IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.07.2017

C O R A M

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

Writ Petition No.15098 of 2017

W.M.P.No.16367 of 2017

Mr.R.Arumugasamy
Managing Director of
M/s. R.A.Samy Trading Pvt Ltd
No.72/2 Kazura Grandens
East Coast Road,
Neelankarai, Chennai 600 041. ... Petitioner

vs.

1. Authorised Officer
United Bank of India
Southern Region
184/132 Ramakrishna Math Road
Mandhavelli
Chennai 600 023.

2. The Branch Manager
United Bank of India
Virugambakkam
Chennai 600 092. ... Respondents.

Writ Petition filed under Article 226 of Constitution of India, to issue a Writ of mandamus, directing the Debts Recovery Appellate Tribunal, Chennai, to treat the amount of Rs.7,29,06,389/- (Rupees Seven crores Twenty Nine Lakhs Six Thousand Three Hundred and Eighty Nine only), standing in the petitioner's account along with Rs.25,00,000/- (Rupees Twenty Five lakhs only) deposited in DRAT as pre-deposit under the second proviso of Section 18 (1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

For Petitioner : Dr.S.N.Amarnath
For Respondents : Mr.P.S.Ganesh
for M/s.Kurian Associates
for R.1.

O R D E R

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

Borrower, has defaulted in payment and hence Bank has issued a notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, claiming a sum of Rs.20,65,92,565/-. Thereafter, possession notice under Section 13(4) of the SARFAESI Act, has been issued. Challenging the same, M/s.R.A.Samy Trading Pvt Ltd., Chennai and R.Arumugasamy/petitioners have filed S.A.No.76 of 2013 under Section 17(1) of the Act. S.A.No.76 of 2013, has been dismissed, on 05.06.2015.

2. Earlier, R.Arumugasamy/borrower has filed W.P.No.27520 of 2014, for a writ of certiorari, to set aside the sale notice, dated 15.09.2014, issued by the Authorised Officer, United Bank of India, Chennai, fixing the e-auction, on 20.10.2014.

3. When the said writ petition No.27520 of 2014 was pending, the petitioner has filed W.P.No.19531 of 2015, challenging the dismissal of S.A.No.76 of 2013. Material on record discloses that subsequently, on 06.07.2015, W.P.No.19531 of 2015, has been dismissed, granting liberty to the writ petitioner, to file an appeal, before the Debts Recovery Appellate Tribunal, by granting time upto 20.07.2015.

4. Thereafter, the writ petitioner has filed Regular Appeal (SR) No.520 of 2015, under Section 18(1) of the SARFAESI Act, 2002, before the Appellate Tribunal, to set aside the order made in S.A.No.76 of 2013, dated 05.06.2015, on the file of the Debts Recovery Tribunal - II, Chennai.

5. In the said R.A.(SR)No.520 of 2015, on 17th July 2015, R.Arumugasamy/petitioner has filed an application, under the provisions 2 and 3 of Section 18 of the SARFAESI Act, 2002, praying for an order to waive pre-deposit, for filing an appeal against the order made in S.A.No.76 of 2013, dated 05.06.2015, on the file of the Debts Recovery Tribunal - II, Chennai.

6. When the said application was pending before the Debts Recovery Appellate Tribunal, the petitioner has filed W.P.No.32716 of 2015, for a writ of declaration, declaring that the action taken by the respondents 1 to 4 therein, in taking possession of the property situate at 72, Kazura Garden, East Coast Road, Neelankarai, Chennai 41, on 07.10.2015, as illegal and non est in law, when creation of Security Interest was under challenge in W.P.No.27520 of 2014.

7. After considering the rival submissions of the parties, decisions made in State of Haryana and Others Vs. Narvir Singh, reported in 2014 (1) SCC - 105, A.V.Sreenivasalu Naidu Vs. V.K.Nataraja Goundan and Another, reported in AIR 1955 Madras 461 and the provisions of SARFAESI Act, 2002, a Hon'ble Division Bench of this Court, vide common order, made in W.P.Nos.27520 of 2014 and 32716 of 2015, dated 09.02.2016, dismissed both the writ petitions.

8. Prayer made in W.P.No.27520 of 2014, is to issue a writ of certiorari, to call upon the sale notice, dated 15.09.2014, issued by the first respondent, informing that e-auction will be conducted, on 20.10.2014 and to quash the same, as against the provisions of SARFAESI Act.

9. Prayer made in W.P.No.32716 of 2015 is to issue a writ of declaration, declaring that the action taken by the respondents 1 to 4, in taking possession of the property, situate at No.72/2 Kazura Garden, East Coast Road, Neelankarai, Chennai 600 041, on 07.10.2015, as illegal and non est in law, when the creation of security interest is challenged, in W.P.No.27520 of 2014.

10. While dismissing the above writ petitions, at paragraph No.20, a Hon'ble Division Bench of this Court held as hereunder:-

> "The confirmation of sale cannot be held as illegal, as the confirmation was made after dismissal of the writ petition, on 8th January, 2015. Having held that the security interest was properly created, the subsequent measures taken by the secured creditor Bank by issuance of demand notice and thereafter, possession notice under Section 13 (4) of the SARFAESI Act, are in accordance with law and cannot be faulted with. We are informed that the dispute is pending before the Debt Recovery Tribunal. The petitioner is at liberty to raise all grounds available under the provisions of law in the pending dispute, if so advised."

11. Material on record discloses that being aggrieved by the said common order, the writ petitioner has filed Special Leave to Appeal (C) Nos.4887-4888/2016. Before the Hon'ble Supreme Court, learned Senior Counsel appearing for the appellant/writ petitioner/borrower has submitted that the petitioner therein was ready and willing to deposit a sum of Rs.7 crores, with the High Court, within two weeks, from 29.02.2016, so as to enable the petitioner therein, to file a Review Application before the High Court, with a prayer that if ultimately, auction is set aside by the High Court, the amount

so deposited, would be paid to the auction purchaser, along with interest and compensation, which might be determined by the High Court.

12. On the basis of the above said statement made by the learned Senior Counsel, the Hon'ble Supreme Court, has permitted the appellant therein/writ petitioner to withdraw SLP (Civil). For brevity, order of the Hon'ble Supreme Court is extracted as hereunder:-

> "In view of the aforestated statement made by the learned counsel for the petitioner, we permit the petitioner to withdraw these petitions."

13. Subsequently, on 10.03.2016, in W.P.No.25708 of 2016, R.Arumugasamy/writ petitioner has deposited Rs.7 crores, by way of Demand Draft, bearing No.509364, dated 10/3/2016, drawn on Yes Bank, T.Nagar Branch, in favour of the Registrar General, High Court, Madras. Thereafter, R.A.Samy Trading Pvt Ltd and R.Arumugasamy, has filed unnumbered interlocutory application in R.A(SA) AIR.No.520 of 2015, to advance the hearing of appeal in R.A(SA) AIR.No.520 of 2015.

14. The petitioner has also filed an interlocutory application, to stay the operation of the order of possession, under Section 14 of the SARFAESI Act, in Crl.M.P.No.4874 of 2014, on the file of the Chief Metropolitan Magistrate, Egmore (now at Allikulam), Chennai.

15. When the matter stood thus, R.Arumugasamy/writ petitioner has filed Review Petition Nos.82 and 83 of 2016, against the orders made in W.P.Nos.27520 of 2014 and 32716 of 2015, dated 09.02.2016.

16. After hearing the learned counsel for the writ petitioners/review petitioners/borrower and Bank, a Hon'ble Division Bench of this Court, vide, common order, in Review Petition Nos.82 and 83 of 2016, dated 18.04.2017, has dismissed both the Review Petitions.

17. While doing so, the Hon'ble Division Bench, has made it clear that dismissal of the Review Petitions, would not preclude the review petitioner therein, to approach the competent forum/Tribunal, to raise all the factual and legal pleas/objections (relating to sale transaction, its inadequacy of price/underbidding), in the subject matter in issue therein and to seek redressal of his grievances, in the manner known to law, and in accordance with law, if he so desires/chooses. Liberty has been granted to the writ petitioner, to seek for refund of the deposit of Rs.7 crores made before this Court, by

filing necessary payment out application, if necessary and to make use of the same to his aid before the Tribunal.

18. On 13.06.2017, in A.I.R.(SA).No.520 of 2015, before the Tribunal, contentions have been made by the writ petitioner that they are ready and willing to deposit 25% of the demand amounting to Rs.20,65,92,565/-, within a period of four weeks, from the above said date.

19. Learned counsel for the appellant therein, has submitted that the borrower would deposit a sum of Rs.25 lakhs, within one week, from the above said date, i.e., 13.06.2016. Appellants before the DRAT, Chennai, have further submitted that a sum of Rs.1.27 crores has already been deposited with the respondent Bank, after issuance of notice under Section 13(2) of the SARFAESI Act, 2002, and the same has to be reduced from the mandatory deposit of 25% of the demand, raised by the respondent Bank.

20. Having regard to the decision of the Hon'ble Supreme Court in Narayan Chandra Ghosh Vs. UCO Bank and Others reported in AIR 2011 SC 1913, the Debts Recovery Appellate Tribunal, Allahabad, as incharge of the Debts Recovery Appellate Tribunal, at Chennai, has directed the appellants therein/writ petitioners, to deposit 25% of the demand raised, within four weeks, from 13.06.2016.

21. The Debts Recovery Appellate Tribunal, Allahabad (incharge) has further directed that a sum of Rs.25 lakhs shall be deposited, within one week, from the said date. Debts Recovery Appellate Tribunal has further submitted that the said amount should be deposited by the appellants therein, in the form of Demand Draft, in the name of Registrar, DRAT, Chennai, who in turn, shall keep the same, in the shape of FDR, in the Nationalised Bank, for a period of six months, in auto-renewal scheme.

22. By order, dated 13.06.2016, the Debts Recovery Appellate Tribunal, Allahabad (incharge) of Chennai, appellate forum has also made it clear that if the appellants therein, A.I.R.SA.No.520 of 2015, fail to deposit the amount, as directed above, under Section 18 (1) of the SARFAESI Act, 2002, within a period, as directed above, the interim order, granted by the appellate Tribunal, shall stand automatically vacated.

23. Thereafter, on 17th June 2016, R.Arumugasamy/petitioner herein has filed a memo, before the Appellate Tribunal, Chennai, stating that a sum of Rs.25 lakhs has been deposited, vide, Demand Draft No.771572, dated 17.06.2016, drawn on "Yes Bank",

in favour of the Registrar General, Debts Recovery Appellate Tribunal, Chennai.

24. On 4th July 2016, R.Arumugasamy/writ petitioner has filed an interlocutory application, to extend the time. At paragraph No.3 of the said application, the writ petitioner has contended as hereunder:-

> "It is further submitted that already a sum of Rs.7 Crores was deposited before the Registrar, High Court, Chennai, in pursuance of the Supreme Court Order and also filed Review Application before the Hon'ble High Court. Accordingly, it was filed and it came before the Divisional Bench of the Hon'ble High Court today (04.07.2016) and it will be finalized within a period of 3 weeks. The amount deposited in High Court in any event will be credited towards the loan account to the tune of Rs.5,51,00,000/- (Five Crore and Fifty One Lakhs) which is over and above 25% to satisfy the order. However, I am filing the application today seeking extension of time for depositing the 25% less Rs.25,00,000/- (Twenty Five Lakhs) by a further period of 8 weeks subject to the order passed by the Hon'ble High Court for transfer of the funds from High Court to the Respondent Bank in lieu of the consideration paid by the auction purchaser. In any event the amount of Rs.5,51,00,000/- (Five Crore and Fifty One Lakhs) is available in deposit to the credit of the Bank. It is submitted that this Hon'ble Tribunal may be pleased to extend the time to report regarding the compliance of the order passed for, by the Hon'ble Tribunal on transfer of funds. The demand draft Rs.25,00,000/- (Twenty Five Lakhs) along with the Memo, filed by me, before the DRT, Chennai, is annexed herewith."

25. The Debts Recovery Appellate Tribunal, Allahabad, as Incharge of DRAT, Chennai, has extended the time. For brevity, submission of the learned counsel appearing for the parties and the order, dated 15.07.2016, passed by the Debts Recovery Appellate Tribunal, Allahabad (as incharge), Debts Recovery Appellate Tribunal, Chennai, are extracted hereunder:-

> “He further submitted that as per order, dated 13/6/2016, after calculation, the amount of Rs.3,64,48,141/- was required to be deposited within 30 days from the date of order, dated 13/6/2016. It was prayed that the appellants be given four weeks more time, to deposit the balance amount because of the liquidity problem.
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> Learned counsel for the respondent Bank has strongly opposed the contention of the learned counsel

for the appellants, for extending the time and prayed that the appellants have complied with the order dated 13/6/2016.

In the facts and circumstances of the case and in the interest of Justice, I deem it just and proper to direct the appellants to deposit Rs.64,48,141/-, within a period of seven days, from today and the balance amount of Rs.3 crores to be deposited, within a period of three weeks from today. Application for extension of time filed by the learned counsel for the appellants is accordingly decided.

It is made clear that interim order granted by this Tribunal, on 13/6/2016, is extended for a further period of three weeks from today.

It is also made clear that if the appellants fail to deposit the amount as directed above, interim order granted by this Tribunal shall stand automatically vacated.

List this case on 22/8/2016, as jointly prayed."

26. When W.P.No.25108 of 2016, came up for hearing, a Hon'ble Division Bench of this Court, while observing that the writ petitioner/borrower has deposited a sum of Rs.7 crores, during March 2016, before this Court and a sum of Rs.21 lakhs, is yet to be deposited, towards the balance and that the writ petitioner has not impleaded the auction purchaser as a party, by order, dated 25th July 2016, in W.P.No.25708 of 2016, directed private notice to the respondents therein, returnable by 10/8/2016. Further, while directing the writ petitioner therein, to take steps to implead the auction purchaser as a party, directed status-quo. Registry has been directed to post the Review Application Nos.82 and 83 of 2016, in W.P.Nos.27520 of 2014 and 32716 of 2016, along with writ petition in W.P.No.25708 of 2016, filed for a declaration to declare that the amount deposited in the petitioner's account, after the issue of demand notice on 02.09.2013, to be accepted as pre-deposit, under Section 18(1) of the SARFAESI Act, for numbering of the appeal in R.A.(SA). AIR.No.520 of 2015, on the file of the Debts Recovery Tribunal, Chennai.

27. Both the learned counsel appearing for the parties in W.P.No.15098 of 2017 submitted that when W.P.No.25708 of 2016, came up for hearing along with the Review Applications, before a Hon'ble Division Bench of this Court, on 21.03.2017, on the basis of an endorsement, W.P. No.25708 of 2016 was withdrawn, as dismissed.

28. We have called for the case bundle in W.P.No.25708 of 2016 and perused the order. Endorsement made by the learned counsel for the petitioner is as follows:-

"This writ petition is withdrawn as not pressed. It may be dismissed."

Recording the endorsement so made, writ petition has been dismissed as withdrawn.

29. Material on record, further discloses that the writ petitioner has not complied with the conditional order, dated 13.06.2016, passed by the Tribunal in AIR.SA.No.520 of 2015. Typed set of papers filed by the respondent Bank shows that AIR (SA) No. 520 of 2015 was listed before the Debts Recovery Appellate Tribunal, Chennai, on 03.05.2017.

30. Before the Debts Recovery Appellate Tribunal, Chennai, learned counsel for the appellant has sought for time to file a memo regarding payments made. Thereafter, AIR No.520 of 2015 has been listed, on 15.05.2015. When the above said matter came up before the Debts Recovery Appellate Tribunal, Chennai, appellant in person has appeared. There was representation on behalf of the Bank. Conditional order, dated 13.06.2016, has not been complied with. Appellant in person has sought for time on personal grounds including ailment and death. Considering the fact that on an earlier occasion also, time was extended on the very same ground and by observing that the Debts Recovery Appellate Tribunal cannot entertain any appeal, without ensuing pre-deposit and of the fact that order dated 13.06.2016, has not been complied with, vide order, dated 29th May 2017, Debts Recovery Appellate Tribunal, Chennai, dismissed AIR SA No.520 of 2015, filed against S.A.No.76 of 2013, on the file of the Debts Recovery Tribunal, Chennai.

31. After the dismissal of A.I.R. No.520 of 2015, without challenging the said order, the borrower has filed the instant writ petition in W.P.No.15098 of 2017, for a mandamus directing the Debts Recovery Appellate Tribunal, Chennai to treat a sum of Rs.7,29,06,389/- standing in the petitioner's account along with Rs.25 lakhs deposited in the Debts Recovery Appellate Tribunal, as pre-deposit under the second proviso to Section 18(1) of the SARFAESI Act, 2002 and number the appeal.

32. By inviting the attention of this Court to the order of the Hon'ble Supreme Court in Special Leave to Appeal (C) Nos.4887 - 4888 of 2016, dated 29.12.2016, Dr.S.N.Amarnath, learned counsel for the petitioner submitted that as per the directions of the Hon'ble Supreme Court, a sum of Rs.7 crores has already been deposited with the Registrar General, High Court, Madras and that the same has to be treated as pre-deposit, for numbering the appeal.

33. Taking this Court through the statement of accounts of the petitioner, for the period between 02.09.2013 to 31.12.2016,

learned counsel for the petitioner further submitted that a sum of Rs.5,88,78,195/- deposited by the auction purchaser, for the auction held on 20.10.2014, also to be treated towards predeposit, as the said amount is deposited in the loan account of the writ petitioner. We have perused the Bank statement. The total amount deposited upto 31.12.2016 is Rs.7,29,06,389.66. Balance as on 31.12.2016 was Rs.5,73,78,195/-.

34. For the above said reasons, he contended that the condition imposed by the Debts Recovery Appellate Tribunal, to deposit a sum of Rs.3,64,48,414/-, is superfluous and for the above said reasons, prayed for the issuance of mandamus, as stated supra.

35. Based on the counter affidavit filed by the Union Bank of India, Chennai, Mr.P.S.Ganesh, learned counsel for the respondent Bank submitted that by sanction letter, dated 08.12.2009, a term loan and cash credit loan of Rs.750.82 lakhs and Rs.500 lakhs respectively, were availed. A further term loan of Rs.500 lakhs and cash credit limit of Rs.700 lakhs were also sanctioned. The overall credit limit was Rs.2450.82 lakhs. Necessary documents were executed by the petitioner and guarantor. Equitable mortgage of the property belonging to the petitioner and guarantor at T.Nagar and Neelangarai, were created.

36. S.A.No.76 of 2013, challenging possession notice, dated 09.12.2013, with respect to the property at T.Nagar was dismissed. Possession Notice, with regard to the property at Nilankarai was challenged in S.A.No.363 of 2013 before the Debts Recovery Tribunal - III, Chennai and that the same was dismissed on 03.11.2016.

37. Writ Petition No.19531 of 2015 filed by the petitioner against the order of dismissal of S.A.No.76 of 2013 was dismissed, at the admission stage itself. Thereafter, the Bank issued proceedings under Section 13 (2) of the Act, dated 14.09.2013, in respect of both properties, viz., Nilankarai and T.Nagar. Learned counsel for the Bank further submitted that aggrieved against the sale notice dated 15.09.2014, fixing e-auction sale, on 20.10.2014, the petitioner has filed W.P.No.27520 of 2014.

38. Learned counsel for the respondent Bank submitted that when S.L.P.Nos.4887 - 4888 of 2016, was heard, learned Senior Counsel, appearing for the petitioner himself came up with a submission that the petitioner was ready and willing to deposit Rs.7 crores, within a period of two weeks from the said date and sought permission to withdraw SLPs, so as to enable the petitioner to file a Review Petitions before the High Court.

39. Learned counsel for the Bank further submitted that from the said order, it could be deduced that it was the petitioner, who came forward to file the review applications, with a prayer that if ultimately auction is set aside by the High Court, the amount deposited would be paid to the auction purchaser.

40. Learned counsel for the respondent Bank further submitted that the amount deposited with the Registrar General, High Court, Madras cannot be apportioned as pre-deposit for numbering the appeal. According to the Bank, for the outstanding loan, as on 20.06.2017, a sum of Rs.21,03,05,131,48 was due and payable by the writ petitioners and therefore, the direction of the Debts Recovery Appellate Tribunal to the petitioner to deposit, Rs.7 crores, cannot be said to be erroneous.

41. On the proposition of law that the amount deposited by the auction purchaser cannot be credited towards the loan amount, learned counsel for the Bank placed reliance on the decision of a Hon'ble Division Bench in W.P.No.17016 of 2009, dated 16/6/2016 (Indian Bank, Chennai Vs. 1. Debt Recovery Appellate Tribunal, Mumbai and four others, and followed by Bombay High Court in W.P.No.1315 of 2014.

42. Inviting the attention of this Court to a judgment of the Hon'ble Supreme Court in Narayan Chandra Ghosh Vs. UCO Bank and Others reported in AIR 2011 SC 1913, learned counsel for the respondent Bank further submitted that when the Hon'ble Supreme Court has made it clear that pre-deposit is mandatory for preferring an appeal and the said judgment apply in all force, to the case on hand.

43. Lastly, learned counsel for the Bank submitted that admittedly AIR (SA) 520 of 2015 filed against the order made in S.A.No.76 of 2013 on the file of the Debts Recovery Tribunal - II, Chennai has been dismissed and when the petitioner has not chosen to challenge the dismissal of the appeal, writ of mandamus sought for, should not be granted. For the above said reasons, prayed for dismissal.

44. By way of reply, Dr.S.N.Amarnath, learned counsel for the petitioner submitted that this Court has got power to mold the prayer, to pass appropriate orders.

Heard the learned counsel for the parties appearing on either side.

45. Demand notice, under Section 13(2) of the SARFAESI Act, 2002, was Rs.20,65,92,565/-. Possession notice, dated

09.12.2013, under Section 13(4) of the SARFAESI Act, was challenged in S.A.No.76 of 2013 and the same has been dismissed on 05.06.2015. When the challenge to the possession notice was pending, the borrower has filed W.P.No.27520 of 2014, for a Writ of Certiorari, to set aside the sale notice, dated 15.09.2014 and when the said writ petition was pending, the borrower has filed another W.P.No.32716 of 2015, challenging the dismissal of S.A.No.76 of 2013, without approaching the appellate forum, i.e., Debt Recovery Appellate Tribunal, Chennai.

46. In the mean time, W.P.No.19531 of 2015, has been dismissed on 06.07.2015, granting liberty to the writ petitioner to file an appeal before the Debt Recovery Appellate Tribunal and that the petitioner has filed regular appeal in Appeal in R.A.(SR)No.520 of 2015, under Sub-Section (1) of Section 18 of the SARFAESI Act, 2002, against the order, dated 05.06.2015, made in S.A.No.76 of 2013.

47. Setting out the details of some payments made in the Waiver Application to R.A (S.A) A.I.R.No.520 of 2015, the petitioner has contended that the question of pre-deposit, cannot be arrived at, due to the fact that there should be some percentage of debt, claimed or determined by the Tribunal. According to the borrower, the order of the Debt Recovery Tribunal-II, Chennai, in S.A.No.76 of 2013, dated 05.06.2015, is vague and non-speaking. The Borrower has also contended that as per Proviso (2) to Section 18 of the SARFAESI Act, 2002, the appellate authority has power to waive the pre-deposit, in entirety. Reliance has also been placed on the decision of this Court in W.P.No.15447 of 2012, dated 05.07.2012.

48. By a common order, dated 09.02.2016, a Hon'ble Division Bench of this Court has dismissed both W.P.No.27520 of 2014 and W.P.No.32716 of 2015, and granted liberty to the writ petitioner to raise all the grounds, available under the provisions of law, in the pending dispute, if so advised.

49. Though Dr.S.N.Amarnath, learned counsel for the petitioner submitted that in Special Leave to Appeal (c) Nos.4887-4888 of 2016, dated 29.02.2016, the Hon'ble Supreme Court has permitted the borrower to file review applications, before this Court, to challenge the common order in W.P.No.27520 of 2014 and W.P.No.32716 of 2015, dated 09.02.2016, on the submission that the petitioner was ready and willing to deposit Rs.7 Crores (Rupees seven crores only), before this Court and on that said basis, SLPs were permitted to be withdrawn, to approach this Court with the review applications and accordingly, the borrower has deposited a sum of Rs.7 Crores to the Registrar (General), High Court, Madras and further contended that the said deposit should also be taken into

account, towards pre-deposit, directed to be made in Regular Appeal (SR) No.520 of 2015, this Court is of the view that the same cannot be countenanced, for the reason that subsequently, a Hon'ble Division Bench of this Court, while dismissing Revision Petition Nos.82 and 83 of 2016, dated 18.04.2017, has made it clear that dismissal of review petitions would not preclude the review petitioner to approach the competent forum/Tribunal, to raise all factual and legal pleas/objections, (relating to sale transaction, its inadequacy of price/underbidding), in the subject matter in issue therein, and seek for redressal of the grievances, in the manner known to law and in accordance with, he is so desires/chooses.

50. Vide common order in Review Petition Nos.82 and 83 of 2016, dated 18.04.2017, though liberty has been granted to the writ petitioner to seek for refund of the deposit of Rs.7 Crores made before this Court by him, by filing necessary payment out application, if necessary and to make use of the same to his aid before the Tribunal, no material has been placed before this Court to show that the writ petitioner has filed any application to the Registrar (General), High Court, Madras, for refund of deposit of Rs.7 Crores.

51. Though the learned counsel for the writ petitioner submitted that the Hon'ble Apex Court has permitted the petitioner to file review applications before this Court and whereas, it was contended by the Bank that it was the petitioner therein, who voluntarily came forward to deposit a sum of Rs.7 Crores, perusal of the common order made in Special Leave to Appeal (c) Nos.4887-4888 of 2016, dated 29.09.2016, shows that ultimately, if auction is set aside by this Court, the amount deposited should be paid to the auction purchaser, along with the interest and some compensation, which might be determined by this Court. In the case on hand, auction has not been set aside by this Court, but by a common order, dated 18.04.2017, in Review Petition Nos.82 and 83 of 2016, permission has been granted to the writ petitioner to raise all grounds in the proceedings, pending before the Tribunal/competent forum.

52. From the order, dated 13.06.2016, made in A.I.R(SA) No.520 of 2015, on the file of the Debts Recovery Appellate Tribunal at Allahabad, as Incharge of DRAT, Chennai, it could be deduced that the petitioner had submitted that they were ready and willing to deposit 25% of the demand. For brevity, submission recorded in the above order, is extracted hereunder:

> "Learned counsel for the appellants submits that the appellants are ready and willing to deposit 25% of the demand, amounting to Rs.20,65,92,565/- within a period of 4 weeks from today. Learned counsel for the appellant has further submitted that the appellants

will deposit a sum of Rs.25.00 Lacs within a week from today."

53. Before the DRAT, Allahabad, as Incharge of the DRAT, Chennai, the petitioner has also submitted that they have already deposited a sum of Rs.1.27 Crores, with the respondent-Bank, after issuance of notice, under Section 13(2) of the SARFAESI Act and therefore, the mandatory requirement of pre-deposit of 25% of the demand raised by the respondent-Bank, be reduced. After hearing the learned counsel appearing for the parties and taking note of the decision in Narayan Chandra Ghosh v. UCO Bank reported in AIR 2011 SC 1913, directed that,

> "for entertaining the present appeal, the appellants shall deposit 25% of the amount, as directed in the preceding paragraphs within 4 weeks, from today, out of which, the appellants shall deposit Rs.25 Lakhs within a week from today. The said amount shall be deposited by the appellants in the form of demand draft in the name of the Registrar, DRAT, Chennai, who shall keep the same in the shape of FDR in the Nationalised Bank for a period of six months in auto renewal scheme."

54. On 13.06.2016, the DRAT, Allahabad, as Incharge of DRAT, Chennai, has made it clear that if the petitioner fail to deposit the abovesaid amount, under Section 18(1) of the SARFAESI Act, 2002, within the specified period, the interim order would stand automatically vacated. The DRAT, Allahabad, as Incharge of DRAT, Chennai, has also directed to post the matter on 20.07.2016. Thus, from the above, it could be deduced that before DRAT, Allahabad, as Incharge of DRAT, Chennai, the petitioner has expressed willingness to deposit 25% of the demand made under Section 13(2) of the SARFAESI Act, 2002.

55. Thus, before the DRAT, Chennai, an application has been filed for extension of time, to make deposit, as per the order, dated 13.06.2016, on the file of the DRAT, Allahabad. On 15.07.2016, before the DRAT, Allahabad, as Incharge of DRAT, Chennai, a submission has been made by the learned counsel for the petitioner that they have deposited a sum of Rs.25 Lakhs, in the name of the Registrar, DRAT, Chennai, on 17.06.2016. Further submission has been made that as per the order, dated 13.06.2016, after calculation, a sum of Rs.3,64,48,141/-was required to be deposited, within 30 days from the dateof the order, dated 13.06.2016 and therefore, they prayed four weeks time to deposit the balance amount. Time has also been granted, directing the petitioner to deposit Rs.64,48,141/-, within a period of 7 days, from the date of passing of the order and the balance amount of Rs.3 Crores, to be deposited within a period of three weeks, from 15.07.2016.

56. Though before the DRAT, Chennai, by filing extension petition, the petitioner has sought for time to deposit the amount, as stated supra, contending inter alia that in Review Application Nos.82 and 83 of 2016, the petitioner has made a deposit of Rs.7 Crores, in lieu of the sale consideration paid by the auction purchaser and that the Bank had appropriated a sum of Rs.5.51 Crores to the credit of petitioner's loan account, the borrower has filed W.P.No.25708 of 2016, seeking for a Declaration, declaring that the amount deposited with petitioner's account, after notice, dated 02.09.2013, can be accepted as pre-deposit, under Section 18(1) of the SARFAESI Act, for numbering the appeal in R.A.(S.A.)AIR.No.520 of 2015, on the file of the DRAT, Chennai.

57. Thus, it could be seen that on 15.07.2016, when the petitioner prayed for extension of time, before the DRAT, Allahabad, as Incharge of DRAT, Chennai, he has filed W.P.No.25708 of 2016, for a declaration, declaring the amount deposited in their account, after the issue of demand notice on 02.09.2013, to be accepted as pre-deposit, under Section 18(1) of the SARFAESI Act, for numbering of the appeal in R.A.(SA). AIR.No.520 of 2015, on the file of the Debts Recovery Tribunal, Chennai.

58. In W.P.No.25708 of 2016, this Court, while ordering notice on 25.07.2016, granted order of status-quo. Thus, it could be seen that the petitioner has successfully prevented the respondent-Bank from taking any coercive steps, without making any pre-deposit, as agreed to, by him, before the DRAT, Allahabad, as Incharge of DRAT, Chennai. Subsequently, when the above writ petition came up for hearing on 21.03.2017, learned counsel for the writ petitioner has made an endorsement to the effect that, “This Writ Petition is withdrawn as not pressed. It may be dismissed.”. Accordingly, on 21.03.2017, a Hon'ble Division Bench of this Court has dismissed the writ petition, as withdrawn.

59. At this juncture, it could be seen that though no leave has been granted by this Court to file a fresh writ petition, the present writ petition has been filed for the same cause of action. Prayer made in the instant W.P.No.15098 of 2017, is for a Mandamus, directing the Debts Recovery Appellate Tribunal, Chennai, to treat the amount of Rs.7,29,06,389/- (Rupees Seven crores Twenty Nine Lakhs Six Thousand Three Hundred and Eighty Nine only), standing in the petitioner's account along with Rs.25,00,000/- (Rupees Twenty Five lakhs only) deposited in DRAT as pre-deposit under the second proviso of Section 18 (1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Supporting the

prayer sought for, at Paragraphs 4 and 5 of the affidavit, filed along with W.P.No.15098 of 2017, the petitioner has stated as follows:

> "4. .....The Bench of the Hon'ble High Court while disposing the matter gave liberty to approach the DRT for purpose of setting aside the sale and the quantum of sale price to be paid to the auction purchaser. Due to above reason after the issue of Section 13(2), the amount standing is 7.5 crores. Since the deposit Rs.5.51 Crores deposited by the auction purchaser has been credited in my account and in case if the sale is set aside, the amount deposited shall go to the auction purchaser.
>
> 5. I humbly state that as stated supra, when the bank took action u/s. 14, I went to Allahabad on 25.05.2016 and later on 30.05.2016 and 13.06.2016, when the incharge the DRAT at Allahabad directed to deposit Rs.3.64,48,414/- before 13.05.2016 but as stated in proceeding para on my depositing of Rs.7 Crores on 10.03.2016 in the Writ Petitoin, the auction sale consideration of Rs.5.51 Crores is deemed to be the deposit by me. As funds were provided by auction purchaser subject to the order of set aside the sale which in now pending before the DRT-III, Chennai in S.A.Sr.4439."

60. The very same averments have been made in W.P.No.25708 of 2016, filed for a Declaration, declaring that the amount deposited with petitioner's account, after notice, dated 02.09.2013, can be accepted as pre-deposit, under Section 18(1) of the SARFAESI Act, for numbering the appeal in R.A.(S.A.) AIR.No.520 of 2015, on the file of the DRAT, Chennai and that the petitioner has withdrawn the said writ petition, without leave.

61. On the facts and circumstances of the instant case, one of the issues, to be considered, is whether the dismissal of W.P.No.25708 of 2016, as withdrawn, without any leave from this Court to file fresh writ petition, would apply, as res judicata in the subsequent proceedings, initiated by the borrower, on the very same averments, moreso, in our considered view, to say so, on the whims and fancies of the petitioner, at any point of time. On the facts and circumstances of this case, we are of the view that the judgment made in Avinash Nagra v. Navodaya Vidyalaya Samiti reported in 1997 (2) SCC 534, is applicable to the case on hand. At Paragraph 13 of Avinash Nagra's case (cited supra), the Hon'ble Supreme Court held as follows:

> "He filed the writ petition in first instance but withdrew the same without permission of the Court with liberty to file the second writ

petition which was dismissed. Therefore, the second writ petition is not maintainable as held by the High Court in applying the correct principle of law."

62. This Court had an occasion to consider the similar plea in Rev. Fr. J.G.Jesudas, etc., v. The Government of Tamil Nadu reported in 1998 Writ.L.R. 756. Following a decision of the Supreme Court in 1987 (1) SCC 5 (Sarguja Transport v. STAT), this Court held that even though there is adjudication on merits, the withdrawal of earlier Writ Petition amounts to waiver of the relief sought for and if the second Writ Petition is filed, it amounts to abuse of process of law. The relevant paragraph of the Judgment of the Supreme Court, as extracted in Rev. Fr. J.G.Jesudas's case, is as follows:

"The question for our consideration is whether it would or would not advance the cause of justice if the principle underlying Rule 1 of Order XXIII of the Code is adopted in respect of writ petitions filed under Articles 226/ 227 of the Constitution of India also. It is common knowledge that very often after a writ petition is heard for some time when the petitioner or his counsel finds that the court is not likely to pass an order admitting the petition, request is made by the petitioner or by his counsel to permit the petitioner to withdraw from the writ petition without seeking permission to institute a fresh writ petition. A Court which is unwilling to admit the petition would not ordinarily grant liberty to file a fresh petition while it may just agree to permit the withdrawal of the petition. It is plain that when once a writ petition filed in a High Court is withdrawn by the petitioner himself he is precluded from filing an appeal against the order passed in the writ petition because he cannot be considered as a party aggrieved by the order passed by the High Court. He may as stated in Daryao v. State of U.P. in a case involving the question of enforcement of fundamental rights file a petition before the Supreme Court under Article 32 of the Constitution of India because in such a case there has been no decision on the merits by the High Court. The relevant observation of this Court in Daryao case[1] is to be found at p. 593 and it is as follows:

"If the petition is dismissed as withdrawn it cannot be a bar to a subsequent petition under Article 32, because in such a case there has been no decision on the merits by the court. We wish to make it clear that the conclusions thus reached by us are confined only to the point of res judicata which has been argued as a preliminary issue in these writ petitions and no other."

The point for consideration is whether a petitioner after withdrawing a writ petition filed by him in the High Court under Article 226 of the Constitution of India without the permission to institute a fresh petition can file a fresh writ petition in the High Court under that article. On this point the decision in Daryao case is of no assistance. But we are of the view that the principle underlying Rule 1 of Order XXIII of the Code should be extended in the interests of administration of justice to cases of withdrawal of writ petition also, not on the ground of res judicata but on the ground of public policy as explained above. It would also discourage the litigant from indulging in bench-hunting tactics. In any event there is no justifiable reason in such a case to permit a petitioner to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution once again."

(emphasis supplies)

63. Typed set of papers, filed by the respondent-Bank indicates that on 03.05.2017, before the DRAT, Chennai, both the learned counsel for the parties were present. The petitioner has sought for time to file a memo, with regard to the payments made. The Tribunal has passed the following order,

"As prayed list for review on compliance or for dismissal of Appeal on 15.05.2017."

64. Before the DRAT, Chennai, on 15.05.2017, both the learned counsel appearing for the parties were present and that the appellant has prayed for time on personal ground of death of some of his family members. DRAT, Chennai, has granted time and directed listing of AIR.No.520 of 2015, on 29.05.2017. On the said date, learned counsel for the petitioner did not appear before the Tribunal. But the appellant/writ petitioner was present. Learned counsel appearing for the respondents-bank were present. On 29.05.2017, the Tribunal has passed the following orders,

"Admittedly, order, dated 13.06.2016, of pre-deposit has not been complied.

Appellant is praying for time on some personal ground including ailment and death etc.,

On earlier occasion also, time was extended on the same ground. It is made clear that DRAT cannot entertain any Appeal without ensuring the pre-deposit and order, dated 13.06.2016, has not been complied with.

Hence, Appeal is dismissed for want of compliance."

65. Perusal of the statement of petitioner's bank accounts, for the period between 02.09.2013 to 31.12.2016 shows that a sum of Rs.7,29,06,389.66, has been deposited, in the abovesaid account. Pursuant to the auction held on 20.10.2014, the auction purchaser has deposited a sum of Rs.5,85,78,195/- and that it is not the money belonging to the borrower. Merely because, the amount against the auction has been deposited in the borrower's account, the same cannot be treated, to satisfy pre-deposit, required to be made by the borrower.

66. In Indian Bank, Asset Recovery Management Branch-I, Chennai v. Debt Recovery Appellate Tribunal, Mumbai reported in 2010 (7) MLJ 237, the legal question required to be answered by the Hon'ble Division Bench is as follows:

> "(i) Whether there could be any complete waiver of deposit amount to be made by the borrower/guarantor, while preferring an appeal before the Debts Recovery Appellate Tribunal, as contemplated under Section 18(1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the 'SARFAESI' Act)? and
>
> (ii) Whether credit could be given to the borrower/guarantor as against the amount deposited/paid by the auction purchaser towards the sale price?"

67. After considering the submissions of the borrower vis-a-vis Bank and Auction Purchaser, that the amount paid cannot be adjusted, under Section 18(1) of the SARFAESI Act, at Paragraphs 13 and 14, a Hon'ble Division Bench of this Court held as follows:

> "13. We are unable to accept this part of the order of the Appellate Tribunal also, since being illegal. As could be seen from Section 18 of the SARFAESI Act, extracted supra, the condition precedent for entertaining any appeal preferred by a 'borrower' is deposit of 50% of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less. But, a power has been granted to the Appellate Tribunal, to reduce the amount to not less than twenty five percent of the debt, for the reasons to be recorded in writing. To understand as to who is the 'borrower', we shall revert back to the definition Section 2 of the SARFAESI Act. Section 2(1)(f) of the SARFAESI Act defines the term 'borrower' in the following terms:
>
> "borrower" means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower

of a securitisation company or reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance;"

14. From this definition clause it is clear that the 'borrower' includes the guarantor also. Therefore, it goes without saying that the obligation created on the person who has availed loan from the Bank or the financial institution, under second proviso to Section 18(1) to deposit fifty percent of the amount of debt to avail the appeal remedy before the Appellate Tribunal also applies equally to the guarantor and no difference or distinction could be made between a debtor and a guarantor, while entertaining the appeal under Section 18(1) of the SARFAESI Act. That being the legal situation, we have no hesitation to hold that the first respondent/Appellate Tribunal has committed a gross legal error in ordering to give credit of the amount deposited by the auction purchaser to the guarantor, as the auction purchaser cannot be brought within the fold of 'borrower' defined under the SARFAESI Act. For these reasons, the legal point framed above, is answered against the respondents 3 and 4/guarantors."

68. In Narayan Chandra Ghosh vs. Uco Bank & Ors. reported in AIR 2011 SC 1913, the question posed before the Hon'ble Apex Court was, whether the requirement of the pre-deposit under Section 18(1) is mandatory or not? Going through Section 18 of the SARFAESI Act, 2002 and the provisos therein, the Hon'ble Apex court, at paragraph No.8 of the said judgment, held as follows:

"8. Section 18(1) of the Act confers a statutory right on a person aggrieved by any order made by the Debts Recovery Tribunal under Section 17 of the Act to prefer an appeal to the Appellate Tribunal. However, the right conferred under Section 18(1) is subject to the condition laid down in the second proviso thereto. The second proviso postulates that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty percent of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less. However, under the third proviso to the sub-section, the Appellate Tribunal has the power to reduce the amount, for the reasons to be recorded in writing, to not less than twenty-five percent of the debt, referred to in the second proviso. Thus, there is an absolute bar to entertainment of an appeal under Section 18 of the Act unless the condition precedent, as stipulated, is fulfilled. Unless the borrower makes, with the Appellate Tribunal, a pre-deposit of fifty percent of the debt due from him or determined, an appeal under the said provision cannot be entertained by the Appellate Tribunal. The language of the said proviso is clear and admits of no ambiguity. It is well-settled that when a statute confers a right of appeal, while granting the right, the Legislature can impose conditions for the exercise of such right, so long as the conditions are not so onerous as to amount to unreasonable restrictions, rendering the right almost illusory. Bearing in mind the object of the Act, the conditions hedged in the said proviso cannot be said to be onerous. Thus, we hold that the requirement of pre-deposit under sub-section (1) of Section 18 of the Act is mandatory and there is no reason whatsoever for not giving full effect to the provisions contained in Section 18 of the Act. In that view of the matter, no court, much less the Appellate Tribunal, a creature of the Act itself, can refuse to give full effect to the provisions of the Statute. We have no hesitation in holding that deposit under the second proviso to Section 18(1) of the Act being a condition precedent for preferring an appeal under the said Section, the Appellate Tribunal had erred in law in entertaining the appeal without directing the appellant to comply with the said mandatory requirement."

69. Yet another point to be considered in this case, is that as rightly pointed out by the learned counsel for the respondent submitted that final order dismissing the appeal in AIR.No.520 of 2015, has not been challenged. Whereas, a Mandamus has sought for. Though the learned counsel for the petitioner submitted that the Court can mould the relief and pass appropriate orders, on the facts and circumstances of the case, we are of the view that the petitioner is not entitled to any equity. Prayer sought for, cannot be granted.

70. Hence, the Writ Petition is dismissed. No costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

skm

To

1.The Debts Recovery Appellate Tribunal,
Chennai.

2. Authorised Officer
United Bank of India
Southern Region
184/132 Ramakrishna Math Road
Mandhavelli
Chennai 600 023.

3.The Branch Manager
United Bank of India
Virugambakkam
Chennai 600 092.

+1cc to Mr.Dr.S.N.Amarnath, Advocate SR.No.49468

W.P.No.15098 of 2017

LRS(CO)
GN(21/07/2017)