

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.01.2017

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR

AND

THE HON'BLE MR.JUSTICE M.GOVINDARAJ

Writ Appeal No.530 of 2010

V.Sambandan

..... Appellant

vs.

1.The Punjab National Bank
Rep. by its Chairman cum Managing Director
Head Office, No.7, Bhikaji Cama Place
New Delhi - 110 066.

2.The Authorised Officer and Chief Manager
The Punjab National Bank
Rayala Towers, 3rd Floor
No.158 (Old No.781), Anna Salai
Chennai - 600 002.

..... Respondents

Writ Appeal filed under clause 15 of the Letters Patent
against the order of the writ court dated 28.10.2009 made in
W.P.No.19557 of 2009.

For Appellant : Mr.P.T.Perumal

For Respondents : Mr.R.Umasuthan

Prayer in WP.19557/2009:

Praying for writ of Mandamus, directing the second
respondent to return the amount of Rs.3,30,000/- (Rupees three
lakhs thirty thousand only) deposited by the petitioner with
the second respondent bank on 17.07.2009.

JUDGMENT

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

Challenge in this appeal is to an order made in
W.P.No.19557 of 2009 dated 28.10.2009, by which, the writ
court, declined to issue a mandamus, directing the Authorised
Officer and Chief Manager, Punjab National Bank, Chennai, to
return a sum of Rs.3,30,000/- deposited by the appellant with
the bank on 17.07.2009.

2. Facts leading to the appeal are that, pursuant to an auction notice issued by the bank dated 07.06.2009, the appellant desired to purchase property comprised in Survey No.375/3 bearing Plot No.9, situated at Kalaimagal Nagar in Mangadu Village, Chennai - 101. Reserve price was fixed as Rs.13,00,000/-. EMD was fixed as Rs.1,30,000/-. The appellant paid a sum of Rs.3,30,000/- by way of three demand drafts to the Authorised Officer and Chief Manager, Punjab National Bank, Chennai/respondent No.2.

3. The appellant issued a legal notice dated 28.07.2009 stating that he had bonafidely participated in the auction sale to purchase the property without any hesitation and in good faith, but the bank did not furnish the original title deeds and copies of other documents including the judgment and decree from the competent court and therefore apprehended that title may not be proper. He therefore decided not to proceed with the transaction. According to him, it was also doubtful as to whether the Authorised Officer and Chief Manager, Punjab National Bank/2nd respondent would deliver possession of the auctioned property, without encumbrance and free from any future litigation.

4. According to him, the property was not kept under the custody of the second respondent-Bank, in terms of Rules 8 and 9 of the SARFAESI Rules, 2002. Therefore, by the aforesaid notice dated 28.07.2009, the appellant demanded return of the deposited amount of Rs.3,30,000/-, within a week's time, from the date of receipt thereof, failing which, he would be constrained to initiate proceedings for recovery, with interest, at the rate of 18% per annum.

5. The Authorised Officer cum Chief Manager, Punjab National Bank, Chennai, has sent a reply dated 14.08.2009 denying the contention that appellant was not provided with copies of documents, at the time of auction. All the original documents pertaining to the schedule mentioned property and further submitted that copies of other parent documents were made available to all the participants, before the commencement of auction. In the auction notice, all the participants were duly put on notice that the sale of properties in question was "in as is where is" and "as is what is" condition, and that it was only on the basis of the above said condition, property was brought for auction. The Authorised Officer and Chief Manager/respondent No.2, has denied the contention of the appellant that Rules 8 and 9 of SARFAESI Rules were not complied with. In the reply notice, dated 14.08.2009, the second respondent has further submitted that refund cannot be made. Bank has contended that as the appellant had defaulted in making payment, the amount deposited is liable for forfeiture.

6. The Authorised Officer and Chief Manager of the Second respondent bank has issued another letter dated 14.09.2009, stating that in terms of Rule 9(5) of the Security Interest (Enforcement) Rules, 2002 (Hereinafter referred to as "the Rules"), read with the terms and conditions of the auction dated 17.07.2009, a sum of Rs.3,30,000/-, shall stand forfeited, for contravening the provisions of the offer.

7. Aggrieved by the order of forfeiture, the auction purchaser/appellant has filed W.P.No.19557 of 2009 and sought for a writ of mandamus directing the Authorized Officer and Chief Manager, Punjab National Bank, Chennai, the second respondent, to return Rs.3,30,000/-, deposited by him, with Punjab National Bank, Chennai. After considering the submissions made by the learned counsel for the parties, with reference to the averments made in the notice and reply and THE forfeiture ordered, by letter, dated 14.09.2009, vide order dated 28.10.2009 in W.P.No.19557/2009, the writ court, at paragraph Nos.11 and 12 ordered as follows:

"11. It must be noted that the contentions raised by the petitioner is no longer res integra. In almost under identical circumstances the Supreme Court while considering a sale by the Official Liquidator, the properties of a wound up company dealt with a similar claim and rejected it vide its decision in United Bank of India v. Official Liquidator and others reported in 1994(1) SCC 575. The following passages found in paragraphs 13 and 14 will make the position clear and they are usefully reproduced below:-

"13. In our view, the complete answer to Triputi's allegation in regard to the failure of the Official Liquidator to hand over to it possession of certain properties which were sold to it, which, according to it, the company in liquidation did not even own, is contained in clause 2 of the Terms and Conditions of Sale upon the basis of which the property and assets of the company in liquidation were sold by the Official Liquidator to Triputi under the orders of this Court. Clause 2 reads thus:

"2. The sale will be as per inventory list on 'as is where is basis' and subject to the confirmation of the Hon'ble Supreme Court of India. The Official Liquidator shall not provide any guarantee and/or warranty in respect of the immovable properties and as to the quality, quantity or specification of the movable assets. The intending purchaser must satisfy themselves in all respect as regards the movable and immovable assets, as to their title, encumbrances, area, boundary, description, quality, quantity, and volume etc. and the purchaser will be deemed to offer with full knowledge as to the description,

area etc. of the properties and defects thereof, if any. The purchaser shall not be entitled to claim any compensation or deduction in price on any account whatsoever and shall be deemed to have purchased the property subject to all encumbrances, liens and claims including those under the existing legislation affecting labour, staff etc. The Official Liquidator shall not entertain any complaint in this regard after the sale is over. Any mistake in the notice inviting tender shall not vitiate the sale." (emphasis supplied)

14. When the Official Liquidator sells the property and assets of a company in liquidation under the orders of the Court he cannot and does not hold out any guarantee or warranty in respect thereof. This is because he must proceed upon the basis of what the records of the company in liquidation show. It is for the intending purchaser to satisfy himself in all respects as to the title, encumbrances and so forth of the immovable property that he proposes to purchase. He cannot after having purchased the property on such terms then claim diminution in the price on the ground of defect in title or description of the property. The case of the Official Liquidator selling the property of a company in liquidation under the orders of the Court is altogether different from the case of an individual selling immovable property belonging to himself. There is, therefore, no merit in the application made on behalf of Triputi that there should be a diminution in price or that it should not be made liable to pay interest on the sum of Rs.1 crore 98 lakhs."

12. In the light of the above, this Court is not inclined to interfere with the Auction conducted by the respondents or grant a direction to refund the amount deposited. The writ petition is clearly misconceived. Accordingly, the same stands dismissed. No costs. Consequently, connected miscellaneous petition is also dismissed."

Being aggrieved by the same, instant writ appeal has been filed.

8. Inviting the attention of this Court to Rules 9(1) to 9(10) of the Security Interest (Enforcement) Rules, 2002, Mr.P.T.Perumal, learned counsel for the appellant submitted that the abovesaid Rules deal with two types of sale, viz., Rules 9(1) to 9(6) deal with sale of unencumbered properties by the Bank, and Rules 9(7) to 9(10) deal with sale of encumbered properties.

9. Referring to Appendix IV in the said Rules, learned counsel for the appellant further submitted that the said

Appendix unambiguously states that possession of properties sold, must be delivered and that sale must be free from all encumbrances. He therefore submitted that SARFAESI Act, 2002 and the Rules made thereunder, do not provide for sale, in "as is where is" and "as is what is" condition.

10. Learned counsel for the appellant further contended that the Doctrine of Caveat Emptor and Doctrine of "as is where is" condition, sale are general provisions, concerning sale of goods and such doctrines do not find a place, where specific provisions are made in SARFAESI Act, 2002 and the Rules made thereunder, for sale of assets, secured by the Bank.

11. On the reliance made to Bank of India v. Official Liquidator and others reported in 1994 (1) SCC 575, learned counsel for the appellant submitted that the said decision was rendered, under the Companies Act, 1956, when the purchaser therein, having purchased the property, sought for diminution in price, on the ground of defect in title in the property. According to the learned counsel, decision in Bank of India's case (cited supra), rendered under the Companies Act, 1956, is inapposite to the case on hand, when sale and handing over possession by the secured creditor, are governed by the provisions of SARFAESI Act, 2002 and the Rules made thereunder.

12. Learned counsel for the appellant further submitted that after making initial deposit of Rs.3,30,000/-, appellant was ready with a demand draft for the balance 75% and insisted that he should be given vacant possession of the auctioned property, occupied by a third party, but the Bank did not take any steps for taking possession, provided therefor, under the SARFAESI Act, 2002 and the Rules made thereunder. On the contrary, the Bank, in its reply notice, dated 14.08.2009, has stated that there was a inherent risk involved, in the auction notice.

13. Placing reliance on a decision of the Hon'ble Apex Court in Transcore v. Union of India reported in 2008 (1) SCC 125, learned counsel for the appellant further submitted that transfer of any asset should be free from all encumbrances, but the Bank did not disclose the encumbrance on the property sold.

14. Referring to a decision of a Hon'ble Division Bench in Kathikkal Tea Plantations v. S.B.I reported in 2009 (7) MLJ 24, he further submitted that when the appellant/auction purchaser was willing to pay the balance 75% of the auction price, and expressed his willingness to complete the auction sale, in terms of the rules, 2002, the Bank has failed to clear the encumbrance and handover vacant possession.

15. Learned counsel for the appellant further submitted that when the bank has failed to fulfil the statutory obligation of handing over possession, forfeiture of 25%

cannot be made. As the Bank had failed to clear the encumbrance and hand over vacant possession, Bank has to return 25% of the deposit. On the above submission, attention of this Court was also invited to Paragraph 16 of Kathikkal Tea Plantations' case (cited supra).

16. Contending inter alia, that on the facts and circumstances of the instant case, order of forfeiture made by the respondent-Bank was erroneous, reliance was made on a decision of this Court in Pandit Vetrivel v. Authorised Officer, Canara bank reported in 2009 (7) MLJ 370.

17. According to the learned counsel for the appellant, statute do not contemplate sale in "as is where is condition" or "as is where is basis". He further submitted that the title deeds were not shown to the auction purchaser.

18. He further submitted that for the shortcomings of the Bank, in not clearing the encumbrance and handing over vacant possession, auction purchaser should not suffer an order of forfeiture. For the abovesaid reasons, he prayed that the order made in W.P.No.19557 of 2009, dated 28.10.2009, be set aside and refund a sum of Rs.3,30,000/-, being 25% of the deposit, be ordered.

19. The Chairman cum Managing Director, Punjab National Bank, New Delhi and Authorised Officer and Chief Manager, Punjab National Bank, Chennai, respondents 1 and 2, in their counter affidavit, have stated as follows:

"(a) M/s.Weather Maker, represented by its proprietor Mr.R.S.Sankar, availed of Term Loan Facility and Overdraft facility from the Respondents herein.

(b) The prompt and due repayment of the aforesaid financial facilities along with interest accrued thereon was duly secured by the personal guarantee of Mrs.P.S.Sarala Devi and Mr.N.E.Subramanian.

(c) The said Mrs.P.S.Sarala Devi also created equitable mortgage in and over her immovable property being land and building, comprised in S.No.375/3, Maangadu Village and situated at Plot No.9, Kalaimagal Nagar, Maangadu within the sub-registration district of Kundrathur and in the registration district of Chennai South by way of deposit of original title documents with the respondent bank towards securing the prompt and due repayment of the loan amount along with the interest accrued thereon by the aforesaid borrower.

(d) Consequent to default committed by the borrower and guarantors in discharge of the liability to the Bank, the Bank filed Civil suit on the files of sub-court Poonammallee on 23.06.1999 and the suit O.S.No.328 of 1999 was also decreed in

favour of the Bank on 10.07.2000.

(e) Sequel to the above, the respondent bank issued notice dated 30.10.2007 both on the borrower and guarantors and called upon them to discharge the decretal liability within 60 days from the date of the notice as per Section 13(2) of the SARFAESI Act. The said 13(2) notice was also published on 20.01.2008.

(f) Consequent to the default committed by both the borrower and guarantors in discharge of their decretal liability, the respondent bank took symbolic possession of the mortgaged property on 16.09.2008 and the same was published in the DAILY on 19.09.2008.

(g) After taking symbolic possession of the mortgaged property, the respondent Bank issued auction sale notice, dated 03.06.2009, fixing the date for the auction sale of the mortgaged property as 17.07.2009. The auction sale notice was also published in the DAILY dated 07.06.2009.

(h) In the course of the tender-cum-public auction held by the respondent on 17.07.2009, six persons including the appellant herein participated in the auction. The appellant was declared as the highest bidder who agreed to purchase the immovable property in question "in as is where is and as is what is condition".

(i) The appellant herein also remitted a sum of Rs.3,30,000/- towards part payment of sale consideration and agreed to remit the balance sale consideration on or before 01.08.2009. However, for reasons best known to him only, the appellant committed default in payment of the balance sale consideration.

(j) Hence, vide letter dated 14.09.2009, the respondent called upon the appellant to remit the balance sale consideration of Rs.9,90,000/- within a period of 7 days and also put the appellant on specific notice that upon his failure to pay the balance sale consideration on or before 22.09.2009, that the deposit amount of Rs.3,30,000/- paid by the appellant under Section 9(3) of the SARFAESI Rules would stand forfeited in terms of Section 9(4) of the SARFAESI Rules.

(k) Owing to the default of the appellant to pay the balance sale consideration within the time schedule as stated in the auction sale notice dated 07.06.2009 and within the time schedule as extended by the authorized officer, the security deposit of Rs.3,30,000/- paid by the appellant as part payment of the sale consideration stood forfeited.

(i) In as much as the appellant herein participated in the tender cum auction sale held by the respondent bank on 17.07.2009 out of his free

will and volition, after having realized and understood the inherent risk that are associated with a on sale, the Learned Single Judge dismissed the above Writ Petition No.19557 of 2009, based on the ratio as determined to the Hon'ble Supreme Court, in the case of Union Bank of India v. Official Liquidator and others, as reported in 1994 (1) SCC 575."

20. Mr.R.Umasuthan, learned counsel for respondents 1 and 2 further submitted that auction sale, dated 17.07.2009, was subject to "as is where is and "as is what is condition". He further submitted that having gone through the relevant title documents, kept open for inspection and scrutiny, and having understood the terms and conditions of the auction sale, and fully aware of the inherent risk, involved in the auction sale, implications of the terms and conditions of tender cum sale notice, dated 03.06.2009, the appellant has participated in the auction. He further submitted that the Bank has neither enticed the appellant to participate in the auction sale nor the respondent-Bank has assured clear and marketable title to the appellant.

21. Learned counsel for the respondent-Bank further submitted that at the relevant point of time, when auction sale notice was published, there was no impediment in law, to sell the secured asset and as per Rule 9(5) of the Security Interest (Enforcement) Rules, 2002, in the event of default committed by the auction purchaser to pay the balance amount of purchase price, within 15 days from the date of confirmation of sale or within the time schedule or extended by the authorized officer, the deposit amount, paid in terms of Rule 9(3) shall stand forfeited and consequently, the authorized officer would be entitled to resell the property, after complying with the due process of law. He further contended that having committed default in payment of the balance sale consideration, the appellant is not entitled to claim refund of the deposit amount paid, in terms of Rule 9(3) nor compel the authorized officer to sell the property, in question.

22. Refuting the contention of the appellant that under SARFAESI Act, 2002, the authorised officer is bound to convey clear and marketable title free of all encumbrances to the auction purchaser/writ petitioner, Mr.R.Umasuthan, learned counsel for the respondent-Bank submitted that the auction sale, dated 17.07.2009, conducted by the respondent-Bank, was subject to "as is where is and as is what is" condition. He further submitted that the appellant, who had undertaken the risk, is estopped from contending contrary to the terms of the auction notice. According to him, there is no valid grounds to interfere with the well considered order of the writ Court. For the abovesaid reasons, he prayed for dismissal of the writ petition.

Heard the learned counsel for the parties and perused the materials available on record.

23. Rule 8 of the Security Interest (Enforcement) Rules, 2002, deals with sale of immovable secured assets and that the same reads as follows:

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

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

24. Rule 9 of the abovesaid Rules, 2002, deals with time of sale, issue of sale certificate and delivery of possession, etc., and the said Rule is extracted hereunder:

"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 money deposited by the purchaser such surplus shall be paid to the purchaser within fifteen day, from 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."

25. Appendix-IV, in terms of Rule 8(1) of the abovesaid Rules, for immovable property, is extracted hereunder:

APPENDIX-IV
[See rule-8(1)]
POSSESSION NOTICE

(for Immovable property)

Whereas The undersigned being the authorised officer of the _____ (name of the Institution) under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and in exercise of powers conferred under Section 13(12) read with rule 9 of the Security Interest (Enforcement) Rules, 2002 issued a demand notice dated _____ calling upon the borrower Shri _____/M/s _____ to repay the amount mentioned in the notice being Rs. _____ (in words _____) with in 60 days from the date of receipt of the said notice. The borrower having failed to repay the amount, notice is hereby given to the borrower and the public in general that the undersigned has taken possession of the property described herein below in exercise of powers conferred on him/ her under Section 13(4) of the said 27[Act] read with rule 9 of the said rules on this _____ day of _____ of the year _____. The borrower in particular and the public in general is hereby cautioned not to deal with the property and any dealings with the property will be subject to the charge of the _____ (name of the Institution) for an amount Rs. _____ and interest thereon.

Description of the Immovable Property

सत्संगमेव जगते
All that part and parcel of the property consisting of Flat No. _____/Plot No. _____ In Survey No. _____/City or Town Survey No. _____/Khasara no. _____ Within the registration Sub-district _____ and District _____.

Bounded;
On the North by
On the South by
On the East by
On the West by

-----Sd/-
Authorised Officer
(Name of the Institution)

Date:

Place:

26. Rules 8(1) and (2) of the Security Interest (Enforcement) Rules, 2002, state that 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. Possession notice, as referred above, 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.

27. As per Rule 9(7), where the immovable property sold is subject to any encumbrance, 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. Proviso to the said Rule, states that if after meeting the cost of removing encumbrances and contingencies, there is any surplus available out of money deposited by the purchaser such surplus shall be paid to the purchaser within fifteen day, from date of finalisation of the sale.

28. As per Rule 9(8) of the abovesaid Rules, 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. Rule 9(9) states that 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. As per Rule 9(10), 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.

29. In *Transcore v. Union of India* reported in 2008 (1) SCC 125, while considering several issues, at Paragraph 26, the Hon'ble Apex Court held as follows:

"Section 13(6) inter alia provides that any transfer of secured asset after taking possession or after taking over of management of the business, under Section 13(4), by the bank/FI shall vest in the transferee all rights in relation to the secured assets as if the transfer has been made by the owner of such secured asset. Therefore, Section 13(6) inter alia provides that once the bank/FI takes possession of the secured asset, then the rights, title and interest in that asset can be dealt with by the bank/FI as if it is the owner of such an

asset. In other words, the asset will vest in the bank/FI free of all encumbrances and the secured creditor would be entitled to give a clear title to the transferee in respect thereof."

30. The Hon'ble Apex Court in Transcore's case (cited supra), held that Rule 8 of the Security Interest (Enforcement) Rules, 1992, deals with the stage anterior to the issuance of sale certificate and delivery of possession under Rule 9. The Hon'ble Apex Court also held that taking of symbolic possession, is to protect the property from creating third party rights and when such symbolic possession is taken, then as per Section 13(6) of the Act, the rights, title and interest, on the asset, can be dealt with, by the bank/financial institution, as if, it is the owner of such an asset. The asset would vest in the bank/financial institution free of all encumbrances and the secured creditor would be entitled to give a clear title to the transferee in respect thereof.

31. As observed by the Hon'ble Apex Court in Transcore's case (cited supra), to avoid any third party, taking up the defence, affixture and publication has to be done and mere issuance of Section 13(4) notice, in terms of Rule 8, would not be sufficient compliance of Rule 9(9) of the abovesaid Rules, which states that 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) of rule 9 of the abovesaid Rules.

32. What is decided in Transcore's case is the right to take symbolic or physical possession of the mortgaged property and preservation of the same, to avoid third party rights. In the context of sale, the Hon'ble Apex Court held that drawing of dichotomy between symbolic and actual possession does not find place in the scheme of the NPA Act r/w the Security Interest (Enforcement) Rules, 2002. While upholding, taking over of possession under Section 13(4) of the Act, r/w Rule 8, the Hon'ble Supreme Court held that the stage is anterior to issuance of sale certificate and delivery of possession under Rule 9. Section 13(4) empowers the bank to take possession symbolic or actual. As per Rule 8(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.

33. Branch Manager, M/s.Nedungadi Bank Ltd., Purasawalkam Branch, Chennai, has filed O.S.No.328 of 1999, on the file of Subordinate Judge, Poonamallee, for recovery of Rs.3,94,804/-, for the money borrowed by M/s.Weather Maker, 1st defendant, therein. Mr.N.E.Subramanian and P.S.Sarala Devi,

the defendants 2 and 3 therein have deposited the title deeds of the suit property, with M/s.Nedungadi Bank Ltd., on 10.10.1996. On 10.07.2000, the learned Subordinate Judge, Poonamallee, has decreed the suit, as hereunder:

"(1) That the defendant to pay into court on or before the 10th day of September 2000 or any later date upto which time for payment may be extended by the Court, the said sum of Rs.5,08,894.25 and do pay interest on Rs.3,94,804/- at 23.75% p.a. from 10.09.2000, will the date of realisation;

(2) That on such payment and on payment thereafter before such date as the Court may fix, of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the first schedule to the code of civil procedure, 1908, the Plaintiff shall bring to court all documents in his possession of power, relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant or to such person as he appoints and the plaintiff shall, if so required, re-convey or re-transfer the said property from the mortgage and clear of and find all encumbrance created by the Plaintiff or any person claiming under him or any person under whom he claims and shall, if so required, delivery upto the defendant quite and peaceful possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a finding decree for the sale of the mortgaged property and on such application being made, the mortgaged property of a sufficient part thereof shall be directed to be sold and for the purpose of such sale the plaintiff shall procedure before the Court or such officer as it appoint all document in his possession or power relating to the mortgaged property.

4. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into court and shall be duly applied (after deduction there from of the expenses of the sale) in payment of the amount payable to the Plaintiff under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the Plaintiff in respect of such costs of the suit, and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the first schedule to the Code of Civil Procedure, 1908 and that balance, if any, shall be paid to the defendant

or other persons entitled to receive the same.

5. And it is hereby further ordered and decreed and that if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the Plaintiff as aforesaid, the plaintiff shall be at liberty (where such remedy is open to him under the term of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time, as they may have occasion, and on such application nor otherwise the Court may give such directions as it thinks fit."

34. Mr.R.S.Sankar, the Sole Proprietor of M/s.Weather Maker and the 3rd defendant in O.S.No.328 of 1999, has availed a term loan of Rs.2,10,000/- along with a overdraft facility of Rs.7,899/-. For non-payment of loan amount, Punjab National Bank, respondent No.1 herein, has issued a notice, under Section 13(2) of the SARFAESI Act, 2002, demanding a sum of Rs.11,71,699.50, with further interest, from 01.09.2007, until payment in full is made, within 60 days, failing which, action would be taken under Section 13(4) of the SARFAESI Act, 2002.

35. Thereafter, a demand notice, dated 19.01.2008, has been issued, calling upon the borrower, to pay the outstanding loan amount, failing which, the Bank would proceed against the borrower, by exercising their right under sub-Section (4) of Section 13 of the SARFAESI Act, 2002. Thereafter, possession notice, under Section 13(4) of SARFAESI Act, 2002, has been published by Punjab National Bank, in Daily Thanthi on 18.09.2008.

36. Admittedly, when notice, under Section 13(4) of the SARFAESI Act, 2002, was issued by M/s.Punjab National Bank, Chennai, respondents herein, physical possession of the subject property mortgaged, was not taken. Reading of Rule 9 makes it clear that there is a clear distinction, between sale of immovable property, subject to encumbrance and costs, to be incurred for removing the encumbrance.

37. In the case on hand, notice under Section 13(4) of the SARFAESI Act, 2002, has been issued, mentioning the description of the property, mortgaged with the respondent-Bank. According to the Bank, symbolic possession of the subject property was taken on 16.09.2008 and paper publication was effected on 18.09.2008. Setting out the same, Bank has issued a tender-cum-auction, dated 03.06.2009, fixing the auction date and time, as 17.07.2009 at 3.30 P.M. Among other terms and conditions, mentioned in the auction notice, dated 03.06.2009, Condition No.1, was that, "The sale will be of the property of the borrower above named in, "AS IS WHERE IS/AS IS

WHAT IS' CONDITION." Condition Nos.4 and 5, contained in the auction notice, dated 03.06.2009, relevant for the purpose of the instant appeal, are extracted hereunder:

"4. The successful bidder shall deposit 25% of the bid amount (including EMD) immediately on the sale being knocked down in his/her favour and the balance within 15 days from the date of auction. Payment is to be made in the form of banker's cheque/demand draft favouring "Authorised Officer, Punjab National Bank" payable at Chennai.

5. In case the successful bidder fails to deposit 25% of the bid amount immediately or the balance amount within 15 days as aforesaid, the entire deposit amount made by the bidder shall be forfeited by the Authorized Officer without any notice and the property shall forthwith be put up again and resold."

38. Auction notice does not indicate anything about the encumbrance in the subject property sought to be sold, but it only states that sale of the property would be in, "as is where is/as is what is" condition. Section 13(4) of the SARFAESI Act, 2002, enables the secured creditor to take actual possession of the secured assets of the borrower.

39. Certificate of encumbrance, dated 20.07.2009, issued by the Joint Registrar, Kundrathur, enclosed in the typed set of papers, filed along with the writ appeal, shows that in respect of the property in S.F.No.375/3, Kalaimagal Nagar, names of the executants/claimants, have been mentioned as, "Sarala Devi (Principal), Sankar (Agent) and Shanmugam.

40. Legal notice, dated 28.07.2009, has been sent by the auction purchaser to the Authorized Officer and Chief Manager, Punjab National Bank, Chennai, stating that though sale was confirmed in his favour, the Bank has failed to furnish the original title deeds, as well as copies of all the documents, including the judgment and decree from the competent Court, pertaining to the auctioned property. Auction purchaser in the said notice, has further stated that after verification of the encumbrance certificate and inspection of the property, he came to know that some third party is in occupation of the same and also found one notice board in front of that house, stating that the property is in dispute. Therefore, the auction purchaser has stated that without following the relevant provisions under Sections 13(2)(4), 14, 15 of the the SARFAESI Act, 2002 and Rules 8 and 9 of the Security Interest (Enforcement) Rules, 2002, auction has been conducted by the Bank and that therefore, the same is not in accordance with law.

41. In the abovesaid notice, dated 28.07.2009, auction purchaser/appellant has also stated that there was suppression of material facts, in conducting the auction. He has also

stated that the authorised officer was not in a position to deliver possession of the auctioned property, without any encumbrances and free of litigations. He has stated that the original title deeds, as well as copies of documents, including the judgment and decree from the competent Court, pertaining to the auctioned property, except the sale deed Document No.2125/1990, dated 02.07.1990, were not furnished to him and in the abovesaid circumstances, he has issued the said notice, calling upon the authorised officer to cancel the auction proceedings, held on 17.07.2009 and return the deposit amount of Rs.3,30,000/-, within a weeks' time, from the date of receipt of the said notice.

42. The Bank, in its reply notice, dated 14.08.2009, has stated that prior to participation in the auction, the auction purchaser has not only inspected the property in question, but was also satisfied with regard to the clear and marketable title of the owner of the property and the security interest, already created in favour of the Bank. The Bank has further stated that symbolic possession of the scheduled property was taken and that auction was made, in "as is where is and as is what is condition" and therefore, it is not open to the appellant/auction purchaser to return 25% of the deposit.

43. Material on record discloses that a demand draft for Rs.9,90,000/- has been taken on 02.09.2009, in favour of the respondents-Bank. A telegram, dated 12.09.2009, has also been sent to the authorised officer of the Bank, by the auction purchaser, stating that he was ready to handover the demand draft, but then there was an encumbrance.

44. The Bank has sent another letter, dated 14.09.2009, to the auction purchaser, calling upon him to remit the balance amount of Rs.9,90,000/-, from 01.08.2009, till remittance and the same should not be later than 22.09.2009. The Bank has further stated that if the auction purchaser/appellant defaults in payment on or before 22.09.2009, then, in terms of Rule 9(5) of the Rules, 2002, read with the terms and conditions of the auction, dated 17.07.2009, a sum of Rs.3,30,000/- would be forfeited.

45. The auction purchaser/appellant has sent a legal notice, dated 15.09.2009, to the bank. Thereafter, the Authorized Officer and General Manager, Punjab National Bank, has addressed a letter, dated 17.09.2009, to the auction purchaser, stating that 25% of the bid amount, including EMD, ie., a sum of Rs.3,30,000/- has been deposited, at the time of auction and that the balance amount of Rs.9,90,000/- has to be paid, on or before 01.08.2009. A reply, dated 19.09.2009, has been given by the Bank.

46. Nowhere in the auction notice, dated 03.06.2009, Punjab National Bank - respondent/secured creditor has stated that the mortgaged property was under a decree in

O.S.No.328/1999 dated 10.07.2000 on the file of the Subordinate Judge, Poonamallee. Even in the reply notice dated 14.08.2009, Punjab National Bank, has only reiterated that the bank did not commit to hand over physical and vacant possession of the auctioned property and contended that it was sold only on 'as is where is' or 'as is what is' condition.

47. Admittedly, in the case on hand, even from the version of the bank, only symbolic possession has been taken on 16.09.2008. Though bank has contended that as per the legal position, which prevailed in 2008, they had the right to bring the property for auction in terms of Transcore's case and they had not committed to hand over physical or vacant possession of the auctioned property and therefore, there was nothing wrong in ordering forfeiture, the bank has not considered as to whether there is a statutory obligation to hand over physical possession of the property free from encumbrances to the auction purchaser. It is the contention of the auction purchaser that the original title deeds were not furnished despite demand and that a third party was residing in the property. Though the bank has contended that title deeds were shown and with eyes open, with reference to the terms and condition of the auction notice dated 17.07.2009, appellant/auction purchaser has participated in the auction, "as is where is" or "as is what is" condition and that the same was specifically mentioned in the auction notice dated 17.07.2009, statutory provisions of SARFAESI Act, 2002 and the Rules framed thereunder, do not enable the auction purchaser to take possession of the immovable properties on his own. One of the measures for recovery of secured credits under sub section (4) to Section 13 of the Act includes taking possession. At this juncture, it is relevant to extract Section 14 of the SARFAESI Act, 2002.

"14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset.-

1. Where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him-

a. take possession of such asset and documents relating thereto; and

b. forward such asset and documents to the secured creditor.

Provided that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorised officer of the secured creditor, declaring that,
-

(i) the aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;

(ii) the borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;

(iii) the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above;

(iv) the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;

(v) consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a non-performing asset;

(vi) affirming that the period of sixty days notice as required by the provisions of sub-section (2) of section 13, demanding payment of the defaulted financial assistance has been served on the borrower.

(vii) the objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;

(viii) the borrower has not made any repayment of the financial assistance in spite of the above notice and the Authorised Officer is, therefore, entitled to take possession of the secured assets under the provisions of sub-

section (4) of section 13 read with section 14 of the Principal Act;

(ix) that the provisions of this act and the rules made thereunder had been complied with:

Provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the secured assets:

Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act.

(1A) The District Magistrate or the Chief Metropolitan Magistrate may authorise any officer subordinate to him, -

(i) to take poss of such assets and documents relating thereto; and

(ii) to forward such assets and documents to the secured creditor.]

2. For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

3. No act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of this section shall be called in question in any court or before any authority."

48. Section 14 of the Act, 2002, does not empower the auction purchaser to seek for assistance for taking possession. It only enables the secured creditor to approach the Chief Metropolitan Magistrate or District Magistrate, as the case may be, to take possession or control of any such secured assets.

49. In Kathikkal Tea Plantations vs. State Bank of India reported in (2009) 7 MLJ 24, Kathikkal Tea Plantations, represented by its Managing Director, availed loan. There was

default. Symbolic possession was taken under Section 13(4) on 11.12.2006. Bank sold the property by a private treaty on 09.04.2007 and issued a sale certificate. Property was not physically dispossessed and continued to hold on de facto possession, even after without issuance of sale certificate. Therefore, bank, filed an application under Sections 14(1)(2) of the SARFAESI Act, before the learned Chief Judicial Magistrate, Udhagamandalam, on 13.11.2008, seeking an order take possession of the petitioner's property with the help of police aid and hand over the same to the bank. Permission was granted. Writ petition was filed to challenging the order of the learned Chief Judicial Magistrate, Udhagamandalam contending inter alia that once sale certificate was issued in favour of the auction purchaser of the property, there is no secured debt and that the bank loses the character of the secured creditor. Contention has been made that the question of taking actual physical possession does not arise after the issuance of sale certificate. After considering Transcore vs. Union of India repoted in (2008) 1 SCC 125, that banks are entitled to take actual possession of the property in terms of Section 13 of the SARFAESI Act, 2002 and other decisions, in Kathikkal Tea Plantations' case, a Hon'ble Division Bench of this court, at paragraph 16 observed thus:

"The third party, who comes forward to purchase the secured asset, must have a confidence that he would get the property at the earliest. If the transferring of the property by way of title is going to be delayed endlessly, then the object of the Act which is meant for speedy recovery, would be defeated in whole."

50. Observations of this Court is appropriate to the case on hand, where the respondent bank has only reiterated its right to sell the secured assets 'as is where is' or 'as is what is' condition and made a clear declaratory statement that there was no commitment to hand over physical possession of the property. Sale of property even before taking actual physical possession, has been sustained in Kathikkal's case, at paragraph 21, a Hon'ble Division bench held as follows:

"21....in the absence of any specific stipulation in Section 13, the properties could be sold only after taking physical possession and also the combined reading of Sections 13 and 14 with the background of the object would show that it cannot be said that the secured creditor cannot take actual physical possession after issuing sale certificates merely for the reason that the language found in Section 14 refers to the secured creditor and secured asset."

others reported in (1994) 1 SCC 575, the Official Liquidator sold the property. Clause 2 of the Terms and Conditions of the Sale, reads as follows:

"2. The sale will be as per inventory list on 'as is where is basis' and subject to the confirmation of the Hon'ble Supreme Court of India. The Official Liquidator shall not provide any guarantee and/or warranty in respect of the immovable properties and as to the quality, quantity or specification of the movable assets. The intending purchaser must satisfy themselves in all respect as regards the movable and immovable assets, as to their title, encumbrances, area, boundary, description, quality, quantity, and volume etc. and the purchaser will be deemed to offer with full knowledge as to the description, area etc. of the properties and defects thereof, if any. The purchaser shall not be entitled to claim any compensation or deduction in price on any account whatsoever and shall be deemed to have purchased the property subject to all encumbrances, liens anti claims including those under the existing legislation affecting labour, staff etc. The Official Liquidator shall not entertain any complaint in this regard after the sale is over. Any mistake in the notice inviting tender shall not vitiate the sale." (emphasis supplied)

52. When the said clause contained that no compensation or deduction in price on any account whatsoever can be claimed, the auction purchaser therein sought for diminution of the price and in such circumstances, the Hon'ble Apex Court in United Bank of India's case, held that having purchased the property on such terms, then a claim for diminution in the price on the ground of defect in title or description of the property, cannot be made. Though in United Bank of India's case, there was a specific clause that the property sold was "as is where is basis", as rightly contended by the learned counsel for the appellant herein, having regard to the statutory provision, Section 14 of the SARFAESI Act, 2002, enabling the secured creditor to take physical possession of the secured assets, and Rule 9(9) of the Security Interest (Enforcement) Rules, 2002, to hand over possession to the auction purchaser, decision in Union of India's case, cannot in strict sense, be made applicable to the case on hand.

53. In Haryana Financial Corporation v. Rajesh Gupta reported in 2010 (1) SCC 655, the Hon'ble Supreme Court, while considering the case of refund of the initial amount paid towards Earnest Money Deposit, at Paragraphs 18 to 25, discussed and held as follows:

"18. In view of the protests of the respondent, a writ was raised by the Branch Manager of the

appellants /Corporation through letter dated 3.4.1998 addressed to the Head Office. The Branch Manager was informed by the Head Office, through letter dated 7.4.1998 that as per the documents submitted by the defaulting unit at the time of availing loan, clear cut passage/rasta has been provided to the concerned Unit. The letter dated 7.4.1998 reads as follows:

"Please refer to your letter No. HFC\BO\JD\98\7 dated 3.4.98 on the subject cited above.

In this connection, you are advised that clear cut Passage / Rasta has been provided to the concern as per documents submitted by the concern at the time of availing loan.

Enclosed herewith please find photocopy of the Sale Deed No.1494 dated 8.9.94 and photocopy of the Mutation No.5172, another Mutation No.9896 and Search Report and Sale Deed, Rasta, wherein it is clear cut mentioned that there is an approach road the factory site. So, you may please satisfy the Auction Purchaser with these documents and inform us the latest position of the case. It is also added here that you may make clear to the auction purchaser that the unit has been sold by the Corporation as and where basis."

19. A perusal of the aforesaid letter makes it apparent that the appellants/Corporation were merely relying on the documents submitted by M/s. Unique Oxygen Private Limited, Old Hansi Road, Jind i.e., the defaulting unit. The appellants/Corporation had been informed by the management of the defaulting unit at the time of availing of the loan facility that the Unit had the necessary independent approach road. The letter however does not indicate, that any independent inquiries were made by the appellants/Corporation to verify the authenticity of the statements made by the management of the defaulting unit which had availed of the loan, by mortgaging the assets of the unit.

20. The entire issue seems to be concluded against the appellants/ Corporation by letter dated 30.4.1998, the relevant parts of which have already been reproduced in the earlier part of this judgment. A perusal of the extracts, reproduced earlier, would clearly show that the Branch Manager has informed the head office in unequivocal language that the independent passage shown in the sale deed is not connected directly with the defaulting unit. It also indicates that the defaulting unit had merely purchased some land to connect the rasta with the revenue record on which movement of the vehicle is not possible at all. This land was not even mortgaged with the appellants/Corporation. The letter also clearly states that by exclusion of the

aforesaid land the size of the plot would be reduced from 1210 sq. yards to 1130 sq. yards. That would mean that the main gate of the factory would be outside the land offered for sale.

21. Taking into consideration the aforesaid facts the Division Bench concluded as follows:

"Taking the totality of circumstances into consideration, we are satisfied that the petitioner was not at fault. He was entitled to withhold the money as the respondents had failed to provide a proper passage. Still further, the factual position having been admitted in the letter dated April 30, 1998, a copy of which is at Annexure P6, and nothing to the contrary having been produced on the file, we find that the action of the respondent/Corporation in forfeiting the amount deposited by the petitioner was wholly arbitrary and unfair."

22. We are also of the opinion that the Division Bench was justified in further concluding that in law the appellants/Corporation undoubtedly has the power to forfeit the earnest money provided there was a failure on the part of the respondent to make the deposit. The Division Bench, however, observed that the respondent was dealing with an instrumentality of state. He was entitled to legitimately proceed on the assumption that the appellants, a Statutory Corporation, an instrumentality of the State, shall act fairly. The respondent could not have suspected that he would be called upon to pay the amount of Rs.50 lakhs without being given even a proper passage to the Unit that he was buying. We are of considered opinion that the respondent had deposited the sum of Rs.2.5 lakhs on the clear understanding that there would be an independent approach road to the Unit. This is understandable. Without any independent passage the plot of land would be not more than an agricultural plot, not suitable for development as a manufacturing unit. We therefore don't find any substance in the submission made by the learned counsel for the appellants/Corporation.

23. In our opinion, the appellants cannot be given the benefit of Clause 5 of the advertisement. The appellants /Corporation cannot be permitted to take advantage of their own wrong. Clause 5 undoubtedly permits the forfeiture of the earnest money deposited. But this can only be, if the auction purchaser fails to comply with the conditions of sale. In our opinion the respondent has not failed to comply with the conditions of sale. Rather, it is the appellants/Corporation which has acted unfairly, and is trying to take advantage

of its own wrong.

24. In view of the aforesaid, we are of the considered opinion that the appellants/Corporation cannot be permitted to rely upon Section 55 of The Transfer of Property Act, 1882. The appellants/Corporation failed to disclose to the respondent the material defect about the non-existence of the independent 3 'Karam' passage to the property. Therefore, the appellants/ Corporation clearly acted in breach of Section 55(1) (a) and (b) of the Transfer of Property Act, 1882. 25. The aforesaid Section provides as under:

(1) The seller is bound-

(a) to disclose to the buyer any material defect in the property [or in the seller's title thereto] of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover;

(b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power;

A mere perusal of the aforesaid provision will show that it was incumbent upon the appellants/Corporation to disclose to the respondent about the non-existence of the independent passage to the Unit. It was also the duty of the appellants/Corporation to inform the respondent that the passage mentioned in the revenue record was not fit for movement of vehicles. The appellant also failed to produce to the buyer the entire documentation as required by Section 51(1) (b) of the aforesaid Section. We are therefore satisfied that the appellants/Corporation cannot seek to rely on the aforesaid provision of the Transfer of Property Act, 1882."

54. In *Jai Logistics v. The Authorised Officer, Syndicate Bank* reported in 2010 (4) CTC 627, the property sold in auction on 09.11.2009, was without informing the auction purchaser, the subsisting encumbrance. Auction purchaser had paid the Earnest Money Deposit. When he applied for encumbrance on 10.11.2009, he came to know that a settlement deed was executed by the owner of the land on 21.09.2009. As there was encumbrance over the property, the auction purchaser did not pay the balance sale consideration, but sought for refund of money. The Bank rejected the same and forfeited the entire amount. Challenging the said order, the auction purchaser approached this Court.

55. In the above reported case, contentions were raised by the Bank that even when sale notice was issued, the bank was not aware of the encumbrance and therefore, the

publication did not carry the encumbrance. It was further contended that insofar as the bank is concerned, it is entitled to forfeit the earnest money deposit, in the event, the balance sale consideration not paid in time. It was further contended that the auction purchaser has no right to seek for either refund the amount deposited towards earnest money or to purchase the land after the clearance of encumbrance by the bank. Like in the case on hand, reliance was also made to a decision of the Hon'ble Supreme Court in *United Bank of India v. Official Liquidator and others* reported in (1994) 1 SCC 575 and in particular to paragraphs 13 and 14 of the said judgment. After considering the rival submissions, at Paragraphs 5 and 6, a Hon'ble Division Bench in *Jai Logistics's case* (cited supra), held as follows:

"5. We have considered the submissions. Of course, in the aforesaid judgment, the Supreme Court, while considering a sale by the Official Liquidator, has held that it is the duty of the intending purchaser to satisfy himself as to the encumbrance before participating in the bid. Having participated in the bid, the intending purchaser cannot later on turn around and question the Official Liquidator on the ground that the encumbrance was not notified. In that case, the provisions of the Rules as applicable in the present case are not applicable to the Official Liquidator. But in the case on hand, once possession is taken over under Section 13(4) or under Section 14 of the SARFAESI Act, whenever the secured creditor contemplates a sale of immovable property, they will have to follow Rule 8 of the Security Interest (Enforcement) Rules, 2002. Rule 8(6)(f) mandates the secured creditors to set out in the terms of sale notice 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. A reading of the said rule, in our opinion, would also include the encumbrance relating to the property. We are inclined to read the rule in that way keeping in mind the interest of the intending purchaser to be put on notice as to the encumbrance, as otherwise he/she will be purchasing the property and simultaneously buying the litigation as well and an intending purchaser may not bid in the event he/she came to know of any encumbrance over the property. That is why the rule specifically contemplates a provision for the authorised officer, while notifying the sale, to specifically state as to the encumbrance. It will be a different issue in the event the auction notice indicated that it is the duty of the intending purchaser to verify not only the encumbrance by way of alienation of the property, but also the other statutory liabilities and in that case, the intending purchaser cannot

later on turn around and seek for either the refund of the earnest money deposited or insist the bank to clear the encumbrance. In the absence of such indication in the sale notice, in our considered view, the respondent-bank would not be justified in compelling a purchaser to go ahead with the sale by depositing the balance sale consideration together with the encumbrance.

6. In that view of the matter, the challenge in the writ petition merits acceptance. Accordingly, the impugned order of forfeiture is set aside and the writ petition is allowed. The respondent is directed to refund the earnest money to the petitioner. We also take this opportunity to suggest that it is for the banks and financial institutions to indicate the encumbrance both by way of alienation in respect of the property or other statutory liabilities of the company or the individual, as the case may be, in the sale notice itself to avoid a situation like this. Equally the banks and financial institutions could also make it clear in the auction notice in the case of no other liability by the company or individual."

56. In *Standard Chartered Bank v. V.Noble Kumar* reported in 2013 (6) CTC 683, after considering the statutory provisions of the SARFAESI Act, 2002 and various decisions, at Paragraph 36, the Hon'ble Supreme Court held as follows:

"36. Thus, there will be three methods for the secured creditor to take possession of the secured assets:-

36.1 (i) The first method would be where the secured creditor gives the requisite notice under rule 8(1) and where he does not meet with any resistance. In that case, the authorised officer will proceed to take steps as stipulated under rule 8(2) onwards to take possession and thereafter for sale of the secured assets to realise the amounts that are claimed by the secured creditor.

36.2 (ii) The second situation will arise where the secured creditor meets with resistance from the borrower after the notice under rule 8(1) is given. In that case he will take recourse to the mechanism provided under section 14 of the Act viz. making application to the Magistrate. The Magistrate will scrutinize the application as provided in section 14, and then if satisfied, appoint an officer subordinate to him as provided under section 14 (1) (A) to take possession of the assets and documents.

For that purpose the Magistrate may authorise the

officer concerned to use such force as may be necessary. After the possession is taken the assets and documents will be forwarded to the secured creditor.

36.3 (iii) The third situation will be one where the secured creditor approaches the Magistrate concerned directly under section 14 of the Act. The Magistrate will thereafter scrutinize the application as provided in section 14, and then if satisfied, authorise a subordinate officer to take possession of the assets and documents and forwards them to the secured creditor as under clause (ii) above.

36.4 In any of the three situations, after the possession is handed over to the secured creditor, the subsequent specified provisions of rule 8 concerning the preservation, valuation and sale of the secured assets,, and other subsequent rules from the Security Interest (Enforcement) rules, 2002, shall apply."

57. In *R. Shanmugachandran (Deceased) & Others v. The Chief Manager, Indian Bank Asset Recovery Management* reported in 2014 (4) LW 900, a Hon'ble Division Bench of this Court had an occasion to consider a case of forfeiture of 25% of the Earnest Money Deposit and at Paragraphs 23 to 25, held as follows:

"23. The obligation of the Authorised Officer to include in the public notice issued under Rule 8 (6), the details of the encumbrances known to the secured creditor, is actually traceable to Clause (a) under the proviso to Rule 8(6). Since the obligation to disclose encumbrances is inbuilt in Clause (a) of the proviso itself, there is no necessity even to fall back upon Clause (f) under the proviso to Rule 8(6). Clause (f) may relate to matters other than encumbrances, such as pendency of suits etc., subject to the condition that the secured creditor is aware of the same. In this case, the secured creditor appears to be aware of the pendency of a partition suit and they have disclosed the same in the last column of the table given in the auction sale notice. Therefore, the secured creditor has actually fulfilled the requirement of Clause (f) under the proviso to Rule 8(6).

24. In so far as the ratio laid down in *Jai Logistics* {2010 (4) CTC 627} is concerned, it must be clarified that the obligation on the part of the Authorised Officer to disclose the encumbrances, is limited only to "those encumbrances known to the

secured creditor". Since the very wording of Clause (a) under the proviso to Rule 8(6) is of a restrictive nature, there is no scope for expanding the same to all kinds of encumbrances created by the borrower or guarantor behind the back of the secured creditor. The ratio laid down in Jai Logistics, cannot be understood to mean that the secured creditor as an obligation to obtain an encumbrance certificate upto the period one day preceding the date of publication of the auction sale notice. Reading such an obligation into Clause (a) under the proviso to Rule 8(6) would actually tantamount to some kind of a tacit approval of all illegal alienations made or encumbrances created by the mortgagor after the creation of the security interest.

25. As a matter of fact, the statutory provisions make it clear that a sale could take place only after the expiry of 30 days from the date of the public notice. This 30 days time is intended to serve two purposes. One for the borrower to gather resources and repay the loan and another for all intending purchasers to make sufficient enquiries as a person of normal diligence and ordinary prudence would do while buying any immovable property. The purport of Rule 8(6) cannot be extended to such an extent that it obliterates the liability of the purchaser to undertake due diligence and to scrutinise the title to the property. Therefore, the obligation of the Authorised Officer is only to disclose the encumbrance that had come to the notice of the secured creditor. It is for the auction purchaser to apply for encumbrance certificates, in the time of 30 days made available to the intending buyers to see if there are any encumbrances."

58. When rules permit sale, with encumbrance and without, contention of the learned counsel for the appellant that the sale should be free from encumbrance, cannot be accepted. On the facts and circumstances of the instant case, what is required to be considered by us, is whether the Bank has notified the encumbrances on the property sold.

59. In the light of the decisions, stated supra, we are unable to accept the contentions of the bank that by imposing a condition, "as is where is" and "as is what is", the Bank has no obligation to mention in the auction notice, the encumbrance of the property, sought to be sold and it is suffice to contend that in the auction notice, the Bank has clearly stated that the property sold was in "as is where is"

and "as is what is" condition and that the same would satisfy the requirements of Rule 8(6) of the Security Interest (Enforcement) Rules, 2002, which states that the authorised officer shall state the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor. In Jai Logistics's case (cited supra), defence of the Bank that the encumbrance was not known to them, and hence, could not be published on the sale notice, to sustain the order of forfeiture, was not accepted by this Court.

60. On the facts and circumstances of the case, the Bank may be right in contending that physical possession need not be taken before bringing the mortgaged property for auction, but they cannot shirk their duty to hand over possession to the auction purchaser. If the bank was not in a position to take physical possession, before sale, then recourse ought to have been taken under Section 14 of the Act and under the scheme of the Act, the Bank cannot be permitted to contend that there is no statutory obligation, on its part, to put the auction purchaser in possession.

61. Ordinarily, a sale is completed, on receipt of the entire sale consideration and handing over possession. But if encumbrance is specifically mentioned in the sale notice and if the auction purchaser with eyes open, had purchased the property, then there could be a cause to contend that it is the purchaser, who had taken the risk. While issuing a sale notice, it is the duty of the Bank to mention all the encumbrances in the property. The condition, "as is where is" or "as is what is" may indicate that when the property is sold, everything is not clear. But at the same time, the purchaser cannot be expected to know that the property sold was already mortgaged to another bank, viz., Nedungadi Bank and that there was a decree in O.S.No.328 of 1999, dated 10.07.2000, on the file of Subordinate Judge, Poonamallee.

62. Though the appellant has taken a demand draft dated 02.09.2009 in favour of Punjab National Bank, the respondent herein and also sent a telegram that he was ready to hand over the draft, subject to the bank handing over vacant possession of the property and time for remittance was granted up to 22.02.2009, bank has stuck to its stand of 'as is where is' or 'as is what is' condition and not committed to hand over physical and vacant possession of the auctioned property, which in our view is contrary to the scheme of the Act. In the light of the above discussion and decisions, forfeiture of the amount is erroneous. Appellant has made out a case for interference.

dated 28.10.2009, is set aside. The respondent bank is directed to refund, a sum of Rs.3,30,000/- to the appellant, with interest at the rate of 9% per annum, within a period of four weeks, from the date of receipt of a copy of this order.

64. Hence, the Writ Appeal is allowed. No costs.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

skm

To:

1.The Punjab National Bank
Rep. by its Chairman cum Managing Director
Head Office, No.7, Bhikaji Cama Place
New Delhi - 110 066.

2.The Authorised Officer and Chief Manager
The Punjab National Bank
Rayala Towers, 3rd Floor
No.158 (Old No.781), Anna Salai
Chennai - 600 002.

+1cc to Mr.P.T.Perumal, Advocate sr.704

+1cc to Mr.R.Umasultan, Advocate sr.623

sv1(co)
ss(31/01/2017)

Writ Appeal No.530 of 2010

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