, the amount was kept in Non-lien Account. On 19.04.2008, the amount kept in no-lien account was appropriated and Sale Certificate was issued. However, the sale was not registered in view of the pendency of the S.A., before the DRT. On 25.04.2008, the bank sent a letter to the petitioner informing the auction sale and returned the balance amount in the petitioner's account.

22. In W.P.No.10912 of 2008, on 29.04.2008, interim order was passed and on 05.04.2008, final order was passed restraining the respondents not to evict the petitioner till a final decision is taken by the Tribunal. S.A. was transferred from DRT, Coimbatore to DRT, Madurai and numbered as TSA.47 of 2008 and, final order was passed on 03.05.2011 dismissing the application of the petitioner. The appeal filed by the petitioner in RA (SA) No.78 of 2012 was also dismissed by DRAT on 30.01.2017.

23. This Court, by order dated 05.08.2008 in W.P.No.10912 of 2008 filed by the petitioner, has permitted the petitioner to raise all the questions before the DRT including the legality of the auction sale. It would be pertinent to refer that this order dated 05.08.2008 was passed, after the sale certificate was issued on 19.04.2008. Even though, at paragraph No. 9, the Tribunal has referring to the order passed in W.P.No.10912 of 2008, the Tribunal has not gone into details, neither the legality of the publication or the affixture of notice nor gone into the legality of the auction sale. Unless the Tribunal has discussed the manner, in which the publication has been effected, as mandated under the Act, confirmation of sale is contrary to Act.

24. When the Hon'ble Bench has passed an order giving permission to the petitioner to raise all the questions including the legality of the auction sale and also directed the respondents not to evict the petitioner till a final decision is

taken, The Tribunal ought to have considered the grounds raised and given findings as regards the procedure adopted by the Bank, before the auction sale. But without following the directions of this Court, the respondent - bank has proceeded further, and conducted the sale. On 19.04.2008 sale certificate has been issued in favour of the auction purchaser. Surprisingly, vide letter dated 10.04.2008, the respondent bank requested the Sub-Registrar, Salem, Tamil Nadu, to register the sale certificate by dispensing with the presence of the Authorised Officer, Dhanalakshmi Bank, Peenya Branch, Bangalore, which is as follows:-

"The property bearing No.37/2A, Court Road, North Maravaneri, Salem -636 007, has been sold by calling for sealed tenders from the public on 29.02.2008 in exercise of the powers conferred under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 read with Security Interest (Enforcement) Rules, 2002 on the failure of the borrowers to repay the liability.

The said property was mortgaged as security on 13.09.2005 by Smt.Padmavathy, the financial facility granted to M/s. Spacemount inc and others.

The sale was confirmed in favour of the highest tenderer Sri.R.Anandkumar, S/o.Ramanathan, residing at 47/29, Chinnaya Pillai Road, Marvaneri, Salem - 636 007 and sale certificate issued on 10.04.2008. The property has been sold for a sum of Rs.22,01,000.000 (Rupees twenty two lakhs one thousand only).

You are requested to register the Sale Certificate dispensing with the presence of undersigned."

But sale certificate has been issued only on 19.04.2008 and not on 10.04.2008, as stated in the above letter. Therefore, the action of the respondent bank in requesting the Sub-Registrar, Salem, to register the sale certificate is also a matter, which deserves consideration.

25. The highest bidder, second respondent herein has tendered a sum of Rs.16,50,750/- only. The second respondent, in his counter affidavit filed before the Debt Recovery Tribunal, Madurai, at paragraph-4 has submitted that he has quoted the offer price and submitted the tender for

Rs.22,01,000/- and there were only two bidders and one for Rs.22,01,000/- and the other for Rs.22,00,000/-. Since he was the successful bidder, he was advised to remit 25% of the bid amount of Rs.22,01,000/- and he remitted 25% of the tender amount within the stipulated period. He has deposited Rs.2.25 lakhs by D.D.No.508585 dated 22.08.2008 drawn on SBH, Bangalore. Subsequently, the first respondent bank, through letter ARBBGL/161/300/2007-08 dated 29.02.2008 has acknowledged the receipt of Rs.5,50,250/- being 25% of the tender amount and instructed the petitioner to remit the balance amount Rs.16,50,750/- being the remaining 75% on or before 21.03.2008 and submitted that he has remitted the aforesaid balance of Rs.16,50,750/- within the stipulated date, which is incorrect as pointed out by the petitioner.

26. On perusal of the additional typed set of documents submitted by the first respondent bank's counsel, it could be seen that second respondent has sought for extension of time on 29.02.2008 stating that "As per terms and conditions of the tender, I have to remit the balance 75% within 15 days. I request you to please extend the time for payment till 21.03.08 and oblige" and the same has been accepted by the bank. Bank has extended the time, on the same date, which is as follows:-

"The balance amount of Rs.16,50,750/- being the remaining 75% has to be remitted on or before 21.03.2008.

Taking into consideration your request dated 29.02.2008.

Please note that as per the terms and condition of the sale, if you fail to remit the balance amount of Rs.16,50,750/- on or before the date mentioned above i.e., 21.03.2008, the amount Rs.5,50,250/- (25%) remitted by you will be forfeited. "

27. On 20.03.2008, the bank again wrote a letter to the second respondent stating that "At your request letter dated 15.03.2008 (which has not been produced before this Court), you are permitted to remit the balance amount of Rs.16,50,750/- on or before 31.03.2008." Again, in the letter dated 02.04.2008 (which has been produced, but struck off) there is a reference to the bank's letter dated 29.03.2008 and the second respondent's letter dated 29.03.2008, in which the bank has stated that "at your request, you were permitted to remit the balance amount of Rs.16,50,750/- on or before 02.04.2008 vide our above referred letter. However, since you have not remitted the balance amount of Rs.16,50,750/- within the stipulated time, you have failed to comply with the terms and conditions of sale under SARFAESI Act. As a last chance, you are permitted to pay the balance amount on or before 19.04.2008 and in the event of your failure to do so,

the amount Rs.5,50,250/- (25%) remitted by you shall stand forfeited without further notice." and they also requested that as per tender notice dated 22.04.2008, he has to remit the balance amount enabling them to issue sale certificate in your favour i.e., on 02.04.2008."

28. The bank ride on two horses (i.e.,) on 03.04.2008, a telegram has been sent to the petitioner. On 10.04.2008, a slip has been given by Dhanalaxmi Bank for receiving Rs.16,07,050 by putting a seal 'cash received', but on perusal of the 'Statement of Accounts' of the respondent bank, it is seen that cash was received only on 19.04.2008 and not on 10.04.2008. Hence, it is clear that in the letter dated 10.04.2008 addressed to the Sub-Registrar, Salem, the bank has requested to register the sale certificate issued on 10.04.2008, i.e., even prior to the second respondent depositing the amount and the 'statement of accounts' clearly shows that the bidder - R2 has deposited the balance amount only on 19.04.2008. While perusing the 'statement of accounts', it is clear that before the credit of Rs.16,50,000/-, in the month of April 2008, there were only two transactions earlier, i.e., on 04.04.2008, a sum of Rs.8.25 lakhs was deposited by the petitioner and on 19.04.2008, the bid amount of Rs.5,50,250/- has been deposited. The bidder Anandakumar had paid Rs.16,50,000/-, and given credit only on 19.04.2008. But the sale certificate has been issued earlier, on 10.04.2008.

29. The learned counsel for the petitioner submitted that there is no provision for extending the time to deposit 75% of the bid amount and as per the existing Rule, 75% of the bid amount should be deposited within 15 days from the date of auction. In support of the said contention, the learned counsel has cited the decision of this Court reported in 2012 (5) CTC 1 "Hemalatha Ranganathan vs The Authorised Officer". Relevant paragraph in the said decision reads as follows:-

"19. The Authorised Officer has produced a copy of the letter issued by Thiru B. Subramani appointing Thiru S. Manisekaran as his nominee to pay the balance amount and he also made a request to the Bank to issue the sale certificate in favour of the nominee. The date of the letter was corrected as 7 January 2011. There is no indication as to the actual time of receipt of the said letter by the Authorised Officer. The confirmation letter proceeds as if Thiru S. Manisekaran himself took part in the auction and the sale was concluded in his favour for a sum of Rs.1,15,00,000/-. The subsequent correspondence exchanged between Thiru S.

Manisekarn and the Authorised Officer shows that 75% of the bid amount viz., Rs.86,25,000/- was not paid within the outer time limit of fifteen days stipulated by the Bank in the order of confirmation issued on 7 January 2011. Thiru S. Manisekaran has been taking time to deposit the balance 75% of the amount under the pretext that the Bank is yet to give him vacant possession. The series of correspondence exchanged between Thiru S. Manisekaran and the Authorised Officer shows that the so called auciton purchaser was not prepared to deposit the balance amount in spite of the ultimatum given by the Bank. The amount was deposited only on 11 June 2012 and it was readily accepted by the Authorised Officer not withstanding the mandatory condition that the amount should be deposited within fifteen days of confirmation.

20. The auction notification issued by the Bank does not contain any provision permitting the successful bidder to nominate a person to take the property after paying the balance amount. Similarly, there was no provision giving discretion to the Authorised Officer to extend the time for deposit of 75% of the bid amount.

"25. The sale is Governed by the provisions of the SARFAESI Act and the Rules made thereunder.

"(a) Rule 9(2) of the Security Interest (Enforcement) Rules 2002 provides that the sale shall be confirmed in favour of the purchaser, who has offered the highest sale price in his bid and shall be subject to confirmation by the secured creditor.

(b) Rule 9(3) provides that the purchaser shall immediately deposit 25% of the amount of the sale price with the Authorised Officer conducting the sale and in default of such deposit, the property shall forthwith be sold again.

(c) Rule 9(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.

(d) Rule 9(5) gives authority to the Bank to forfeit 25% of the amount in case balance 75% is not deposited within the stipulated period.

(e) Rule 9(6) gives power to the Authorised Officer to issue sale certificate indicating the sale of the immovable property in favour of the purchaser as per the form given in Appendix V to the Rules.

(f) Rule 9(9) provides that the Authorised Officer shall deliver the property to the purchaser free from encumbrances."

26. The provisions quoted above clearly gives an indication that the Authorised Officer has no power to issue the order of confirmation or Sale Certificate in favour of the nominee of auction purchaser.

27. The sale in question was confirmed in favour of Thiru.S.Manisekaran notwithstanding the fact that he was not a bidder. As per the terms of auction and the order of confirmation, Thiru S.Manisekaran was bound to pay 75% of the amount on or before 22 January 2011. The Authorised Officer very clearly stated in the letter of confirmation that in case the balance bid amount of 75% is not deposited on or before 22 January 2011, 25% of the bid amount already deposited will be forfeited without further notice. Therefore, it is clear that the Authorised Officer has not reserved any right to extend the time limit for deposit of balance 75% of the bid amount. Even though the order of confirmation was given in favour of Thiru S.Manisekaran on 7 January 2011 and he was directed to pay the balance amount by 22 January 2011, the fact remains that the amount was deposited only on 11 June 2012 and that too after identifying a person to purchase the property.

28. It is therefore, evident that 75% of the bid amount expected to be paid on or before

22 January 2011 was paid after a period of about one year and five months, in utter violation of the provisions of SARFAESI Act and the Security Interest (Enforcement) Rules, the mandatory conditions of the auction notification and the letter of confirmation.

29. The issue regarding the power of the Recovery Officer to extend the time limit for payment of the balance amount came up for consideration before us in P. Kumar v. The Debts Recovery Appellate Tribunal 2011(6) CTC 369, in the context of Rule 57(1) and (2) of II Schedule to the Income Tax Act, 1961 which is made applicable to the sale under the Recovery of Debts Due to Banks and Financial Institutions Act. We made the position clear in paragraph 26 of the said judgment that in case the auction notification does not contain a provision for extension of time for depositing 75% of the amount, the recovery officer has no authority to give further time."

30. As per the existing provision, payment should be made within 15 days time. The then existing SARFAESI Act contemplates that if any extension of time has to be given, then that has to be given only with the consent of the parties. But in the present case, perusal of records would show that no such consent has been taken from the borrower to extend the time for paying 75% of the bid amount by the auction purchaser. When the borrower/petitioner was running from pillar to post to pay the balance loan amount and to close her account, the respondent bank has chosen to extend the time to the auction purchaser, without any reason. When the bank could show so much of lenience towards the auction purchaser, by extending time against the provisions, the same benefit also should have been given to the borrower, to safeguard her residential building. But, the first respondent bank has returned the amount paid by the petitioner towards the final settlement on 25.04.2008 vide D.D.Nos.631799 and 631780 dated 22.03.2008 Rs.9,00,000/- and Rs.4,94,046.56 to the petitioner. Action of the bank is not in accordance with the objective of its incorporation. The action of the bank should not be harsh against the borrowers, who seek some extension of time to pay the loan amount. The bank should also consider the borrower's interest vis-a-vis the auction purchaser's interest. When the bank takes shelter on technicalities to sustain its action, the borrower's interest to

safeguard the property to be considered if any provision is violated.

31. The view taken by this Court in the Judgment dated 30.07.2009 made in W.P.No.127 of 2009 between "M.Chokalingam and the Authorised Officer, Indian Bank, Chennai and another", is as follows:-

" 8. But, in our considered opinion, since substantial amount has already been paid and further, the property, being a residential one, the request of the learned counsel for the petitioner is just and reasonable and it could be accepted. Hence, we direct the bank to receive the Demand Draft brought by the learned counsel for the petitioner in favour of the bank to the value of Rs.25,00,000/- and the petitioner is also directed to pay the balance amount to the respondent bank by 10.08.2009. On such payment, the cheque handed over by the auction purchaser shall be returned by the bank to the auction purchaser. Since the auction purchaser had already deposited Rs.18 lakhs, being 25% of the auction amount, on the date of auction and the said amount is lying unutilised, the petitioner is directed to pay interest at the rate of 15% on the said deposited amount from the date of deposit of the auction amount till the date of making payment to the auction purchaser on or before 10.08.2009. On failure to make the payments as directed supra, the sale certificate may be issued in favour of the auction purchaser.

With the above observation the Writ Petition is disposed of. No costs. Consequently, connected M.P.is closed."

32. As per Transfer of Property Act, right of redemption embodied in Section 60 of the said Act, is available to the mortgagor. Right of the mortgagor has also been explained by the Hon'ble Supreme Court in the judgment reported in CDJ 2014 SC 428 "Mathew Varghese vs. M.Amritha Kumar and Others" cited supra, which reads as follows:-

"34. The right of redemption which is embodied in section 60 of the Transfer of Property Act is available to the Mortgagor unless it has been extinguished by the act of parties. The combined effect of section 54 of the Transfer of Property Act and section 17 of the Indian Registration Act is that

a contract for sale in respect of immovable property of the value of more than one hundred rupees without registration cannot extinguish the equity of redemption. In India it is only on execution of the conveyance and registration of transfer of the mortgagor's interest by registered instrument that the mortgagor's right of redemption will be extinguished. The conferment of power to sell without intervention of the Court in a Mortgage Deed by itself will not deprive the mortgagor of his right to redemption. The extinction of the right of redemption has to be subsequent to the deed conferring such power. The right of redemption is not extinguished at the expiry of the period. The equity of redemption is not extinguished by mere contract for sale.

35. The mortgagor's right to redeem will survive until there has been completion of sale by the mortgagee by a registered deed. In England a sale of property takes place by agreement but it is not so in our country. The power to sell shall not be exercised unless and until notice in writing requiring payment of the principal money has been served on the mortgagor. Further section 69(3) of the Transfer of Property Act shows that when a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale. Therefore, until the sale is complete by registration, the mortgagor does not lose right of redemption."

In view of the above, the contention of the respondent that right of redemption is lost, cannot be accepted.

33. The Tribunal has not given any finding on the grounds raised by the petitioner that too when there is a duty cast upon the Tribunal to give findings on the grounds raised before it by virtue of the liberty granted to the petitioner to raise the same before the Tribunal by this Court in W.P.No.10912 of 2012.

34. In the result, the Writ Petition is partly allowed. The order dated 30.01.2017 passed by the DRAT in RA(SA) 78 of 2012 is set aside. The sale certificate registered on 19.04.2008 in favour of the second respondent Ananda Kumar is declared as null and void. With regard to the consequential relief of full and final payment, it is left open to the

petitioner to approach the bank. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Asst.Registrar (CS III)

/true copy/

Sub Asst. Registrar

mra

To

1. The Authorised Officer
Dhanalakshmi Bank Ltd.,
Peenya Branch
Peenya, 1st Cross, 1st Stage
Bangalore.
2. The Registrar
Debt's Recovery Appellate Tribunal
Chennai.

+1cc to Mrs.AnandaGomathy, Advocate Sr. 59191
+1cc to Mr.W.S.Jayaprakash, Advocate Sr. 59726
+1cc to Mr.A.Rameshmanikandan, Advocate Sr. 59384
+1cc to Mr.F.B.Benjamin George, Advocate Sr. 59966

सत्यमेव जयते

Order in
Writ Petition No.3789 of 2017

SCD(CO)
VR(18/09/2017)

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