

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.06.2018

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

W.P.No.8206 of 2018
and
WMP No.10174 of 2018

P.Mohan

... Petitioner

vs.

1. The Authorised Officer,
Indian Overseas Bank,
Regional Office,
13/25, Registrar Periasamy Street,
Veerasamy Nagar, Sankaran Palayam,
Vellore - 632 001.

2. Mrs.Premavathy

3. Debts Recovery Appellant Tribunal,
4th Floor, Indian Bank Circle Office,
55, Ethiraj Salai, Chennai.

... Respondents

WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of Certiorarified Mandamus, calling for the records relating to the order dated 27.03.2018 made in RA (SA) No.104 of 2014 on the file of the Hon'ble Debts Recovery Appellate Tribunal, Chennai in confirming the order dated 16.01.2014 in S.A.No.198 of 2013 by the Hon'ble Debts Recovery Tribunal III, Chennai and to quash the same and thereby set aside the sale made on 11.07.2013 and direct the Bank to permit the petitioner to redeem the property at Door No.69, Akkiah Naidu Road, Tiruttani.

For Petitioner : Mr.R.K.M.Suresh

For Respondents: Mr.FB.Benjamin George (for R1)
Mr.PV. Rajeswari (for R2)

ORDER

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

Borrower, has availed financial assistance of Rs.5 Lakhs from Indian Overseas Bank, Vellore, 1st respondent in the year 2007. Cash credit facility was increased to the tune of Rs.25 Lakhs. Borrower defaulted. Hence, Bank classified the account as Non Performing Asset. Bank issued notice dated 17.07.2012 under Section 13(2) of the SARFAESI Act, 2002, followed by a possession notice dated 26.02.2013, under Section 13(4) of the SARFAESI Act, 2002. Borrower had tendered some amounts in installments. After four months, bank issued sale notice dated 06.06.2013. Said notice was published on 12.06.2013 in the newspapers. Sale was fixed on 11.07.2013 between 11.00 am and 12.00 noon.

2. Being aggrieved by the sale notice dated 06.06.2013, borrower has filed S.A.No.198 of 2013, before the Debts Recovery Tribunal-III, Chennai. Auction was permitted by the tribunal. Petitioner filed I.A.No.414 of 2013 in S.A.No.198 of 2013, to raise additional grounds. Petitioner also filed I.A.No.415 of 2013 to set aside the sale dated 11.07.2017, in so far as property mentioned in Item No.1 of the sale notice dated 06.06.2013. Petitioner also filed I.A.No.416 of 2013 to implead Mrs.Premavathy, auction purchaser / 2nd respondent herein. IA No.414 of 2013 was allowed in favour of the writ petitioner / borrower. Contentions raised before the Debts Recovery Tribunal-II, Chennai in SA No.198 of 2013 and in I.A.Nos.415 & 416 of 2013 are,

- "(i) No clear 30 days notice is given in this case.
- (ii) Sale Notice was never served to the applicant.
- (iii) Valuation is not proper and it was not done by an approved Valuer under Wealth Tax Act.
- (iv) Sale notice does not contain the amount due as on date.
- (v) Sale notice was not affixed in the property.
- (vi) There was only bidder and there may be a likelihood of syndicate formation, especially when the purchaser is residing in very close proximity to the secured asset.
- (vii) A sum of Rs.22 lakhs was the upset price fixed by the bank and the property was sold for Rs.22.7 lakhs.
- (viii) Time was fixed between 11am and 12 noon but the ame was unilaterally changed to 11 a.m. to 1.p.m."

3. Before the Debts Recovery Tribunal-III, Ex.A1 to A4 were marked on the side of the borrower. Ex.B1 to B15, were marked on the side of the bank. On the above grounds and submissions, vide order dated 16.01.2014, Debts Recovery Tribunal-III,

dismissed S.A.No.198 of 2013. Being aggrieved, borrower, filed RA (SA) No.184 of 2014, before the Debts Recovery Appellate Tribunal, Chennai.

4. Though, the borrower has reiterated the abovesaid grounds and in particular, that there was no clear thirty days notice, placing reliance on the decisions of the Hon'ble Supreme Court in Mathew Varghese Vs. M.Amritha Kumar, reported in (2014) 5 SCC 610 and Vasu P. Shetty Vs. Hotel Vandana Palace and others, reported in (2014) 5 SCC 660 and, after considering, rival submissions, the Debts Recovery Appellate Tribunal, vide order dated 27.03.2018 in RA (SA) No.104 of 2014, concurred with the order of the Debts Recovery Tribunal-III, Chennai, as hereunder.

"8. On having a comparative view of evidence of both the parties, in my considered opinion, valuation of the house fixed by the Bank can be presumed to be reasonable and correct. Merely by the fact that upset price was fixed at Rs.22 lakhs will not vitiate the sale, because ultimately it was sold for a sum of Rs.28 lakhs. At times, upset price is fixed to be low with a view to attract more persons. In so far as proof of service of notice by affixture is concerned, photographs are available where Bank Officers were photographed in front of the house. Personal service of Sale Notice on 6.6.2013 though was questioned by the appellant, but appellant failed to discharge his part of duty. He also left some ambiguity in his defence.

9. Sole question remained about the time gap between date of publication of Sale Notice and the actual sale. It should be 30 days, whereas it is 29 days. There appears no substance in the averment that time of sale was fixed to be 11.00am to 12.00 noon, but it was extended upto 1.00pm, because extension of time can be ignored, illegality can be presumed when auction was completed even before the time schedule. Grant of some more time, i.e., one hour will not be prejudicial to anyone. However, it was extended only to wait for any specific stay order to be ordered by PO of DRT in the SARFAESI Appeal. It means Appellant was more interested in litigation than in repayments. In this backdrop and in these circumstances, lack of one day's gap in Sale Notice, in my considered opinion, it has been rightly ignored by the PO of DRT.

10. PO of DRT has discussed the facts and law meticulously. In view of the facts and circumstances of this cases, PO of DRT has arrived at on a conclusions."

5. Accordingly, appeal in RA(SA) No.104 of 2014 has been dismissed. Being aggrieved by the order in RA(SA) No.104 of 2014 dated 27.03.2018, instant writ petition is filed on the following grounds:

(i) The Appellate Tribunal has erred in not taking into consideration that the Writ petitioner herein during the pendency of the application filed under Section 17 before the Debts Recovery Tribunal-III, in S.A.No.198 of 2013 had deposited a sum of Rs.5,00,000/- and thereafter, in the proceedings before the Appellate Tribunal in RA(SA) No.104 of 2014, deposited a sum of Rs.2,80,167/-. Thus, the total deposit made by the petitioner was Rs.13,65,137/- vis-a-vis, the alleged claim of the bank Rs.22,76,335/-. That the second respondent herein was the sole bidder in the auction, alleged to have been conducted, which is in violation of the rules and therefore, the appellate tribunal, in the interest of justice, ought to have set aside the auction, and permitted redemption of the property by the petitioner.

(ii) The Appellate Tribunal has failed to note that Rules 8 and 9 of the Rules of Security Interest (Enforcement) Rules are mandatory in nature and not directory. In this regard, the writ petitioner has relied on the decisions of the Hon'ble Apex Court reported in (2014) 5 SCC 610 (Mathew Varghese Vs. M.Amritha Kumar & Others) and in (2014) 5 SCC 660 (Vasu P.Shetty vs. Hotel Vandana Palace & Others).

(iii) The Appellate Tribunal has failed to note that clear 30 days notice was not given to the petitioner, as mandated in 8 of the Security Interest (Enforcement) Rules.

(iv) The Appellate Tribunal has failed to note that the Sale notice was not affixed, in the property, as prescribed in the Act and Security Interest (Enforcement) Rules.

6. Indian Overseas Bank, 1st respondent herein has filed counter affidavit on 25.06.2018 and the same is as follows:

(i) Petitioner P.Mohan is the borrower of Indian Overseas Bank. Petitioner, initially borrowed a cash credit limit of Rs.5 Lakhs from the Tiruttani Branch of the bank on 13.03.2007. Later, at the request of the said borrower, the limit was enhanced to Rs.15 Lakhs on 22.03.2008 and further enhanced to Rs.25 Lakhs on 31.10.2008. The said loan was inter-alia secured by immovable properties measuring 900 sq.ft and the building measuring 900 sq.ft. situated thereon bearing Door No.69, New No.68/B, Akkaiya Naidu Street, Tiruttani situated within R.S.No.139/8 and 139/11. Petitioner availed the loan and operated the account. However, borrower defaulted in repayment

of the dues and on 31.03.2012, the account became NPA. As on 31.06.2012, a total sum of Rs.27,30,334/- was due in the cash credit account of the petitioner. Therefore, the 1st respondent bank, invoked the provisions of the SARFAESI Act, 2002 and issued a demand notice dated 17.07.2012 under Sec.13(2) of the Act. The petitioner received the said notice under clear postal acknowledgment. However, he did not furnish any reply. Therefore, the 1st respondent proceeded further under SARFAESI Act, 2002 and on 26.02.2013 took symbolic possession of the schedule property. Thereafter, the secured creditor bank issued a sale notice for the sale of the schedule property on 06.06.2013, fixing the date of auction on 11.07.2013.

(ii) Borrower has challenged the said measure under Section 17 of the SARFAESI Act, by filing an application SA.No.198 of 2013 on the file of the Debts Recovery Tribunal - III, Chennai. The said application came before the Tribunal on 11.07.2013 and the Debts Recovery Tribunal by its order dated 11.07.2013 permitted the bank to go ahead with the auction sale and restrained the bank from confirming the sale until further orders. Later, in compliance of the conditional order passed by the Debts Recovery Tribunal, the petitioner/borrower remitted a sum of Rs.5 Lakhs. However the balance amount was not paid.

(iii) In the auction held on 11.07.2013, one Mrs.Premavathi 2nd respondent herein, was the successful bidder. Later the Debts Recovery Tribunal on 16.01.2014 dismissed SA No.198 of 2013, thus enabling the 1st respondent bank to confirm the auction. Therefore, the 1st respondent confirmed the sale, in favour of the auction purchaser and on payment of the entire sale consideration, issued the sale certificate to the 2nd respondent on 31.01.2014.

(iv) Challenging the order dated 11.07.2013 in SA No.198 of 2013, the petitioner herein filed RA(SA) No.104 of 2014 and finding no merit in the appeal, the same was dismissed on 27.03.2018. Being aggrieved the present Writ Petition has been filed.

(v) Petitioner has canvassed the following grounds before the DRAT.

- a) No clear 30 days notice was given
- b) Sale notice was not served on the applicant
- c) Valuation is not proper and it was not done by an approved valuer under Wealth Tax Act.
- d) Sale Notice does not contain the amount due, as on date.
- e) Sale notice was not affixed in the property.
- f) There was only one bidder and there was a likelihood

of syndicate formation, especially when the purchaser is residing in close proximity, of the secured assets.

g) A sum of Rs.22 lakhs was the upset price fixed by the bank and the property was sold only for Rs.22.70 lakhs.

h) Time fixed for auction was between 11 AM and 12 noon, but same was unilaterally changed to 11 AM to 1 PM.

Bank has further contended that the above grounds rejected by the DRAT, Chennai have been raised, by the petitioner, in the present writ petition.

(v) Bank has further contended that it is incorrect to say that no 30 days notice was given to the petitioner, for sale of the secured asset. E-Auction Sale Notice 06.06.2013 was personally served on the petitioner against acknowledgment on 06.06.2013 itself. The sale was conducted only on 11.07.2013, which is after the expiry of 30 days provided under Rule 8 and 9 of Security Interest (Enforcement) Rules, 2002. The secured asset was valued by the approved valuer. The Sale Notice contains the amount due and recoverable from the petitioner, and the sale Notice was affixed at the site. All relevant documents were filed before DRT, which has given a categorical finding that the procedure laid down under the rules were followed. The said finding has been reaffirmed by the DRAT. It is not the case of the petitioner that the said finding is perverse. Bank has contended that in a proceeding under Article 226 of Constitution of India, this Hon'ble Court cannot re-appreciate the concurrent findings of the tribunals below. Infact the petitioner himself has produced copy of the documents in the typed set of papers, and the said documents would show that all the proceedings were duly followed in the sale.

(vi) Bank has further contended that the Security Interest (Enforcement) Rules 2002 does not bar the sale of the asset in the event of a single bidder. The fact that against the upset price of Rs.22 Lakhs, the 2nd respondent Auction purchaser had submitted her bid for Rs.28 lakhs and became the successful bidder itself is sufficient to show that the allegation of formation of syndicate is false. the circumstances under which, the auction was extended has been discussed by the DRT in its order dt. 16.01.2014.

(vii) It is the further case of the petitioner that 30 days duration was not given between the date of publication and the date of Sale. Rule 9 of Security Interest (Enforcement) Rules 2002 contemplates a minimum period of 30 days either from the date of service of notice or from the date of publication and the date of auction sale. It is relevant to note that 30 days clear notice was given to the petitioner. The judgments relied

upon by the petitioner viz. 2014 (5) SCC 610 and 2014 (5) SCC 660 have no application to the facts of the present case. It is pertinent to note that the sale held under the SARFAESI Act, was not set aside by the Hon'ble Apex Court even in those judgments. In any event, no prejudice was caused to the petitioner and it is not the case of the petitioner that the purchaser was prevented from participating the auction for want of sufficient time.

(viii) Bank has further contended that SARFAESI Act, 2002 permits the borrower to pay the entire dues any time before completion of sale to redeem the property. In the instant case, the borrower has failed to exercise the said right. The property has been sold. Sale certificate was issued and it has been registered. Therefore, at this stage, the question of exercising the right of redemption does not arise. Further though it is the prayer of the petitioner to permit redemption of the property, till date the petitioner has not shown his bonafide by tendering the entire dues before this Hon'ble Court. There is no bonafide in the actions of the petitioner. Therefore the writ petition is liable to be dismissed.

7. Counter affidavit of the auction purchaser / the 2nd respondent herein is reporeduced.

(i) Averments in paragraph No.4 of the affidavit are denied. The petitioner has not produced any document either before the Debts Recovery Tribunal or before the Debts Recovery Appellate Tribunal to substantiate the averments made in para 4 of the affidavit filed in support of the writ petition. From the Notice of e-auction sale of the property served by the 1st respondent on the petitioner on 06.06.2013 which is enclosed, as document at page 32 of the "typed set of documents" filed by the petitioner along with the writ petition, it is evident that the petitioner has been served with the sale notice on 06.06.2013 itself. In such circumstances, publication of sale notice dated 06.06.2013 in "The New Indian Express" on 12.06.2013 for bringing the property for sale by e-auction on 11.07.2013 cannot be considered as illegal, and that the same will not vitiate the auction sale.

(ii) The property of the petitioner purchased by the auction purchaser in the e-auction conducted by the 1st respondent on 11.07.2013 is just a single hall type godown adjoining the auction purchaser's residence. When the notice was pasted in the property, the auction purchaser came to know about the sale and since the same is next to the residence of the auction purchaser, she thought it fit to purchase the same for more convenient enjoyment of her residential property with a plan, to extend the residential property, as her younger son was about to be married at that time. Even though the auction purchaser is

illiterate, her younger son who had completed MCA at that time took all sincere efforts to enable her to participate in the e-auction by duly applying for and obtaining a valid Digital Certificate in the name of the auction purchaser and submitted the bid online application on 10.07.2013 and participated in the e-auction on the following day, viz., 11.07.2013. After coming to know about the proposed sale of the property through the notice of e-auction of the first respondent the auction purchaser proceeded to enquire about the sale and participated in the e-auction conducted by the first respondent in a bonafide manner and finally purchased the property for a valuable consideration of Rs.28,00,000/- following due procedure prescribed by the first respondent bank, for completing of such e-auction sale.

(iii) The "Sale (through e-auction only) Notice" dated 6.6.2013 of the 1st respondent prescribed certain terms and conditions for participating in the e-auction. After duly complying with all such conditions and as a bonafide bidder, holding valid digital certificate, the auction purchaser submitted her bid after paying EMD amount of Rs.2,20,000/- in respect of only one property out of the three properties, which were notified for e-auction, in the Sale Notice. Before submission of the bid, the auction purchaser also enquired with the first respondent bank about the pendency of any proceedings, preventing such sale. At that time the auction purchaser was informed by the first respondent bank that the petitioner has moved an application before the Debts Recovery Tribunal-III and the auction purchaser was advised to have a keen watch on the portal of the first respondent bank, on the day fixed for the e-auction sale, i.e. 11.7.2013. Auction purchaser further submitted that accordingly as a genuine bidder, having interested in purchase of the property, in a bonafide manner, the auction purchaser kept a close watch of the website of the first respondent bank, through her younger son, to purchase the property out of her earned savings.

(iv) It was only in such circumstances, she raised her bid value on 11.07.2013, based on the prevailing market rates to Rs.28,00,000/- immediately, after the portal opened for e-auction on and rightly the property was knocked down in her favour. Thereafter on the same day, she paid Rs.4,80,000/- which sum when added to the EMD amount of Rs.2,20,000/- already paid by her worked out to 25% of the Bid amount, i.e. 7,00,000/- and as such she complied with all the terms and conditions of Auction.

(v) After the auction proceedings on 11.07.2013, she was informed by the first respondent bank that on an application filed by the petitioner, Debts Recovery Tribunal has passed an

order dated 11.07.2013 not to confirm Sale till the next day of hearing of the case. Accordingly, the auction purchaser was instructed to await the outcome of the said proceedings.

(vi) Thereafter, the auction purchaser received a communication dated 17.1.2014 from the first respondent bank, informing her that the application filed by the petitioner was dismissed by the Debts Recovery Tribunal-III, Chennai and she was called upon to remit the balance amount of Rs.21,00,000/- to the credit of the EMD A/c. No.140502000000800. She was further informed that on such payment, Sale certificate would be issued in her favour and if she fails to pay the balance amount, she will have to forego the EMD amount already paid. On receipt of such intimation, she immediately remitted Rs.8,50,000/- to the first respondent bank on 20.1.2014 by mortgaging her husband's house property with the bank. She also paid the remaining amount and completed payment of the entire bid amount of Rs.28,00,000/- on 27.1.2014. Since the entire payment towards the e-auction sale of the property was completed by her, she was asked to deposit the Registration Fees of Rs.2,24,200/- for issue of the Sale Certificate. She had also deposited the Registration Fees of Rs.2,24,200/- on 31.1.2014. On the same day, i.e. 31.1.2014 itself, Sale Certificate in respect of the said property was issued in her favour by the first respondent bank. Accordingly, she is the bonafide purchaser of the property in the e-auction conducted by the first respondent bank.

(vii) As detailed above, she has participated in the e-auction conducted by the first respondent bank, in respect of one property out of the three properties and based on the market value of the property, she thought it fit to increase the bid amount for the property, soon after the e-auction proceedings commenced on 11.07.2013 even though she had quoted Rs.22.70 Lakhs initially in her bid submitted on 10.07.2013. Hence, the averment in para 10 of the affidavit to the writ petition that unilateral increase of e-auction price by her ought to have been considered, as a point in favour of the petitioner by the Debts Recovery Tribunal-III is unsustainable. The unilateral increase cannot be a ground for vitiating the sale validly concluded by the first respondent in her favour.

(viii) From the documents produced by the petitioner it is evident that the petitioner has not taken any steps to clear the dues to the first respondent bank either before or during the pendency of the proceedings before the Debts Recovery Tribunal-III, Chennai. Even after the dismissal of the petition by the Debts Recovery Tribunal-III, Chennai, the petitioner had not taken any step to clear the dues.

(ix) In fact, it is evident from the record of the proceedings filed in the typed set of documents that the appeal itself was moved on 6.2.2014 along with an application for waiver of pre-deposit in I.A.No.143 of 2014. It is also submitted further that by that time, the sale certificate was already issued in her favour on 31.1.2014. It was only thereafter, pursuant to the orders of the third respondent Appellate Tribunal, the petitioner seemed to have deposited an amount of Rs.2,80,167/- as pre-condition deposit. However, such a pre-conditional deposit is only for consideration of the appeal against the orders of the Debts Recovery Tribunal and such payment cannot be considered as a ground for setting aside the sale, validity concluded in her favour by the first respondent bank.

(x) She further submitted that the grounds raised by the petitioner in para 12 of the affidavit are unsustainable in law and none of the grounds therein is legally available to the petitioner to set aside the e-auction conducted by the first respondent on 11.7.2013 and concluded in her favour. In respect of the various grounds raised in para 12, she further submitted that the Debts Recovery Appellate Tribunal has elaborately considered them by applying its judicial mind on the facts of the case and based on the documents submitted by the parties. The reasons adduced by the Appellate Tribunal are based on the documents produced before the Tribunal and are not based on any presumption, assumption, and surmises as averred by the petitioner in para 12.

(xi) She had duly and strictly complied with all the terms and conditions of the e-auction and therefore e-auction sale concluded in her favour is not in violation of any of the provisions / rules. The fact that she was the sole bidder cannot be a ground in favour of the petitioner to challenge the order passed by the Appellate Tribunal. It is evident from the records produced by the petitioner that she was served with the copy of notice for e-auction dated 11.7.2013 as early as on 6.6.13 itself and in such circumstances the ground raised by the petitioner that there was no clear 30 days notice given to the petitioner as prescribed under Rule 8 of the Security Interest (Enforcement) Rules, is unsustainable. Both the Debts Recovery Tribunal and the Debts Recovery Appellate Tribunal have duly considered all the documents produced before them including the service of Sale Notice on the petitioner and rightly dismissed the application and appeal, respectively. Hence the grounds raised by the petitioner in the writ petition for challenging the well considered order of the third respondent, are

unsustainable in law. The writ petition is only to protract the proceedings and deny her from taking physical possession of the property.

(xii) The ground raised by the writ petitioner that sale notice was not affixed in the property is false and being a person residing in the adjoining house sharing wall on one side of the said property, auction purchaser also submitted that she had the knowledge about the e-auction primarily only through the sale notice, affixed on the property.

(xiii) The time of auction in the sale notice was mentioned only as "from 11.00 AM on 11.07.2013" and that she was having a close watch on the website on that particular day with a view to participate in the e-auction proceedings. Hence immediately after the portal for conducting the auction was opened on 11.07.2013, she participated in the auction and merely because there was a delay of few minutes in commencing the e-auction, after the notified time of 11:00 AM, on the notified day, the same cannot be a ground for challenging the auction sale or the sale legally concluded in her favour.

(xiv) Auction purchaser has further submitted that the property is not a residential house in occupation of the petitioner as claimed by the writ petitioner in para 13 of the affidavit. It is only a single hall without any basic amenities like water, toilet etc. and it was only let out by the petitioner as a godown for a furniture showroom until 12.06.2018. Now, as on today the property is lying vacant.

(xv) Auction purchaser has further submitted that the auction was not postponed, as averred by the petitioner in paragraph no.13 of the affidavit and that she had paid the balance amount of 75% soon after the receipt of communication from the 1st respondent bank and therefore the averments in para 13 of the supporting affidavit to the writ petition that the balance amount of 75% was not paid on time is incorrect. The petitioner has not exercised his right to redeem the property, within the period allowed by law, and has been initiating and prosecuting vexatious proceedings to deprive the auction purchaser's lawful right to take possession of property duly purchased in the auction sale conducted by the 1st respondent.

(xvi) Auction purchaser has further submitted that she is a bonafide purchaser of the property, in the e-auction conducted by the first respondent, and shelled out the hard earned money of Rs.28,00,000/-. She had purchased the property bonafide, believing that she would soon be put in physical possession of the property and that she can use the same for extending her residential house adjoining the same.

(xvii) Knowing fully well that the petitioner could not mobilise funds to clear the dues to the bank and without taking any steps towards that end, the petitioner has been unnecessarily preventing the auction purchaser for the past about five years from taking physical possession of the property.

(xviii) From the e-auction notice itself it is clear that it is not the only property of the petitioner and if he had the intention to clear the dues to the first respondent bank and redeem the property sold to the auction purchaser under e-auction dated 11.7.2013, he would have taken steps towards that end and got the property redeemed even before the issue of sale certificate in her favour. Sale certificate has already been issued in her favour and the writ petitioner does not have any legal or valid grounds to seek an order of injunction restraining the 1st respondent from executing the sale certificate in her favour.

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

9. Though several grounds have been raised, we propose to address the issue as to whether there is any violation of the requisite of 30 days clear notice to the borrower or guarantor, whose property was brought for auction. Sale notice has been issued on 06.06.2013, fixing the date of auction as 11.07.2013 between 11.00 am and 12.00 noon. Admittedly publication of the sale notice in newspapers has been made on 12.06.2013. Sale has been effected on 11.07.2013. Rule 8 and 9(1) of the Security Interest Rules, 2002, relevant for the purpose of the instant case are extracted hereunder.

8. Sale of immovable secured assets

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

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

(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 an 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 of.

(5) Before effecting sale of the immovable property referred to in sub-rule (1) of rule 9, the authorised officer shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods:--

(a) by obtaining quotations from the persons dealing with similar secured assets, or otherwise interested in buying the such assets; or

(b) by inviting tenders from the public;

(c) by holding public auction; or

(d) by private treaty.

(6) The authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5):

PROVIDED that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers; one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which shall include,--

(a) the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;

(b) the secured debt for recovery of which the property is to be sold;

(c) reserve price, below which the property may not be sold;

(d) time and place of public auction or the time after which sale by any other mode shall be completed;

(e) depositing earnest money as may be stipulated by the secured creditor;

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

(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 web-site of the secured creditor on the Internet.

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

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."

10. On the aspect as to whether the borrower / guarantor, whose property is brought for an auction should be put on a clear thirty days notice before bringing the secured asset for auction and as to whether all the three modes viz., service on the borrowers / guarantors, as the case may be, publication in the newspapers and affixture on the property should be made with a clear thirty days notice, the Hon'ble Supreme Court in Mathew Varghese's case at paragraph Nos.29 to 35, held as follows.

"29. A careful reading of sub-section (8), therefore, has to be made to appreciate the legal issue involved and the submissions made by the respective counsel on the said provision:

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

29.2. When we analyse in depth the stipulations contained in the said sub-section (8), we find that there is a valuable right recognised and asserted in favour of the borrower, who is the owner of the secured asset and who is extended an opportunity to take all efforts to stop the sale or transfer till the last minute before which the said sale or transfer is to be

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

29.3. Therefore, dehors the extent of borrowing made and whatever costs, charges were incurred by the secured creditor in respect of such borrowings, when it comes to the question of realising the dues by bringing the property entrusted with the secured creditor for sale to realise money advanced without approaching any court or tribunal, the secured creditor as a TRUSTEE cannot deal with the said property in any manner it likes and can be disposed of only in the manner prescribed in the SARFAESI Act.

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

30. Therefore, by virtue of the stipulations contained under the provisions of the SARFAESI Act, in particular, Section 13(8), any sale or transfer of a secured asset, cannot take place without duly informing the borrower of the time and date of such sale or transfer in order to enable the borrower to tender the dues of the secured creditor with all costs, charges and expenses and any such sale or transfer effected without complying with the said statutory requirement would be a constitutional violation and nullify the ultimate sale.

31. Once the said legal position is ascertained, the statutory prescription contained in Rules 8 and 9 have also got to be examined as the said Rules prescribe as to the procedure to be followed by a secured creditor while resorting to a sale after the issuance of the proceedings under Sections 13(1) to (4)

of the SARFAESI Act. Under Rule 9(1), it is prescribed that no sale of an immovable property under the Rules should take place before the expiry of 30 days from the date on which the public notice of sale is published in the newspapers as referred to in the proviso to sub-rule (6) of Rule 8 or notice of sale has been served to the borrower. Sub-rule (6) of Rule 8 again states that the authorised officer should serve to the borrower a notice of 30 days for the sale of the immovable secured assets. Reading sub-rule (6) of Rule 8 and sub-rule (1) of Rule 9 together, the service of individual notice to the borrower, specifying clear 30 days' time-gap for effecting any sale of immovable secured asset is a statutory mandate. It is also stipulated that no sale should be affected before the expiry of 30 days from the date on which the public notice of sale is published in the newspapers. Therefore, the requirement under Rule 8(6) and Rule 9(1) contemplates a clear 30 days' individual notice to the borrower and also a public notice by way of publication in the newspapers. In other words, while the publication in newspaper should provide for 30 days' clear notice, since Rule 9 (1) also states that such notice of sale is to be in accordance with the proviso to sub-rule (6) of Rule 8, 30 days' clear notice to the borrower should also be ensured as stipulated under Rule 8(6) as well. Therefore, the use of the expression "or" in Rule 9(1) should be read as "and" as that alone would be in consonance with Section 13(8) of the SARFAESI Act.

32. The other prescriptions contained in the proviso to sub-rule (6) of Rule 8 relates to the details to be set out in the newspaper publication, one of which should be in "vernacular language" with sufficient circulation in the locality by setting out the terms of the sale. While setting out the terms of the sale, it should contain the description of the immovable property to be sold, the known encumbrances of the secured creditor, the secured debt for which the property is to be sold, the reserve price below which the sale cannot be effected, the time and place of public auction or the time after which sale by any other mode would be completed, the deposit of earnest money to be made and any other details which the authorised officer considers material for a purchaser to know in order to judge the nature and value of the property.

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

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

33.2. Secondly, when such a secured asset of an immovable property is brought for sale, the intending purchasers should know the nature of the property, the extent of liability pertaining to the said property, any other encumbrances pertaining to the said property, the minimum price below which one cannot make a bid and the total liability of the borrower to the secured creditor. Since, the proviso to sub-rule (6) also mentions that any other material aspect should also be made known when effecting the publication, it would only mean that the intending purchaser should have entire details about the property brought for sale in order to rule out any possibility of the bidders later on to express ignorance about the factors connected with the asset in question.

33.3. Be that as it may, the paramount objective is to provide sufficient time and opportunity to the borrower to take all efforts to safeguard his right of ownership either by tendering the dues to the creditor before the date and time of the sale or transfer, or ensure that the secured asset derives the maximum price and no one is allowed to exploit the vulnerable situation in which the borrower is placed.

34. At this juncture, it will also be worthwhile to refer to Rules 8(1) to (3) and in particular sub-rule (3), in order to note the responsibility of the secured creditor vis-à-vis the secured asset taken possession of. Under sub-rule (1) of Rule 8, the prescribed manner in which the possession is to be taken by issuing the notice in the format in which such notice of possession is to be issued to the borrower is stipulated. Under sub-rule (2) of Rule 8 again, it is stated as to how the secured creditor should publish the notice of possession as prescribed under sub-rule (1) to be made in two leading newspapers, one of which should be in the vernacular language having sufficient circulation in the locality and also such publication should have been made seven days prior to the intention of taking possession. Sub-rule (3) of Rule 8 really casts much more onerous responsibility on the secured creditor once possession is actually taken by its

authorised officer. Under sub-rule (3) of Rule 8, the property taken possession of by the secured creditor should be kept in its custody or in the custody of a person authorised or appointed by it and it is stipulated that such person holding possession should take as much care of the property in its custody as a owner of ordinary prudence would under similar circumstances take care of such property. The underlying purport of such a requirement is to ensure that under no circumstances, the rights of the owner till such right is transferred in the manner known to law is infringed. Merely because the provisions of the SARFAESI Act and the Rules enable the secured creditor to take possession of such an immovable property belonging to the owner and also empowers to deal with it by way of sale or transfer for the purpose of realising the secured debt of the borrower, it does not mean that such wide power can be exercised arbitrarily or whimsically to the utter disadvantage of the borrower.

35. Under sub-rule (4) of Rule 8, it is further stipulated that the authorised officer should take steps for preservation and protection of secured assets and insure them if necessary till they are sold or otherwise disposed of. Sub-rule (4), governs all secured assets, movable or immovable and a further responsibility is created on the authorised officer to take steps for the preservation and protection of secured assets and for that purpose can even insure such assets, until they are sold or otherwise disposed of. Therefore, a reading of Rules 8 and 9, in particular, sub-rules (1) to (4) and (6) of Rule 8 and sub-rule (1) of Rule 9 makes it clear that simply because a secured interest in a secured asset is created by the borrower in favour of the secured creditor, the said asset in the event of the same having become a non-performing asset cannot be dealt with in a light-hearted manner by way of sale or transfer or disposed of in a casual manner or by not adhering to the prescriptions contained under the SARFAESI Act and the abovesaid Rules mentioned by us."

11. After considering the statutory provisions and decision in Narandas Karsondos Vs. S.A.Kamtam, reported in (1977) 3 SCC 247, Mardia Chemicals Ltd., Vs. Union of India, reported in (2004) 4 SCC 311, Ramkishun Vs. State of U.P., reported in (2011) 11 SCC 511 : (2013) 1 SCC (Civ.) 382 and Transcore Vs. Union of India, reported in (2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116, the Hon'ble Supreme Court, at paragraph No.43 of the

judgment in Mathew Varghese's case, has categorically held that recovery of public dues should be made expeditiously, in accordance with the procedure prescribed by law and it should not frustrate a constitutional right, as well as the human right of a person, to hold a property and in the event of a fundamental procedural error occurred in a sale, the same can be set aside. For brevity paragraph No.43 of the judgment of the Mathew's case is reproduced.

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

12. Considering the ratio decidendi in Mathew's case [cited supra], the Hon'ble Supreme Court in Vasu P. Shetty Vs. Hotel Vandana Palace and others, reported in (2014) 5 SCC 660, held as follows:

"12. We may point out, at the outset, that the opinion of the High Court on the interpretation of sub-Rules (5) and (6) of Rule 8 of the Rules is flawless. In this behalf it would be pertinent to mention that there is an imprimatur of this court as identical meaning is assigned to these provisions. In the case of Mathew Varghese v. M. Amritha Kumarr & Ors.; 2014 (2) SCALE 331. The aforesaid judgment has been followed by this very Bench of the Court in C.A. No. 3865 of 2014 titled as J. Rajiv Subramaniyan & Anr. v. M/s Pandiyas & Ors. decided on March 14, 2014, wherein the earlier referred case has been discussed in the following manner:-

"12. This Court in the case of Mathew Varghese Vs. M. Amritha Kumar & Ors. examined the procedure required to be followed by the banks or other financial institutions when the secured assets of the borrowers are sought to be sold for settlement of the dues of the banks/financial institutions. The Court examined in detail the provisions of the SARFAESI Act, 2002. The Court also examined the detailed procedure to be followed by the bank/financial institutions under the Rules, 2002. This Court took notice of Rule 8, which relates to Sale of immovable secured assets and Rule 9 which relates to time of sale, issue of sale certificate and delivery of possession etc. With regard to Section 13(1), this Court observed that Section 13(1) of SARFAESI Act, 2002 gives a free hand to the secured creditor, for the purpose of enforcing

the secured interest without the intervention of Court or Tribunal. But such enforcement should be strictly in conformity with the provisions of the SARFAESI Act, 2002. Thereafter, it is observed as follows:-

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

13. This Court in Mathew Varghese case, further observed that the provision contained in Section 13(8) of the SARFAESI Act, 2002 is specifically for the protection of the borrowers in as much as, ownership of the secured assets is a constitutional right vested in the borrowers and protected under Article 300A of the Constitution of India. Therefore, the secured creditor as a trustee of the secured asset can not deal with the same in any manner it likes and such an asset can be disposed of only in the manner prescribed in the SARFAESI Act, 2002. Therefore, the creditor should ensure that the borrower was clearly put on notice of the date and time by which either the sale or transfer will be effected in order to provide the required opportunity to the borrower to take all possible steps for retrieving his property. Such a notice is also necessary to ensure that the process of sale will ensure that the secured assets will be sold to provide maximum benefit to the borrowers. The notice is also necessary to ensure that the secured creditor or any one on its behalf is not allowed to exploit the situation by virtue of proceedings initiated under the SARFAESI Act, 2002.

14. Thereafter, in Paragraph 27, the Court observed as follows:-

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

expenses and any such sale or transfer effected without complying with the said statutory requirement would be a constitutional violation and nullify the ultimate sale."

15. As noticed above, this Court also examined Rules 8 and 9 of the Rules, 2002. On a detailed analysis of Rules 8 and 9(1), it has been held that any sale effected without complying with the same would be unconstitutional and, therefore, null and void.

13. The Hon'ble Supreme Court has declared the law that Rule 8 and 9 of the Security Interest Rules, 2002, are mandatory and that there should be a clear gap of 30 days notice, when property of the borrower / guarantor, as the case may be, is brought for auction and all the three modes viz., service on the borrowers / guarantors, publication in newspapers and affixture on the property, should be made with a gap of thirty days notice to the borrower / guarantor, as the case may be.

14. Reverting to the case on hand, there is no clear 30 days notice from the date of publication. At the risk of repetition, sale notice was dated 06.06.2013. Publication was on 12.06.2013 and sale had been effected on 11.07.2013, evidencing thereby that there was no 30 days notice as between publication and sale.

15. Though, by inviting the attention of this Court, to paragraph Nos.67 & 68 of the judgment of the Hon'ble Supreme Court in Mathew Varghese's case, Mr.F.B.Benjamin George, learned counsel for the bank submitted that ultimately, in the above reported case, the Hon'ble Supreme Court was not inclined to set aside the sale, on the facts and circumstances of the instance case, we are not in agreement with the said submission.

16. Though the learned counsel for the bank also submitted that sale certificate had already been issued, interest of the auction purchaser should be protected and on the same lines, Mrs.PV.Rajeswari, learned counsel for the auction purchaser / 2nd respondent made submissions, we are not inclined to accept the said contentions, for the reason that when the Hon'ble Supreme Court has laid down the law declaring that Rule 8 and 9 of the Security Interest Rules, 2002 as mandatory, then the declaration of law binds this Court.

17. When violation of law, is substantiated, then Courts have to give effect to the law declared by the Hon'ble Supreme Court. As regards, protection of the right, said to have been created by the issuance of sale certificate, grievance of the auction purchaser can always be redressed by refund of the auction amount with reasonable interest and the cost of registration, incurred.

18. In *Ambalavanan Vs. Canara Bank*, [Review Application (writ) No.302 of 2015], dated 01.04.2016, a Hon'ble Division Bench of this Court considered the question of awarding interest to the auction purchaser. Following the same, a Hon'ble Division Bench of this Court in W.P.No.39199 of 2016 dated 28.04.2017 awarded 10% interest on the amount paid by the auction purchaser. Following the same, we direct the respondent bank to refund a sum of Rs.28 Lakhs, received as bid amount, for the purchase of the property with 10% per annum simple interest from the date of deposit, till refund, to the auction purchaser, within a period of two weeks from the date of receipt of a copy of this order.

19. Insofar as the Registration charges incurred by the auction purchaser is concerned, we direct the petitioner / borrower to pay a sum of Rs.2,24,200/- to the auction purchaser / 2nd respondent, within a period of two weeks from the date of receipt of a copy of this order.

20. Impugned orders made in SA No.198 of 2013 dated 16.01.2014- and RA (SA) No.104 of 2014 dated 27.03.2018, are set aside. Consequent to the same, if the original documents pertaining to the subject property, were already handed over to the auction purchaser, following the issuance of sale certificate, no sooner the bank refunds the amount to the auction purchaser and the registration charges, as directed, auction purchaser is directed to return all the original documents, to the bank within a period of two weeks, thereafter.

21. Record of proceedings shows that submission was made before the Debts Recovery Appellate Tribunal, that after the issuance of 13(2) notice, for Rs.27,30,334/- a sum of Rs.10.85 Lakhs has been paid by the borrower to the bank.

22. Record of proceedings dated 28.03.2014 in IA No.143 of 2014 (waiver application) in RA (SA) No.104 of 2014, further shows that a sum of Rs.2,80,167/- has been directed to be deposited with the Registrar of DRAT before 25.04.2014 and that the said amount has also been deposited. Since 11 years has elapsed, from the date of availing loan and having regard to the deposit already made / paid to the bank, it is open to both parties to negotiate and arrive at an amicable settlement. Above observation does not foreclose the right of the bank to take appropriate proceedings for realisation of the due.

23. With the above directions and observations, the instant writ petition is allowed. No Costs. Consequently, the connected writ miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

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To

1. The Authorised Officer,
Indian Overseas Bank,
Regional Office,
13/25, Registrar Periasamy Street,
Veerasamy Nagar, Sankaran Palayam,
Vellore - 632 001.
2. Debts Recovery Appellant Tribunal,
4th Floor, Indian Bank Circle Office,
55, Ethiraj Salai,
Chennai.

+2cc to Mr. Antony Selvam, Advocate Sr.41273 & 40770
+1cc to Mr. F.B. Benjamin George, Advocate Sr.40308
+1cc to Ms. P.V. Rajeswari, Advocate Sr.40286

W.P.No.8206 of 2018
and
WMP No.10174 of 2018

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