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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 01.10.2018

CORAM

THE HON'BLE MR.JUSTICE S.MANI KUMAR
&
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.P.No.21791 of 2017
and
W.M.P.No.22803 of 2017

A.Abdul Salam

... Petitioner

Vs.

1. M/s.South Indian Bank Ltd.,
Chinnakada Branch,
Bishop Jerome Nagar,
Commercial Complex,
Chinnakakada,
Kollam Rep. by its Branch Manager.
2. The Authorised Officer and Chief Manager,
M/s.South Indian Bank Ltd.,
Regional office,
Thiruvananthapuram.
3. M/s.Prasanthi Cashew Pvt. Ltd.,
No.21, Prasanthi Nagar,
Mangad, Kollam - 691 015.

... Respondents

Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for the records relating to order dated 02.08.2017 in RA(SA).No.50 of 2014 on the file of the Debts Recovery Appellate Tribunal, Chennai, confirming the order dated 15.01.2014 in S.A.No.272 of 2011 on the file of the Debts Recovery Tribunal, Ernakulam, quash the same and consequently to cancel the sale dated 19.08.2011 held in favour of the 3rd respondent and restore possession of the property mentioned in the schedule to the petitioner.

For Petitioner : Mr.F.B.Benjamin George

For Respondents : Mr.M.Arunkumar

For R1 & R2

Mr.P.Vasanthakumarvisweswaran

For R3



ORDER

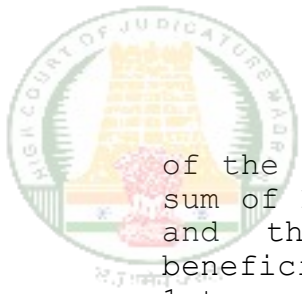
(Order of the Court was made by V.BHAVANI SUBBAROYAN)

The Writ Petition has been filed to call for the records relating to order dated 02.08.2017 in RA(SA).No.50 of 2014 on the file of the Debts Recovery Appellate Tribunal, Chennai, confirming the order dated 15.01.2014 in S.A.No.272 of 2011 on the file of the Debts Recovery Tribunal, Ernakulam, and to quash the same, and consequently to cancel the sale dated 19.08.2011 held in favour of the 3rd respondent and to restore possession of the property mentioned in the schedule to the petitioner.

2. The petitioner herein has come before this Court by claiming that he is a partner of the firm, namely, M/s.Kaikkara Construction Company which is engaged in the business of execution of public works under the Government of Kerala on contract basis. The other partner of the firm is his wife Smt.Juvairy Salam. The petitioner claims that when he was need a fund for his business purposes during the year 1998, he availed a loan for a limit of Rs.50 lakhs from the 1st respondent. Subsequently, the said limit was enhanced periodically upto 7 crores based on the requirements of the petitioner's firm. Apart from this, the petitioner firm had also availed a term loan of Rs.1.5 crores from the 1st respondent during the year 2006. As per the request of the firm, the 1st respondent bank had issued bank guarantee to an extent of Rs.3.7 crores. The petitioner had claimed that they had been doing the business transactions for the past 20 years and was permitted to pay the interest charges, by which, loan of Rs.10 crores has been remitted by the petitioner firm to the 1st respondent by way of interest and charges alone.

3. The petitioner who had taken contracts from the State Government of Kerala, due to unforeseen situation and circumstances, could not secure sufficient work to run the business which made the petitioner to seek for arbitration between the petitioner and State Government of Kerala, for claiming compensation for the work done by the petitioner. The petitioner's firm in the year 2008 could not service the interest in the overdraft account and pay the installments in the term loan account paving way to the 1st respondent to classify the loan account as NPA.

4. After declaration of the loan account as NPA, the 2nd respondent, being the Authorised Officer of the 1st respondent, initiated proceedings under SARFAESI Act, 2002, and issued a notice on 18.07.2008 demanding payment for a sum of Rs.9,97,56,589.91 within 60 days. The petitioner claims that on receipt of the demand notice under Section 13(2) of the SARFAESI Act, he remitted a sum of Rs.1,33,01,736/- in Cash Credit account



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of the 1st respondent. Meanwhile, the bank guarantee for a total sum of Rs.2,93,16,736/- issued by the 1st respondent got expired and the same was not requested to be renewed by the beneficiaries. In the result, the bank guarantee issued by the 1st respondent got reduced to Rs.77,47,300/- thus, reducing the liability of the firm considerably.

5. The petitioner claims that admittedly, after issuance of the demand notice dated 18.07.2008 under the SARFAESI Act, 2002, the petitioner firm paid a total sum of Rs.2,26,86,180/- to the 1st respondent. Claiming to have paid a substantial amount, the petitioner requested the 1st respondent to settle the account under one time settlement, which the 1st respondent rejected by its letter dated 19.01.2009. Left with no other alternative, the petitioner requested the 1st respondent to release some of the secured assets to enable him to sell the same and to liquidate the dues. The petitioner has offered 55 items of properties as security to the 1st respondent while availing the loan.

6. The petitioner has contended that out of the 55 items of properties, few items of properties were released by the 1st respondent and the petitioner has paid 2 Crores by selling the same. However, the 1st respondent did not cooperate to sell some other properties to enable the petitioner to mobilize the funds, so as to settle the dues of the petitioner. The petitioner would also contend that the 1st respondent filed an Original Application No.212 of 2009 dated 18.05.2009 before the DRT, Ernakulam, under RDBB & FI Act claiming to recover a sum of Rs.9,17,52,019.33, thus, abandoning the proceedings initiated under SARFAESI Act, 2002.

7. The petitioner has further contended that having found that the amount claimed by the bank was highly inflated, he had requested the bank to reconcile the account and give the correct figures to enable him to pay the dues. At no point of time, the petitioner has denied the borrowing and the consequential liability. The petitioner requested the bank for sometime, for making the payment, as he had held some negotiation with prospective buyers for the sale of immovable property owned by him, to pay the dues of the first respondent.

8. The petitioner would further contend that pallelly arbitration proceedings were also initiated as against State Government of Kerala, wherein, a decision was rendered in his favour and that he was awarded Rs.4 crores with accrued interest, which the petitioner claims sufficient to satisfy the amount due to the first respondent.

9. The petitioner has further contended that the demand notice under Section 13(2) was for a sum of Rs.9,97,56,509.91 as against the secured assets as assessed and approved by the bank



which was more than Rs.25 Crores. The petitioner would further contend that even before issuing Section 13(4) notice, the first respondent has invoked the provision of Section 14 of the SARFAESI Act, 2002, and obtained an order of 12.08.2009 for taking physical possession of the secured assets.

10. The petitioner also claims that the order was obtained from the learned Chief Judicial Magistrate who has no Jurisdiction to pass such orders which included the residential properties of the petitioner. Hence, the petitioner has approached the High Court of Kerala by way of Writ Petition, which was later on came to be disposed of.

11. The petitioner would further contend that long after taking physical possession under Section 14, the respondents 1 and 2 had issued notice under Section 13(4) of the SARFAESI Act, 2002, only on 17.03.2011 and 18.03.2011 respectively and taken symbolic possession of the some of the properties which were mortgaged. This notice under Section 13(4) of the SARFAESI Act, 2002 came to be challenged by the petitioner before the DRT at Ernakulam on 27.04.2011 by filing SA.No.272 of 2011, in which, a conditional order of stay was granted. Since the petitioner's entire assets were mortgaged with the first respondent bank, he could not comply the conditional order in full, as the bank did not co-operate to release the assets to mobilise the funds.

12. The petitioner would further contend that during the pendency of OA.No.212 of 2009 and SA.No.272 of 2011, the first and second respondent issued a sale notice dated 02.07.2011, thereby, bringing some of the secured assets for sale, fixing auction date as 18.01.2007 claiming the dues as Rs.12,06,78,97,62.

13. Under these circumstances, the petitioner had no other alternative except to file a SARFAESI application S.A.No.272 of 2011 before the DRT at Ernakulam, in which, the petitioner expressed his rediness to pay a sum of Rs.60,00,000/- to show his bonafide. Meanwhile, the first respondent has already filed O.A.No.212 of 2009 under RDDBFI Act, 1993, for recovery of Rs.9,115,219.33. The petitioner disputed the claim on the grounds that the first and second respondent has reconciled their accounts, realised amounts, and therefore, the claim made by the bank is erroneous. The first respondent filed an application in IA.No.320 of 2011 on 04.12.2011 before the DRT at Ernakulam praying to reduce the claim amount from Rs.9,17,52,019.33 to Rs.7,68,13,139.33 and the petition was allowed on 27.11.2007.

14. The petitioner would further contend that even the reduced the amount from Rs.9,17,52,019.33 to Rs.7,68,13,139.33 is also incorrect, as the amount to be paid by the petitioner firm will be lesser than that amount. Despite there being an



discrepancy, the petitioner seems to have submitted to a decree before the DRT, praying to fix the pendent-lite and post-lite interest at reasonable rate, however, no order was passed in the memo. On 17.08.2011 in Second Appeal filed by the petitioner in SA.No.272 of 2011, the Tribunal in Ernakulam has passed a conditional order in a stay petition directing the petitioner to pay a sum of Rs.1,50 lakh on or before 18.02.2011 that is the next day at 05.00 pm, and another sum of Rs.1,50 lakhs on or before 03.09.2007. Since the petitioner could not comply with the said order, the first and second respondents have proceeded with the proposed sale auction on 19.08.2011 and they were claiming that the third respondent was declared as a successful bidder for 15 crores in respect of one item of property alone, as against the upset price of Rs.10 crores and 10 lakhs.

15. The petitioner would further contend that the interim conditional order dated 17.08.2011 in IA.No.1735 of 2011 in SA.No.272 of 2011 was initially challenged by the petitioner before the DRAT by way of appeal, in MA.(SA).No.740 of 2011, in which, the Appellate Tribunal passed an order on 11.10.2011 directing the DRT to determine the liability of O.A.No.212 of 2009 on the statement filed by the petitioner submitting to a decree and stay the SARFAESI proceedings till the disposal of the OA before the Tribunal at Ernakulam. The order passed by the Appellate Tribunal, was challenged by the respondent before the High Court of Kerala at Ernakulam by way of Writ Petition, in, W.P.No.3545 of 2011 and the same came to be allowed on 25.07.2011 remitting the matter back to the DRAT to reconsider the decision dated 11.10.2011. In the meanwhile, DRT, by order dated 14.11.2011 passed the final order, in Original Application No.212 of 2009 filed by the first respondent, thereby, determined the liability at Rs.7,83,13,13.30 together with pendent-lite and post-lite interest, at the rate of 12% per annum.

16. After the remand order passed by the High Court of Kerala, Ernakulam, the Appellate Tribunal passed an order under the 3rd proviso to Section 18 of SARFAESI Act on 08.12.2011 and directed the petitioner to deposit a sum of Rs.2,52,94,656. This order was also challenged by the petitioner and also by the respondent by way of filing Writ Petitions before the High Court of Kerala. The High Court of Kerala dismissed the Writ Petitions filed by the petitioner and allowed the Writ Petition filed by the respondents.

17. The petitioner would further submit that the order passed by the Honourable High Court of Kerala, was challenged by the petitioner in Supreme Court in SLP.Nos.9376, 9377, 9378 of 2012 and the Honourable Supreme Court, by order dated 02.04.2012 passed the following orders:

"i. Having heard the learned senior counsel appearing for the as also for respondent 1, who is on



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caveat, we are of the view that instead of going into the merits of the impugned Judgment, it would be proper and expedient to dispose of the petition with a direction to the Debts Recovery Tribunal at Ernakulam to dispose of S.A.No.272 of 2011 on merits, without insisting on its order of pre-deposit dated 17th August, 2011 as expeditiously as practicable and in any case, not later than 3 months from the date of receipt of a copy of this order. It is goes without saying that it will be open to the parties before the Tribunal to urge all the contentions as may be available to them in accordance with law."

18. The petitioner would contend that the effect of order passed by the Honourable Supreme Court is, in a way wiping out of the conditional order of DRT dated 17.08.2011, due to non compliance of which, the alleged sale was held and therefore, in view of the orders passed by the Supreme Court, the said sale dated 19.08.2011 has become non-est in law. In between 13.12.2011, the DRT permitted the first respondent to appropriate the sale proceeds to its liquidation of dues and that such appropriation is subject to outcome of SARFAESI application.

19. The petitioner would also contend during the pendency of SARFAESI application, on 08.04.2013 he has remitted a sum of Rs.11,03,05,900 as determined by DRT in OA dated 02.07.2009. It is contended by the petitioner that as directed by the Hon'ble Supreme Court, the S.A.No.272 of 2011 was not disposed of within a period of 3 months, which made the petitioner to approach the Hon'ble Supreme Court once again and after the direction, the DRT took the main application itself for final hearing and passed final order on 15.01.2018 that is after just 5 days before the superannuation of the presiding officer. However, the order dated 15.01.2014 was made ready and delivered only on 24.02.2014. The DRT have also disposed of two other applications in IA.No.2136 of 2011 filed for production of statement of account and another IA.No.2137 of 2011 for production of the entire file pertaining to the impugned sale proceedings which were also dismissed without assigning any reasons, along with the SA.272 of 2011 itself and also held that the petitioner has got no right to redeem the property sold at the stage that the first and second respondent bank have taken impugned action under the act in accordance with law only.

20. The petitioner would further contend that he challenged the order dated 15.01.2014 made in S.A.No.272 of 2011, by filing an appeal in RA(SA).No.50 of 2014 before DRAT at Chennai, who initially granted an order of interim injunction restraining the third respondent herein from creating any encumbrance over the petitioner's property sold under the SARFAESI Act which



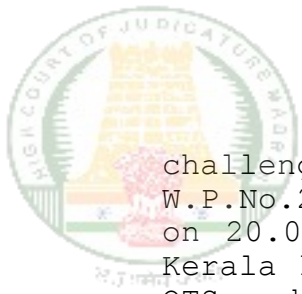
periodically came to be extended and later, confirmed by this Court in the Writ Petition filed by the third respondent herein and the petitioner in W.P.No.28232 of 2014 and W.P.No.35156 of 2014 respectively. Thereafter, DRAT took up the appeal for arguments and after hearing the counsel on both sides on 14.04.2017 and 12.07.2017, dismissed the appeal on 02.08.2017, confirming the order dated 15.01.2014 passed by DRT, Ernakulam. As against the said order, the present Writ Petition has been filed by the petitioner on various grounds.

21. Denying the averments made in the Writ Petition filed by the petitioner, the 1st and 2nd respondents/bank have filed a counter, wherein, it has been contended that 55 items of immovable properties were given as security, for the business transactions between the petitioner and the first and second respondents, and the petitioner firm committed default in repayment of amount due to the bank, and the account become highly irregular and hence, the petitioner's account was classified as NPA as on 30.06.2008. As on the date of classification, the amount due to the respondent bank were (i) Overdraft limit of Rs.700 lakhs (ii) FSL (Flexi) loan of Rs.14 lakhs and (iii) FSL loan of Rs.150 lakhs. Further, bank guarantee No.10/2005 dated 31.08.2005 for Rs.77.47 lakhs issued in favour of Superintendent Engineer, Central Circle, under the BG limit was also outstanding with the liability being not crystallized as on the date.

22. The respondent bank would also contend that the second respondent as an Authorised Officer, issued a notice under Section 13(2) of the SARFAESI Act on 18.07.2008, which came to be challenged by the petitioner in W.P.No.33745 of 2008 before the Honourable High Court of Kerala, Ernakulam, and the High Court disposed of the same, by order dated 20.11.2008, directing the Chief General Manager of the respondent bank, to look into the request made by the petitioner and take a decision thereon, in accordance with law, within a period of two weeks from the date of receipt of a copy of the Judgment.

23. The respondent bank would further contend that the petitioner has filed W.P.No.1053 of 2009 before the High Court of Kerala on 31.12.2008, seeking for a direction, to consider his representation dated 29.12.2008. By order dated 16.01.2009, the High Court of Kerala, directed the respondent bank to reconsider the request for restructuring of the credit facility. Pursuant to the order of the Honourable High Court of Kerala, the respondent bank, examined the representation of the petitioner, and rejected the petitioner's request on 19.01.2009 for one time settlement, as the offer was very low and the time frame stipulated by the petitioner was too long.

24. Furthermore, the respondent bank would contend that



challenging the letter dated 19.01.2009, the petitioner filed W.P.No.2251 of 2009 before the Honourable High Court of Kerala, on 20.01.2009. By an order dated 03.02.2009, The High Court of Kerala held that the Court cannot compel the bank to accept the OTS and further held that Section 13(13) of the SARFAESI Act is an enabling provision empowering a secured creditor to release the properties. Moreover, it was held that the stand taken by the respondent bank, the challenge to letter dated 19.01.2009 of the bank, rejecting the OTS offer, need not be entertained and accordingly, the Writ Petition was disposed of. In the meantime, the respondent bank has also filed OA.No.212 of 2009 against the petitioner company for recovery of a sum of Rs.9,17,52,019.33 due as on date of filing the O.A., together with further interest and cost.

25. The respondent bank would also contend that the petitioner has filed W.P.No.18325 of 2009 before the Honourable High Court of Kerala, on 23.06.2009, seeking for a direction to the respondent bank, to permit the petitioner to sell the properties i.e. items nos.8, 51 and 54, as requested in his representation, within a time limit prescribed by the Court. By order dated 07.07.2009, the Honourable High Court of Kerala, permitted the petitioner to clear the entire liability. Accordingly, the petitioner was also directed to pay a sum of Rs.15 lakhs on or before 31.07.2009 and further sum of Rs.10 lakhs on or before 30.08.2009 and the balance amount of Rs.1.06 crores on or before 30.08.2009. On payment of the said amount, the respondent bank was directed to release the said 3 items of properties, without any encumbrance, so as to enable the petitioner to have private sale and to raise further amount to discharge his liability to the bank. To that effect, an undertaking was also given by both the petitioner and the respondent bank and accordingly, the Writ Petition was disposed of.

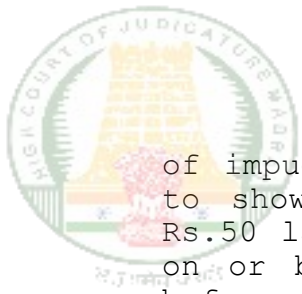
26. The respondent bank would further contend that petitioner has also filed W.P.No.20533 of 2009 before the Honourable High Court of Kerala, seeking for a direction, commanding the respondent bank to refrain from the proceedings initiated under the SARFAESI Act, 2002, against the residential property of the petitioner, as it was unjust, arbitrary, unfair and vitiated by malafides. By order dated 29.07.2009, the Honourable High Court of Kerala, disposed of the said Writ Petition, by recording the submission made by the learned counsel for the petitioner that they have no objection for the bank proceedings against any of the secured asset, excluding the residential properties and the 3 items covered in the representation, submitted by the petitioner and that the petitioner was ready and willing to surrender the other properties, as and when required. Subsequently, the petitioner remitted a sum of Rs.2,26,00,180/- on various dates and the



schedule item nos 2,3, 46 to 54 in O.A.No.212 of 2009 were released from the bank's charge. Thereafter, on 04.02.2011, the respondent bank filed IA.No.320 of 2011 in OA.No.212 of 2009 to carry out amendments in the O.A. on account of the subsequent developments after the date of filing the OA. Thus, the claim amount of Rs.9,17,52,019.33 was amended to Rs.7,68,13,139.33 duly accounting the part amount received and the liability arising out of the invocation of bank guarantee. Further, the respondent bank has released the charge against the immovable properties shown as item nos.2, 3, 46 to 54 of the O.A., as withdrawn.

27. The respondent bank would further contend that challenging the order of the learned Cheif Judicial Magistrate, Thiruvananthapuram, passed in CMP.No.2507 of 2009 dated 05.10.2009, the petitioner has filed Writ Petition in W.P.No.29172 of 2009 before the Honourable High Court of Kerala, Ernakulam. By an order dated 20.10.2009, the Honourable High Court of Kerala, Ernakulam, granted interim stay against the operation of the order of learned Cheif Judicial Magistrate, Thiruvananthapuram, for a period of one month, making it clear that the respondent bank is free to publish notice taking over possession and conduct sale with respect to all the secured assets except the two residential properties referred in the Judgment in W.P.No.20533 of 2009. Further, on 05.11.2009, the Honourable High Court of Kerala, modified the interim order dated 20.10.2009 to the extent, permitting the respondent bank to publish their notice for taking over possession under Section 13(4), with respect to the remaining secured assets, including the two residential properties referred to above. But it was made clear that the actual dispossession of the petitioner or sale of the two items of residential properties referred to above, shall be kept in abeyance until further orders. Further, the petitioner was also directed to make payment of the balance amount of Rs.40 lakhs, as stipulated in the Judgment in W.P.No.20533 of 2009 within a period of two months from the date of receipt of a copy of the order.

28. The respondent bank would also contend that the Honourable High Court of Kerala, has neither barred the respondent bank from taking possession of all the properties, nor declared the proceedings initiated as illegal. Hence, the second respondent has taken symbolic possession of the properties on 17.03.2011 and 18.03.2011 and issued a sale of proclamation for three items of properties by way of public auction on 19.08.2011. The possession notices dated 17.03.2011 and 18.03.2011, were challenged by the petitioner on 27.04.2011 in S.A.No.272 of 2011 before the DRT-I, Ernakulam, claiming various prayers which includes to declare the possession notice, as null and void. By an order 09.05.2011, The DRT-I, Ernakulam, directed the bank "to maintain status quo as of date in respect



of impugned proceedings, subject to the condition that in order to show his bonafide, the petitioner shall deposit a sum of Rs.50 lakhs on or before 11.06.2011, another sum of Rs.50 lakhs on or before 11.07.2011 and further sum of Rs.50 lakhs on or before 11.08.2011, to be appropriated by the respondent bank to the credit of the petitioner's dues recoverable under the impugned auction. The DRT-I also directed that, upon remittances of further sums, the respondent bank may also consider releasing securities of its worth". The said order of the DRT-I dated 09.05.2011, was not complied with by the petitioner, hence, the respondent bank issued a sale notice dated 02.07.2011 for sale of three items of properties to recover a sum of Rs.12,06,78,097.62 and the sale was fixed on 19.08.2011 at 12.00 noon which came to be published in English and vernacular daily namely, "The Hindu" and "Malayala Manorama" on 03.07.2011.

29. Moreover, the respondent bank would contend that on 17.08.2011, the petitioner filed an advance hearing petition and a memo, withdrawing the contentions taken in the O.A., contending that they have no objections in allowing the O.A.No.212 of 2009 and prayed for a pendent-lite and post-lite interest at a reasonable rate. In I.A.No.1735 of 2011 in S.A.No.272 of 2011 filed by the petitioner on 12.08.2011, by order dated 17.08.2011, DRT-I, Ernakulam, granted interim stay on condition that the petitioner shall deposit a sum of Rs.1.50 crores on or before 19.08.2011 and further sum of Rs.1.50 crores on or before 03.09.2011. Further, it was made clear that if the petitioner failed to remit the above said amount, the respondent bank is at liberty to proceed with any further action (including the auction sale as scheduled) in accordance with law. Despite the said order, the petitioner has not paid any amount, hence, the respondent bank sold one item of properties mentioned in the schedule, to the third respondent herein, who is the successful bidder, namely, M/s.Prasanthi Cashew Private Limited and the total bid amount was Rs.15 crores as against the reserved price of Rs.10.10 crores.

30. The respondent bank would further contend that the third respondent herein, being a successful bidder, had deposited 25% of the bid amount on 19.08.2011 at Kollam branch of the respondent bank, by way of DD.No.000365 dated 18.08.2011 for a sum of Rs.1 crore 1 lakh and DD.No.000371 dated 19.08.2011 for a sum of Rs.2 crores 74 lakhs, both drawn on IDBI bank. The balance 75% of the bid amount i.e. Rs.11,25,00,000/- was paid by the third respondent on 02.09.2011, by way of DD.No.124656 dated 02.09.2011.

31. Challenging the sale conducted by the respondent bank, the petitioner has filed W.P.No.22667 of 2011 before the High Court of Kerala, Ernakulam, which came to be dismissed on



19.08.2011, for the reason that the petitioner did not comply with the condition stipulated by the Tribunal. Thereafter, the respondent bank initiated action under Section 14 by filing an application before the learned Chief Judicial Magistrate, Kollam. Meanwhile, O.A.No.212 of 2009 filed by the respondent bank along with two interim applications, were taken up for disposal and the respondent bank was directed, not to appropriate the sale proceeds towards the dues awaiting the final order. But the sale process under the SARFAESI Act, was not interfered with.

32. In addition to the above, the respondent bank would contend that the order passed in O.A.No.212 of 2009 dated 02.09.2011, was challenged by the petitioner on 11.10.2011 in AIR.(SA).No.740 of 2011 along with four interlocutory applications, before the DRAT, Chennai. In the said appeal, the DRAT was pleased to restrain the Authorized Officer from in any way proceeding further under the provisions of SARFAESI Act, in any manner including the taking of physical possession of the secured asset, awaiting final orders in OA.No.212 of 2009. This order was challenged by the respondent bank and the auction purchaser in O.P.(DRT).No.3472 of 2011 and 3545 of 2011, before the Honourable High Court of Kerala. In the meanwhile, on 14.11.2011, DRT-I, Ernakulam, passed a final order in O.A.No.212 of 2009, allowing the bank to recover the O.A. amount with simple interest at 12% per annum. On 25.11.2011, the Honourable High Court of Kerala, had disposed of O.P.(DRT).No.3472 of 2011 and 3545 filed by the respondent bank and the auction purchaser, with a direction to the DRAT to pass fresh orders in the matter, after considering the question as to whether the borrower is bound to make pre-deposit as per Section 18 and if so to what extent.

33. The respondent bank would further contend that on 08.12.2011, the petitioner has filed IA.No.1495 of 2011 before the DRAT, Chennai, seeking to advance the posting of AIR.(SA).No.740 of 2011 and IA's. Accordingly, DRAT, heard the IA's on 08.12.2011 and directed the petitioner to deposit a sum of Rs.2,52,99,656/- into the Tribunal on or before 14.02.2012, restraining the Authorised Officer to proceed further under SARFAESI till 14.02.2012. Aggrieved by the said order, on 15.02.2012, the respondent bank and the auction purchaser filed fresh O.P.(DRT).No.4281 of 2011 and 4296 of 2011 respectively, before the High Court of Kerala. The petitioner also challenged the above DRAT order imposing pre-deposit of a sum of Rs.2,52,99,656/- by filing O.P.(DRT).No.455 of 2012. The applications filed by the respondent bank and the auction purchaser were allowed, and the application of the petitioner was dismissed by Honourable High Court, vide common order dated 15.02.2012. Again on 24.02.2012, an amount of Rs.10,06,50,121/- out of the sale proceeds of Rs.15 crores was appropriated

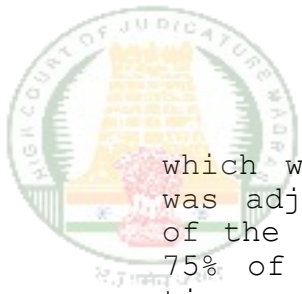


towards the amount due to the bank. The balance amount of Rs.4,93,49,879/- available with the respondent bank, after adjusting the debt due, was forwarded to the borrower account by way of DD.No.370174 dated 24.02.2012 drawn on the South Indian Bank Limited, Thiruvananthapuram Main branch, but, the borrower did not accept the same and returned the DD on 06.03.2012. On 05.03.2012, physical possession of the property was delivered to the third respondent/auction purchaser and the sale certificate issued in his favour was registered before the Sub Registrar, Kundara on 12.03.2012 and numbered as 1247/2012.

34. Aggrieved by the same, the petitioner has filed Special Leave Petition in Civil Nos.9376-9378 of 2012 before the Honourable Supreme Court, against the order of the Honorable High Court of Kerala, in O.P.(DRT).No.4281 of 2011 and 4296 of 2011 and OP.No.455 of 2012 was heard and disposed of by the Honourable Supreme Court, directing the DRT to dispose of the pending S.A.No.272 of 2011 on merits, without insisting on any pre-deposit dated 17.08.2011, within a period of 3 months from the date of receipt of a copy of the order.

35. On 08.04.2013, during the pendency of S.A.No.272 of 2011, the petitioner deposited an amount of Rs.11.4 crores towards the debt due to the respondent bank, but, the bank did not accept the same, as the entire dues have already been discharged, through the sale of secured assets in auction under the SARFAESI Act. Moreover, the sale of secured asset was concluded and was also registered in favour of the auction purchaser in Sale Certificate No.1247/2012 dated 12.03.2012. Since the respondent bank has not accepted the amount of Rs.11.4 crores, the petitioner, further deposited a sum of Rs.11.3 crores in DRT, and the balance sale proceeds of Rs.4,93,49,879/- was left with the bank and the borrower has not taken the same. Thereafter, on 15.01.2014, the DRT dismissed the SA.No.272 of 2011 filed by the petitioner. Challenging the same, the petitioner filed R.A.(SA).No.50 of 2014 which was also dismissed by DRAT, Chennai, on 02.08.2017. Hence, the petitioner has filed the present Writ Petition, to quash the order dated 02.08.2017 passed in R.A.(SA).No.50 of 2014 and to cancel the sale dated 19.08.2011 held in favour of the 3rd respondent/auction purchaser and further to restore possession of the property mentioned in the schedule to him. Thus, the respondent bank has refuted the averments of the petitioner in the counter filed by them.

36. The third respondent/auction purchaser has also filed a counter, wherein, he claims that the land admeasuring about 9 Hectares, 87 Ares and 65 Sq.mts comprised in R.S.No.622, 624 of 2010, 624 of 2011, 646 of 2017 and 646 of 2018 at Perinadu Village, Kollam Taluk, Kollam District, Kerala, mortgaged by the petitioner with the respondent bank, was brought for auction



which was held on 19.08.2011. He participated in the same and was adjudged as the successful bidder. Thereafter, he paid 25% of the bid amount on the date of auction itself and the balance 75% of the amount was paid on 02.09.2011 i.e. within 15 days time as stipulated in the terms and conditions of auction. Further, sale certificate was also issued in favour the auction purchaser on 06.09.2011.

37. The third respondent, further claims that he was put in physical possession of the property on 05.03.2012 and the sale certificate was registered on 12.03.2012 as Document No.1247 of 2012 at Sub Registrar Office, Kundara, Kerala and as such he is in exclusive occupation and enjoyment of possession of the said land as a rightful owner, as on the date of filing this counter statement.

38. The third respondent would further contend that by order dated 10.04.2012, he was made as a party defendant in SA.No.272 of 2011 filed by the petitioner in I.A.No.753 of 2012 as a necessary party, as he was a successful bidder and auction purchaser of one of the properties of the petitioner secured from the first and second respondents. Hence, substantiating his right over the property which was purchased through the auction dated 19.08.2011, the third respondent rebutted the averments set out by the petitioner in his affidavit filed in support of the Writ Petition. The third respondent has contended that the second respondent issued a sale notice dated 02.07.2011 fixing the date of sale for auction on 19.08.2011 with respect to 3 items of properties including the property which is the subject matter of this Writ Petition. The said sale notice was affixed on the property to be auctioned and a panchnama dated 04.07.2011 in proof of the same was also filed. Further, the sale notice was published in reputed newspapers, namely, "The Hindu" and "Malayala Manorama" on 03.07.2011.

39. The third respondent would also claim that the respondent bank has sent the aforesaid sale notice by registered post to the petitioner and the same was received by him on 04.07.2011, thereby, the respondent bank has completed all the statutory requirements under SARFAESI Rules for sale of property by auction. The amount claimed by the respondent bank from the petitioner firm was Rs.12,06,78,090.62/- which was due and payable by the petitioner as on 30.06.2011.

40. The third respondent further states that the petitioner has filed IA.No.1735 of 2011 on 12.08.2011 before DRT, Ernakulam in SA.No.272 of 2011, praying to stay the sale notice dated 02.07.2011. By order dated 17.08.2011, DRT, Ernakulam, passed a conditional order which was not complied with by the petitioner. Instead, challenging the sale notice dated 02.07.2011, the petitioner filed W.P.No.22667 of 2011 before the Honourable High

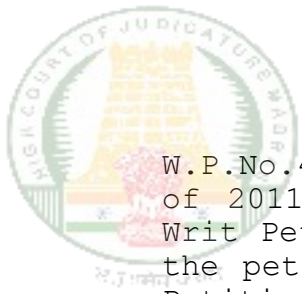


Court of Kerala, raising various grounds other than that was raised in the above said I.A.No.1735 of 2011. The said Writ Petition was dismissed on 19.08.2011, on which date, the sale was conducted and the auction was confirmed to the auction purchaser by the respondent bank. In fact, the third respondent has also made averments with regard to OA.No.212 of 2009 filed by the second respondent before the Tribunal at Ernakulam for recovery of a total sum of Rs.7,68,13,139.33, wherein, the interest was fixed at 19% with monthly rests, to which, the petitioner has submitted that they have no objection in allowing the Original Application, fixing the pendent-lite and post-lite interest at a reasonable rate.

41. The third respondent further states that having admitted the liability before the DRT, Ernakulam, the petitioner cannot question the auction sale before the Tribunal, that too, after the right, title, possession and ownership having been vested absolutely with the third respondent. Further, the third respondent would states that the petitioner has filed an Appeal in AIR(S.A).No.740 of 2011, challenging the order made in I.A.No.1735 of 2011 in S.A.No.272 of 2011, wherein, the petitioner has filed four Interlocutory Applications in I.A.Nos.1106,1107,1108,1109 of 2011, seeking waiver of pre-deposit, stay of further proceedings and to record the payment already made by him as sufficient compliance towards deposit under the proviso to Section 18(1) of the Act.

42. Furthermore, the third respondent would state that the Debt Recovery Appellate Tribunal, Chennai, by order dated 11.10.2011, passed an order in I.A.No.1106 of 2011 in AIR(S.A).No.740 of 2011, restraining the second respondent from in any way proceeding further under the proviso of SARFAESI Act in any manner, including taking physical possession of the secured assets until further orders. This order came to be challenged by the second respondent bank in W.P.No.3472 of 2011 and the third respondent in W.P.No.3545 of 2011 before the Honourable High Court of Kerala. The said Writ Petitions were allowed by a common Judgment dated 25.11.2011 and thereby, the aforesaid order of the DRAT, Chennai, was quashed and further, DRAT, Chennai, was directed to first consider the question as to whether the borrower/the petitioner herein, is bound to make pre-deposit as contemplated in second proviso to Section 18 of the Act and if so to what extent.

43. The third respondent would also contend that pursuant to the order of the Honourable High Court of Kerala, DRAT, Chennai, passed an order in I.A.No.1106 of 2011 in AIR(S.A).No.740 of 2011, directing the petitioner to deposit a sum of Rs.2,52,99,656/- on or before 14.02.2012. Instead of making pre-deposit, the petitioner has filed W.P.No.455 of 2012 against the above said order, the second respondent has also filed



W.P.No.4269 of 2011 and the third respondent filed W.P.No.4281 of 2011. By a common Judgment dated 15.02.2012, all the three Writ Petitions were ordered, wherein, the Writ Petition filed by the petitioner in W.P.No.455 of 2012 was dismissed and the Writ Petitions filed by the third respondent and the second respondent herein were partly allowed.

44. As against the above said Judgment, the petitioner has filed Special Leave to Appeal (Civil) Nos.9376-9378 of 2012, wherein, by an order dated 15.02.2012, the Hon'ble Supreme Court directed DRT, Ernakkulam, to dispose SA.No.272 of 2011 on merits, with liberty to the respective parties to raise their contentions before the Tribunal. As per the said order, the proceedings in S.A.No.272 of 2011 was taken up for hearing and after hearing all the parties, DRT, Ernakkulam, dismissed the SA.No.272 of 2011 on 15.01.2014. As against which, an appeal in R.A.(S.A).No.50 of 2014 has been filed by the petitioner, before DRAT, Chennai. The DRAT, after hearing all the parties, dismissed the appeal on 02.08.2017. As against the said order, the present Writ Petition has been filed by the petitioner.

45. Heard the learned counsel for the petitioner and the learned counsel for the respondents, and perused the materials available on record.

46. The learned counsel for the petitioner, Mr.Benjamin George argued that both the Appellate Tribunal at Chennai as well as the DRAT, Ernakkulam, have wrongly appreciated the facts while dismissing the Securitisation Application as well as the appeal before the Appellate Tribunal and both the Tribunal erred in denying the petitioner's right to exercise the right of redemption and the Tribunals failed to appreciate that the entire dues have been deposited by the petitioner, during the pendency of SA.No.272 of 2011.

47. The learned counsel for the petitioner further submitted that the Tribunal ought to have noticed that the sale held on 19.08.2011 is subject to lis pendence, and therefore the petitioner is entitled to exercise his right of redemption until and unless his right got extinguished by an order of the Court. The learned counsel also tried to impress upon this Court that the Tribunal ought to have held that the action of the third respondent is unsustainable, due to improper and under valuation of the property. He submitted that the valuation fixed by the valuer on the basis of local enquiry is not a proper valuation. The valuer, who has valued the property was disqualified under the Security Interest Enforcement Rules, 2002, which is denied by the respondents later.

48. The learned counsel for the petitioner would also contend that the DRT cannot dismiss the application filed by the



petitioner only on the sole ground that the petitioner has failed to comply with the earlier conditional order, pursuant to which, the sale was held and therefore, the petitioner lost the right of redemption. The learned counsel for the petitioner would vehemently contend that when the order passed by the DRT dated 17.08.2011 was finally challenged, the Hon'ble Supreme Court directed the Tribunal at Ernakulam to dispose of the SA.No.272 of 2011 on merits without insisting on its order of pre-deposit dated 17.08.2011 as expeditiously as possible. The said order has wiped out all other conditional orders including the sale held on 19.08.2011 in favour of the third respondent which has become non est in law.

49. The learned counsel for the petitioner would also contend that the right of redemption provided under Section 13 (8) of SARFAESI Act is a valuable right available to the mortgagor, which cannot be taken away, as the entire dues has been settled to the first and second respondents during the pendency of S.A.No.272 of 2011. Hence, the petitioner is entitled for redemption under Section 13(8) of the SARFAESI Act.

50. Furthermore, the learned counsel for the petitioner would argue that when DRAT took up the appeal for arguments, the petitioner has also made written and oral submissions, to the effect that the Tribunal has not considered any of the submissions in proper perspective, but, dismissed the appeal. Further, the reasons given by the Tribunal cannot be accepted and do not fulfill the basic requirement on any canon's of law.

51. The learned counsel for the petitioner would further argue that the petitioner does not lose his right of redemption just because the sale was concluded during the pendency of SARFAESI application, on the ground that the Doctrine of lis-pendens is applicable to the present case and the order of the Tribunal, holding that right of redemption is not available to the petitioner cannot be accepted and it has to be set aside for the reason that the decision of Tribunal is contrary to the doctrine of lis-pendens

52. The learned counsel for the petitioner would also argue that SARFAESI Act provides for enforcement of the security. It does not abrogate the right of the borrower as the non-obstante clause contains in SARFAESI Act in only against the Section 69 and Section 69A of Transfer of Property Act and SARFAESI Act does not override the other provisions of Transfer of Property Act particularly Sections 52 and 60.

53. The learned counsel for the petitioner would further argue that the third respondent cannot be a bonafide purchaser, as the purchase made by him was with knowledge of the pending SARFAESI application, and he cannot claim any protection, as a



bonafide purchaser.

54. The learned counsel for the petitioner would also support the claim that the principle of lis-pendens would be applicable to the present property under sale and the petitioner has not lost the right of redemption. Substantiating his claim, the petitioner has relied upon various Judgments, which are as follows:

(2012) SCC 628 in the case of [Jagan Singh Vs. Dhanwanti & another]

"32. The broad principle underlying Section 52 of the TP Act is to maintain the status quo unaffected by the act of any party to the litigation pending its determination. Even after the dismissal of a suit, a purchaser is subject to lis pendens, if any appeal is afterwards filed, as held in Krishanaji Pandharinath v. Anusayabai. In that matter the respondent (original plaintiff) had filed a suit for maintenance against her husband and claimed a charge on his house. The suit was dismissed on 15-7-1952 under Order 9 Rule 2, of the Code of Civil Procedure, 1908 for non-payment of process fee. The husband sold the house immediately on 17-7-1952. The respondent applied for restoration on 29-7-1952, and the suit was restored leading to a decree for maintenance and a charge was declared on the house. The plaintiff impleaded the appellant to the darkhast as purchaser. The appellant resisted the same by contending that the sale was affected when the suit was dismissed. Rejecting the contention the High Court held in para 4 as follows:

"...In Section 52 of the Transfer of Property Act, as it stood before it was amended by Act 20 of 1929, the expression 'active prosecution of any suit or proceeding' was used. That expression has now been omitted, and the Explanation makes it abundantly clear that the 'lis' continues so long as a final decree or order has not been obtained and complete satisfaction thereof has not been rendered. At p.228 in Sir Dinshah Mulla's 'Transfer of Property Act', 4th Edn., after referring to several authorities, the law is stated thus:

'Even after the dismissal of a suit a purchaser is subject to "lis pendens", if an appeal is afterwards filed.'

If after the dismissal of a suit and before an appeal is presented, the 'lis' continues so as to prevent the defendant from transferring the



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property to the prejudice of the plaintiff, I fail to see any reason for holding that between the date of dismissal of the suit under Order 9 Rule 2 of the Civil Procedure Code and the date of its restoration, the 'lis' does not continue."

33. It is relevant to note that even when Section 52 of the TP Act was not so amended, a Division Bench of the Allahabad High Court had following to say in *Moti Chand v. British India Corpn. Ltd* (AIR p.212).

"... The provision of law which has been relied upon by the appellants is contained in Section 52, TP Act. The active prosecution in this section must be deemed to continue so long as the suit is pending in appeal, since the proceedings in the appellate court are merely continuation of those in the suit (see *Gobind Chunder Roy v. Guru Churn Kurmokar*)."

34. If such a view is not taken, it would plainly be impossible that any action or suit could be brought to a successful termination if alienations pendente lite were permitted to prevail. The Explanation to this section lays down that the pendency of a suit or a proceeding shall be deemed to continue until the suit or a proceeding is disposed of by a final decree or order, and complete satisfaction or discharge of such decree or order has been obtained or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

35. In the present case, It would be canvassed on behalf of the respondent and the applicant that the sale has taken place in favour of the applicant at a time when there was no stay operating against such sale, and in fact when the second appeal had not been filed. We would however, prefer to follow the dicta in *Krishanaji Pandharinath* to cover the present situation under the principle of *lis pendens* since the sale was executed at a time when the second appeal had not been filed but which came to be filed afterwards within the period of limitation. The doctrine of *lis pendens* is founded in public policy and equity, and if it has to be read meaningfully such a sale as in the present case until the period of limitation for second appeal is over will have to be held as covered under Section 52 of the TP Act."

(1999) 8 SCC 511 in the case of [U.Nilan Vs. Kannayyan]



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"30. In another decision rendered by the Madras High Court in V.A. Narayana Raja vs. Renganayaki Achi, it was again reiterated that an application under Order 34 Rule 5 would be maintainable during the pendency of the appeal filed by the judgment-debtor against an order passed by the executing court refusing to set aside the sale effected in execution of the decree passed in the mortgage suit. It was further held that although as a result of the confirmation of sale and the issue of a sale certificate, the auction-purchaser got title to the property and the title of the judgment-debtor was lost but since the sale was subject to the final result of the petition, filed by the judgment-debtor under Order 21 Rule 90 C.P.C., the confirmation of sale and the sale certificate issued thereafter would also be subject to the result of that petition. Similarly, if an appeal was pending against an order refusing to set aside the sale, the whole situation relating to confirmation of sale and issuance of sale certificate would be in a nebulous state and consequently it would be open to the judgment-debtor to invoke the provisions of Order 34 Rule 5 C.P.C. and make the necessary deposits to save his property from being transferred to a third person or, may be, to the decree holder, in execution of decree passed in the mortgage suit.

31. The entire legal position was reviewed by this Court in Maganlal v. Jaiswal Industries and it was held that the sale does not become absolute or irrevocable merely on passing an order confirming the sale under Order 21 Rule 92 but it would attain finality on the disposal of the appeal, if any, filed against an order refusing to set aside the sale."

(2000) 3 SCC 664 in the case of [Kharaiti Lal Vs. Raminder Kaur & others]

"3. Col. Joginder Singh subsequently filed a suit for foreclosure in order to recover the mortgage money by sale of Industrial Plot No. 255-P and the building constructed thereon. A preliminary decree was passed in that suit on January 23, 1976, directing the appellant to deposit a sum of Rs. 28,187.50 along with future interest at the rate of 9 per cent per annum on or before March 23, 1976. The amount was not deposited and, therefore, Col. Joginder Singh filed an application for final decree which was passed by the Sub-ordinate Court, Chandigarh, on April 8, 1976. The decree was put to execution and in



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execution proceedings, the property was auctioned on August 25, 1976. Nazar Singh, who is now represented by the present respondents, purchased the property at the auction for a sum of Rs. 45,000. The auction-sale was challenged by the appellant by filing an application under Order 21 Rule 90 C.P.C. on August 28, 1976. The objections were rejected on November 28, 1977 and on the next day, namely, on November 29, 1977, the Court confirmed the auction-sale.

4. The appellant, thereafter, filed two appeals (Appeal Nos. 373 and 374 of 1977) in the High Court. During the pendency of those appeals, he also deposited a sum of Rs. 47,250 on May 3, 1985 and another amount of Rs. 525 was deposited by him on August 19, 1985. When the appeals came up for hearing before the Single Judge, it was noticed that the appellant had already deposited the requisite amount under Order 34 Rule 5 of the Code of Civil Procedure and, therefore, the appeals were allowed on August 30, 1985 and the auction-sale as also its confirmation were set aside with the direction that the amount, deposited by the appellant, would be paid to the heirs of Nazar Singh who had, in the meantime, died and was substituted in the appeals by the present respondents. The judgment passed by the Single Judge was challenged by the respondents in the Letters Patent Appeals filed before the Division Bench, which allowed both the appeals by the impugned judgment dated July 2, 1998 and set aside the judgment passed by the Single Judge. It is in these circumstances that the present appeals have come up before us.

5. Learned counsel for the appellant has contended that the Division Bench of the High Court was in error in interfering with the judgment passed by the Learned Single Judge on the ground that the deposits, made by the appellant during the pendency of the appeals in the High Court, would not enure to his benefits and could not be treated to have been made under Order 34 Rule 5 C.P.C. as the auction-sale had already been confirmed. It is further contended that Order 34 Rule 5 C.P.C. contemplates deposit before "confirmation of sale" and if the order by which the sale was confirmed had been challenged in appeal, the sale would not be treated as confirmed unless the appeal was disposed of. It is further contended that since the appellant, in the instant case, had made the deposits during the pendency of the appeals in the High Court, which were directed against the auction-sale as also its confirmation, the



deposits so made were valid and could not have been treated to have been made "after confirmation."

6. Learned counsel for the respondents, on the contrary, contended that when a preliminary decree was passed by the trial court, the appellant was allowed time to deposit the whole of the decretal amount by a specific date, namely, by March 23, 1976 but the appellant did not do so and, consequently, the property was auction-sold. The sale was challenged by the appellant through objections under Order 21 Rule 90 C.P.C., which were rejected and the sale was thereafter confirmed. It is contended that after rejection of the objections under Order 21 Rule 90 C.P.C., the Executing Court was bound to confirm the sale and since the sale was confirmed on the next day of the rejection of the objections under Order 21 Rule 90 C.P.C., the sale, for all practical purposes, shall be deemed to have been confirmed on that day. Any deposit, made by the appellant thereafter, would be of no avail and on the basis of that deposit, the sale could not be set aside. It is contended that the Division Bench of the High Court was justified in setting aside the judgment passed by the Single Judge.

7. A perusal of the judgment passed by the Division Bench would show that after setting out the facts, it formulated a question as under :-

"The question that arises for consideration is - when can a sale of the mortgaged property be said to have been confirmed? The ancillary question would be - Can a deposit be made under Order 34 Rule 5 even when an appeal is pending?"

8. Thereafter, the Division Bench proceeded to answer the question by holding ultimately that the deposit of money, during the pendency of appeals in the High Court, could not be treated as a valid deposit under Order 34 Rule 5 C.P.C. For this purpose, it placed reliance upon a decision of this Court in Hukamchand v. Bansilal & Ors., [1967] 3 SCR 695=AIR (1968) SC 86. The decision in Hukamchand's case (supra) was given on the particular facts of that case. It was noticed by the Court, in that case, as under :-



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"Though O.XXXIV r.5(1) recognises the right of the judgment-debtor to pay the decretal amount in an execution relating to a mortgage decree for sale at any time before the confirmation of sale, the rule does not give any power to the court to grant time to deposit the money after the final decree has been passed. It is not open to the court to go on fixing date after date and postponing confirmation of sale merely to accommodate a judgment-debtor."

9. The Court did not hold in that case that a deposit under Order 34 Rule 5 C.P.C. could not be made during the pendency of an appeal against the order by which the sale was confirmed.

10. The entire case law was reviewed by this Court in a recent decision in U. Nilan v. Kannayyan (Dead) through Lrs., [1999] 8 SCC 511=(1999) 6 Scale 358=JT (1999) 7 SC 621, in which also the Court had formulated the following question :-

"21. What is the meaning of the phrase "before the confirmation of sale "may now be considered in the light of other relevant provisions of the Code of Civil Procedure."

11. The above question is identical to the question framed by the Division Bench of the High Court in this case. This Court, on a consideration of a number of decisions, including the decision of this Court in Hukamchand's case (supra) laid down that if an appeal was pending against an order refusing to set aside the sale, the confirmation of sale as also the issuance of Sale Certificate would be in a nebulous state and, consequently, it would be open to the judgment-debtor to invoke the provisions of Order 34 Rule 5 C.P.C. and make the necessary deposits to save his property from being transferred to a third person or, may be, to the decree-holder, in execution of the decree passed in the mortgage suit. It may be mentioned that in U. Nilan's case (supra), reliance was also placed upon the decision of this Court in Maganlal & Anr. v. Jaiswal Industries, Neemach & Ors., [1989] 4 SCC 344=[1989] 3 SCR 696=AIR (1989) SC 2113, in which it was held that the sale does not become absolute or irrevocable merely on passing an order confirming the sale under Order 21 Rule 92, but it



would attain finality on the disposal of the appeal, if any, filed against an order refusing to set aside the sale."

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(1989) 4 SCC 344 in the case of [Maganlal Vs. Jaiswal Industries, Neeach & others]

"2. Maganlal has made an application before this Court under order 34 Rule 5 of the Code being C.M.P. No. 9940 of 1982 to which an objection has been filed. This application was ordered to be put up at the time of the hearing of the appeal. Subsequent events and proceedings of the court below on the basis whereof this application has been made as stated therein are these.

33. In view of the foregoing discussion we are of the opinion that the application made by Maganlal under Order 34 Rule 5 of the Code is maintainable and the requirements of the said provision having been satisfied the application deserves to be allowed."

(1972) 2 SCC 200 in the case of [Jayaram Mudaliar Vs. Ayyaswami & Others]

"13. Coming to the second point, this Court has considered the scope of Section 52 of the Transfer of Property Act and the rule of lis pendens in a number of cases. There is no difficulty in holding that Ex. B7 falls within the provisions of Section 52 of the Transfer of Property Act. But Ex. B51 stands in a different position. It was held in Samarendra Nath Sinha and Anr. v. Krishna Kumar Nag, 28 that the principle of lis pendens applies even to involuntary alienations like court sales. Shelat J., observed :

"The purchaser pendente lite under this doctrine is bound by the result of the litigation on the principle that . since the result must bind the party to it so must it bind the person deriving his right, title and interest from or through him. This principle is well illustrated in Radhamabhub Holder v. Monohar 15 I.A. 97 where the facts were almost similar to those in the instant case. It is true that Section 52 strictly speaking does not apply to involuntary alienations such as court sales. But it is well-established that the principle of lis pendens applies to such alienations. [See Nilkant v.



Suresh Chandra 12 I.A. 171 and Motilal v
Karrabuldin (24 I.A. 170).]

14. These observations were referred to with approval by this Court in Kedar Nath Lal v. Ganesh Ram. If the principle of lis pendens applies to court auctions there is no reason why it should not apply to revenue sales. But the effect of the application of the principle may vary according to the nature of the provisions under which the revenue sale is held. The principle of lis pendens does not affect pre-existing rights. If there is a valid charge or mortgage on a property, this does not vanish because the property becomes the subject-matter of a partition suit. In this case according to defendant No. 12 a valid charge subsisted on the lands by virtue of the provisions of the Land Improvement Loans Act. Under Section 7 of the Land Improvement Loans Act loans are recoverable by the Collector in all or any of the following modes, namely :

(a) from the borrower as if they were arrears of land revenue due by him;

(b) ...

(c) out of the land for the benefit of which the loan has been granted as if they were arrears of land revenue due in respect of that land;

(d) ...

18. Jayaram Mudaliar, the Appellant before us by Special Leave, purchased some lease hold land for Rs. 10,500/- from Munisami Mudaliar and others under a sale deed of 7-7-1958 (Exhibit B-7) and some other lands shown in a sales' certificate dated 15-7-1960, (Exhibit B-51) sold to him for Rs. 6,550/- at a public auction of immovable property held to realise the dues in respect of loans taken by Munisami Mudaliar under the Land Improvement Loans' Act 19 of 1883. Both Jayaram and Munisami, mentioned above, were impleaded as codefendants in a partition suit, in Vellore, Madras, now before us in appeal, commenced by a pauper application dated 23-6-1958 filed by the plaintiff-respondent Ayyaswami Mudaliar so that the suit must be deemed to have been filed on that



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date. The plaintiff respondent before us had challenged, by an amendment of his plaint on 18-9-1961, the validity of the sales of land mentioned above, consisting of items given in Schedule 'B' to the plaint, on the ground, inter-alia, that these sales, of joint property in suit, were struck by the doctrine of lis pendens embodied in Section 52 of the Indian Transfer of Property Act. As this is the sole question, on merits, raised by the appellant before us for consideration, we will only mention those facts which are relevant for its decision.

47. It is evident that the doctrine, as stated in Section 52, applies not merely to actual transfers of rights which are subject-matter of litigation but to other dealings with it "by any party to the suit or proceeding, so as to affect the right of any other party thereto". Hence, it could be urged that where it is not a party to the litigation but an outside agency, such as the tax Collecting authorities of the Government, which proceeds against the subject-matter of litigation, without anything done by a litigating party, the resulting transaction will not be hit by Section 52. Again, where all the parties which could be affected by a pending litigation are themselves parties to a transfer or dealings with property in such a way that they cannot resile from or disown the transaction impugned before the Court dealing with the litigation, the Court may bind them to their own acts. All these are matters which the Court could have properly considered. The purpose of Section 52 of the Transfer of Property Act is not to defeat any just and equitable claim but only to subject them to the authority of the Court which is dealing with the property to which claims are put forward.

48. In the case before us, the Courts had given directions! to safeguard such just and equitable claims as the purchaser appellant may have obtained without trespassing on the rights of the plaintiff-respondent in the joint property involved in the partition suit before the Court. Hence, the doctrine of lis pendens was correctly applied."

55. The learned counsel for the petitioner would further contend that very classification of the petitioner's account as NPA and invocation of SARFAESI Act is contrary to the RBI Guidelines and he cited the following Judgments:



(2008) 1 SCC 125 in the case of [Transcore Vs. Union of India & another]

"60. Value of an asset in an inflationary economy is discounted by "time" factor. A right created in favour of the bank/ FI involves corresponding obligation on the part of the borrower to see that the value of the security does not depreciate with the passage of time which occurs due to his failure to repay the loan in time.

66. We have already analysed the scheme of both the Acts. Basically, the NPA Act is enacted to enforce the interest in the financial assets which belongs to the bank/ FI by virtue of the contract between the parties or by operation of common law principles or by law. The very object of Section 13 of NPA Act is recovery by non-adjudicatory process. A secured asset under NPA Act is an asset in which interest is created by the borrower in favour of the bank/ FI and on that basis alone the NPA Act seeks to enforce the security interest by non-adjudicatory process. Essentially, the NPA Act deals with the rights of the secured creditor. The NPA Act proceeds on the basis that the debtor has failed not only to repay the debt, but he has also failed to maintain the level of margin and to maintain value of the security at a level is the other obligation of the debtor. It is this other obligation which invites applicability of NPA Act. It is for this reason, that Sections 13(1) and 13(2) of the NPA Act proceeds on the basis that security interest in the bank/FI; needs to be enforced expeditiously without the intervention of the court/tribunal; that liability of the borrower has accrued and on account of default in repayment, the account of the borrower in the books of the bank has become non-performing. For the above reasons, NPA Act states that the enforcement could take place by non-adjudicatory process and that the said Act removes all fetters under the above circumstances on the rights of the secured creditor.

68. The object behind introducing the first proviso and the third proviso to Section 19(1) of the DRT Act is to align the provisions of DRT Act, the NPA Act and Order XXIII CPC. Let us assume for the sake of argument, that an O.A. is filed in the DRT for recovery of an amount on a term loan, on credit facility and on hypothecation account. After filing of O.A., on account of non disposal of the O.A. by the tribunal due to heavy backlog, the bank finds that one of the three accounts has become sub-standard/ loss, in such a case the bank can invoke the NPA Act with or without the permission of the DRT. One cannot lose sight of the fact that even an application



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for withdrawal/ leave takes time for its disposal. As stated above, with inflation in the economy, value of the pledged property/ asset depreciate on day to day basis. If the borrower does not provide additional asset and the value of the asset pledged keeps on falling then to that extent the account becomes non-performing. Therefore, the bank/ FI is required to move under NPA Act expeditiously by taking one of the measures by Section 13(4) of the NPA Act. Moreover, Order XXIII CPC is an exception to the common law principle of non-suit, hence the proviso to Section 19(1) became a necessity."

(2009) 4 KLT 72 in the case of [Bhuvannendran Vs. LIC Housing Finance Ltd.]

"10. One of the main points raised was that, because of the stipulation under the Statute, the borrower had to satisfy the entire liability for redeeming the property before any challenge is raised in this regard before the DRT. More so, the right to approach the DRT would arise only after taking steps under Section 13 (4). After considering the facts and circumstances, the Apex Court held that, eventhough some of the provisions are very much stringent, that alone cannot be a reason for setting aside the provision to declare the same as unconstitutional, particularly since the purpose of enactment was to avoid the delayed proceedings before the Civil Court or such other forum and to realize the money, instead of leaving the same as 'NPA' without generating funds, in favour of the financial institutions and to make use of the same for public good. It was however observed that, in cases where there was no dispute on the amount due, the property can be redeemed by the borrower as provided under the Statute. In the cases where the amounts were in dispute, it was also observed that, the parties could very well approach the DRT and matter can be got finalized before the sale. Necessary observations were made in paragraphs 50, 54, 55 and elsewhere. It was also taken note of by the Apex Court that, the scope of jurisdiction of Civil Court, though ousted with respect to the matters provided in the Act, it could be attracted in rare cases where the issue regarding the 'English Mortgage' was involved. But for the specific instances as aforesaid, the jurisdiction of the Civil Court was specifically held as not applicable under any circumstances.

(1996) 2 SCC 689 in the case of [Seth Banarsi Dass Vs. Dist. Magistrate & Collector]



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"7. The second objection of the appellant, however, deserves to be accepted. It is contended by him that two sets of objections were raised by him to the proposed auction sale when the shares were attached. These objections to the sale were pending when the auction sale took place. These objections go to the root of the liability of the appellant to pay the amounts under the recovery certificate as well as to the saleability of the shares proposed to be sold. These objections ought to have been adjudicated upon before the auction sale. An auction which is held without deciding objections to it is bad in law. Recovery proceedings are equivalent to execution proceedings under the Civil Procedure Code. The objections to the attachment and sale of the said shares were raised by the debtor. Under Section 47 of the Civil Procedure Code, all questions arising between the parties relating to execution, discharge or satisfaction of the claim were required to be determined by the officer in charge of execution before proceeding with execution by way of sale. The objections, for example, related to the amount which is claimed in the recovery certificate. According to the appellant the amount mentioned in the recovery certificate was not correct because subsequent citation was for a different amount. The appellant had also claimed repayment of various amounts. It was also pointed out by the appellant that the shares were already pledged with the Oriental Bank of Commerce. Yet no notice was given to the Oriental Bank of Commerce and the shares were purported to be sold ignoring the pledge of the shares in favour of the Oriental Bank of Commerce. We need not examine the merits of the objections raised by the appellant. But it is important to notice that these objections were not decided prior to the holding of the auction sale. The first respondent has given no explanation for not deciding these objections earlier. In our view the High Court was not right in observing that the objections could be decided at a later date even after the sale of the shares to which the objections pertained. Proceeding with the auction sale without adjudicating upon the objections is a material irregularity which vitiates the sale. The appellant has thereby lost his valuable right to have his objections adjudicated upon in accordance with law. The objections were raised much prior to the auction sale and they ought to have been decided before the auction sale took place. Failure to do so vitiated the sale."

(2000) 5 SCC 274 in the case of [Union Bank of India Vs. Official Liquidator H.C. Of Calcutta & Others]

"14. Further, it appears that learned Judge has not



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applied his mind to the valuation report itself. He has only considered the last figures given in the valuation report which says that total valuation of the property was Rs.66,19,032/-. Had the Court considered the report, it would have immediately noticed that valuation report was not at all reliable. This would be clear from the following facts narrated in the valuation report: -

Valuation: On enquiry from the local people, it is understood the land price in this particular varies between Rs.2 lakhs to 2.5 lakhs per Katta depending on size, position, Road Frontage, low and or high land etc. However, after considering all aspects, it is felt fair and reasonable value at Rs.2 lakhs per katta is found reasonable but as a matter of fact the land is lease hold. So the value of land will be lease because of lease hold land.

As per lease beginning of the year of 1963 for the term of 99 years @ Rs.300/- per month.

So, the rent for 99 years @ Rs.300/- = Rs.3,56,400. 15% Municipal Tax & Repairing of structure etc.=Rs.53,460/-. Total rent, tax etc. for 99 years=Rs.4,09,860/- So, the value of land for 99 years = Rs.4,09,860/-."

56. The petitioner has also relied on the following Judgment, in support of his contention that the SARFAESI Act neither creates any new right in favour of the secured creditor nor abrogates any right of the borrower:

(2009) 4 SCC 94 in the case of [Central Bank of India Vs. State of Kerala and Others]

"103. A non obstante clause is generally incorporated in a statute to give overriding effect to a particular section or the statute as a whole. While interpreting non obstante clause, the Court is required to find out the extent to which the legislature intended to do so and the context in which the non obstante clause is used. This rule of interpretation has been applied in several decisions.

104. In State of West Bengal v. Union of India [(1964) 1 SCR 371], it was observed that the Court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed



but to the entire statute; it must compare the clause with the other parts of the law and the setting in which the clause to be interpreted occurs.

115. It is thus clear that provisos referred to above are only part of the distribution mechanism evolved by the legislature and are intended to protect and preserve the right of the workers of a company in liquidation whose assets are subjected to the provisions of the Securitisation Act and are disposed of by the secured creditor in accordance with Section 13 thereof."

(1994) 1 SCC 131 in the case of [Desh Bandhu Gupta Vs. N.L.Anand & Rajinder Singh]

"13. Yet another contention of Mr Gupta is that the sale of the plot of 550 sq. yards is in excess of the execution and the order to sell it is the result of non-application of mind touching the jurisdiction of the court rendering the sale void or manifestly illegal. Therefore, the need to invoke Order 21 Rule 90 does not arise and it can be set aside under Section 47 CPC.

14. Proviso to sub-rule (4) of Rule 17 of Order 21 provides the procedure to receive the application for execution of the decree. In the case of a decree for payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree. Rule 64 of Order 21 charges the Executing Court that it may order attaching of any property to the extent that "such portion thereof as may seem necessary to satisfy the decree would be sold". It is also enjoined under sub-rule (2)(a) of Rule 66 of Order 21 that where a part of the property would be sufficient to satisfy the decree the same be sold by public auction. Form 27 of Appendix of the schedule also directs the court auctioneer to sell so much of the said property as shall realise the sum in the said decree and costs. The Code, therefore, has taken special care charging the duty on the Executing Court and it has a salutary duty and a legislative mandate to apply its mind before settling the terms of proclamation and satisfy that if part of such property as seems necessary to satisfy the decree should be sold if the sale proceeds or portion thereof is sufficient for payment to the decree-holder or the person entitled under the decree to receive the amount and so much of that property alone should be ordered to be sold in execution. In *Ambati Narasayya v. M. Subba Rao* this Court held that it is the duty cast upon the court under Order 21 Rule 64 to sell only such



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property or a portion thereof as may be necessary to satisfy the decree. It is a mandate of the legislature which cannot be ignored. Therein for execution of a decree of a sum of Rs 2,000 and costs, the appellant's 10 acres land was brought to sale which was purchased for a sum of Rs 17,000, subject to discharge of a prior mortgage of Rs 2,000. This Court held that without the court's examining whether a portion of the property could be sold, the sale held was not in conformity with the requirement of Order 21 Rule 64 and it was held to be illegal and 4 (1987) 4 SCC 717 : AIR 1987 SC 2081 5 1989 Supp (2) SCC 693 : AIR 1990 SC 119 without jurisdiction. The sale was set aside and the court was directed to put the judgment-debtor in possession of the land and to refund the sale amount to the auction-purchaser. Further direction was given to execute the decree in accordance with law. In Mangal Prasad v. Krishna Kumar Maheshwari⁶ a shop was sold to realise a decree debt of about Rs 29,000 and the sale price at the auction was Rs one lakh and odd. This Court finding that it is excessive execution, set aside the sale and directed return of the sale amount to the auction-purchaser with interest @ 12%. In Takaseela Pedda Subba Reddy v. Pujari Padmavathamma⁷ to recover the decree debt in two decrees, the properties situated in two different villages were brought to sale. In the first instance the property in 'D' village fetched a sum of Rs 16,880, which was sufficient to satisfy the decretal amount. The property in 'G' village was also sold which fetched a sum of Rs 12,000. This Court set aside the sale of 'G' village. Admittedly the site in sale is to the extent of 550 sq. yards, situated in a commercial area around which the petroleum installations are established. Though, as contended by Shri Madhava Reddy, that there may be building regulation for division of the property into portions, but the court made no attempt to sell a portion of the property, maybe 100 yards or 150 yards out of it, or whether undivided portion thereof would have satisfied the decree debt. It could be legitimately concluded that the court did not apply its mind at all to this aspect as well.

16. In Janak Rai v. Gurdial Singh⁹ relied on by Shri Madhava Reddy, in execution of ex parte decree for a sum of Rs 519, the property of the judgment-debtor was brought to sale and was sold for a sum of Rs 5,100. Thereafter the judgment-debtor made an application to set aside the ex parte decree. An objection was raised to the sale on the ground that the value of the house was Rs 25,000 and it was auctioned for a sum of Rs 5000. The ex parte decree was set aside. On application made by the



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auction-purchaser, the sale was confirmed. It was contended that since the ex parte decree was set aside the confirmation of sale need to be set aside, which was negatived by 8 (1974) 2 SCC 213 : (1974) 3 SCR 678 9 (1967) 2 SCR 77 : AIR 1967 SC 608 all the courts. In that background it was held that confirmation of the sale was not illegal and the inadequacy of the price was not a ground to set aside the sale. The ratio therein has to be considered in the light of its own scenario. The facts in this case are entirely different. The case of Chinnammal v. P. Arumugham¹⁰ also does not help the auction-purchaser. Therein it was found that pending appeal the money decree was executed and the properties were brought to sale. The High Court allowed the appeal and set aside the decree. Thereafter the Executing Court was moved to set aside the sale on diverse grounds including the plea of inadequacy of price. The learned Single Judge set aside the sale, but the Division Bench reversed the decision. On appeal, this Court held that the auction-purchaser was not a bona fide purchaser. The auction-sale in his favour was set aside and the restitution ordered. The court cannot lend assistance to a person to retain the property of the judgment-debtor who has since got rid of the decree. In that context it was held that the stranger auction purchaser who is not a party to the decree is protected against the vicissitudes or fortunes of the litigation and remains unaffected and does not lose title to the property by subsequent reversal or modification of the decree. The rights of bona fide purchaser who purchased the property in ignorance of the litigation should be protected. The ratio in that case would indicate that the purchaser must be a bona fide purchaser for adequate price without knowledge of the pending litigation. If it is otherwise, it is liable to be set aside. In that context it was held that the true question is whether the stranger auction purchaser had knowledge of the pending litigation about the decree under execution. If it is shown by evidence that he was aware of the pending appeal against the decree, when he purchased the property, the court cannot assume that he was a bona fide purchaser for giving him protection against restitution. His knowledge about the pending litigation would make all the difference in the case. Though he may be stranger to the suit, but he must be held to have taken a calculated risk in purchasing the property. Far from helping the auction-purchaser this goes against him. Mr Gupta contended that Rajinder Singh is not a bona fide purchaser. His brother is the adjacent owner of the site in question. The second respondent and his brother only made the bids and participated in the sale. Rest of the people had no capacity to purchase the



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property. The sale, therefore, is only a fraudulent and collusive one. Though we find some substance in what Mr Gupta contends, we need not to go into that question on the facts of this case. Suffice to state that all is not well. It is true that there is a distinction between irregularity and material irregularity in conducting the sale and it must be established that by reasons of illegalities or irregularities in conducting the sale, the judgment-debtor has sustained substantial injury. In *Dhirendra Nath Gorai v. Sudhir Chandra Ghosh*¹¹ this Court held that non-compliance of Section 35 of the Bengal Money Lenders Act does not render the sale void. It is only an irregularity. The judgment-debtor having had the knowledge did not file any objection. He did not attend the court for drawing up of the proclamation of the sale. On those circumstances the sale was held not liable to be set aside.

17. Under Section 47 all questions relating to execution, discharge or satisfaction of the decree should be determined by the Executing Court alone. The pre-sale illegalities committed in the execution are amenable to the remedy under Section 47. Post-sale illegalities or irregularities causing substantial injury to the judgment-debtor are covered under Order 21 Rule 90. Sub-rule (1) thereof covers the field of material irregularities or fraud in publicity or conducting the sale. Sub-rule (2) enjoins proof thereof and the court should find that by reason thereof the applicant sustained substantial injury. The total absence of drawing up of the proclamation of sale and settlement of its term by judicial application of mind renders the sale a nullity being void. It is covered by Section 47. The non-application of mind whether sale of a part of the property would satisfy the decree debt is a material irregularity doing substantial injury to the appellant attracting Order 21 Rule 90. In either case the sale is liable to be set aside. It is true that there is distinction between mere irregularity and material irregularities and the sale is not liable to be set aside on proof of mere irregularity. It must be material irregularity and the court must be satisfied that on account thereof substantial injury was sustained by the appellant. The sale of 550 sq. yards for recovery of a paltry sum of Rs 7,780.33, without selling a portion thereof, caused substantial injury to the appellant."

(1990) 1 SCC 513 in the case of [Chinnammal & Others Vs. Arumugham & another]



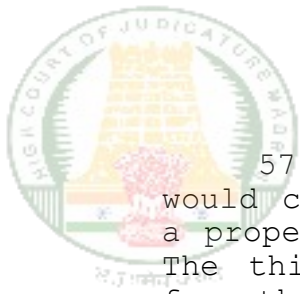
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"13. The Madras High Court in *R. Raghavachari v. M.A.Pakkiri Mahomed Rowther and Ors.*, AIR 19 17 Mad 250 has however, taken a contrary view. It was held that restitution under Section 144 CPC cannot be demanded as against a bona fide purchaser who was not a party to the decree. 'The High Court also remarked that the reversal of the decree by the appellate Court or the knowledge of the purchaser about the pendency of the appeal makes no material difference to the operation of that rule.

14. This proposition, we are, however, unable to accept. In our opinion, the person who purchases the property in court auction with the knowledge of the pending appeal against the decree cannot resist restitution. His knowledge about the pending litigation would make all the difference in the case. He may be a stranger to the suit, but he must be held to have taken calculated risk in purchasing the property. Indeed, he is evidently a speculative purchaser and in that respect he is in no better position than the decree holder purchaser. The need to protect him against restitution therefore, seems to be unjustified. Similarly the auction purchaser who was a name lender to the decree holder or who has colluded with the decree holder to purchase the property could not also protected to retain the property if the decree is subsequently reversed.

16. This is also the principle underlying Section 144 of the Code of Civil Procedure. It is the duty of all the Courts as observed by the Privy Council "as aggregate of those tribu- nals" to take care that no act of the court in the course of the whole of the proceedings does an injury to the suitors in the Court. The above passage was quoted in the majority judgment of this Court in *A.R. Antulay v.R.S. Nayak and Ors.*, [1988] 2 SCC 602 at 672. Mukherjee, J., as he then was, after referring to the said observation of Lord Cairns, said (at 672):

"No man should suffer because of the mistake of the Court. No man should suffer a wrong by technical procedure of irregularities. Rules or procedures are the handmaids of justice and not the mistress of the justice. Ex debito justitiae, we must do justice to him. If a man has been wronged so long as it lies within the human machinery of administration of justice that wrong must be remedied."



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57. Furthermore, the learned counsel for the petitioner would contend that in SARFAESI sale, every purchaser, purchases a property pending litigation, knowing fully aware of the same. The third respondent has been watching the entire proceedings from the beginning, and he is not a bonafide purchaser.

58. The learned counsel for the petitioner would also contend that the procedure followed by the respondents 1 and 2, for enforcing the security interest, was not in accordance with law, as the possession notice was neither affixed nor published in the newspapers. Hence, the basic principles were not followed in accordance with law. The entire proceedings initiated by the respondents have to be set aside.

59. The learned counsel for the petitioner would further contend that the sale certificate which was registered on 12.03.2012, contained the words, "in excess there of" which would mean to say that the auction purchaser is entitled for more than the property, he has taken, under the auction. In so far as the order passed by DRT as well as DRAT, the learned counsel for the petitioner would argue that the DRT has accepted certain documents furnished by the bank without giving any opportunity, to rebut those documents with regard to physical possession of the asset.

60. The learned counsel for the petitioner would further argue that the learned Chief Judicial Magistrate has no jurisdiction to pass an order under Section 14 of the SARFAESI Act which ground was specifically urged upon before the DRT, however, no question of law was framed by the DRT with regard to Section 14 of the SARFAESI Act and the procedure adopted by the learned Chief Judicial Magistrate is erroneous. The learned counsel for the petitioner has also relied on few Judgments, which are as follows:

CDJ 2013 MHC 3970 in the case of [K.Arockiyaraj Vs. The Chief Judicial Magistrate]

"35. From the perusal of the above judgments as well as the statutory provisions contained in Section 14 of the SARFAESI Act, 2002, in its independent existence, we are of the firm view that Section 14 does not contemplate the secured creditors to approach the Chief Judicial Magistrates for assistance to secure their assets and the secured creditors can approach the Chief Metropolitan Magistrate in Metropolitan areas and in non-metropolitan areas, the secured creditors has to approach the District Magistrate, and not the Chief Judicial Magistrate."

36. In fine, the reference is answered by holding that the decision of the Division Bench of this Court



reported in (2009) 1 MLJ (Crl) 416 does not laid down the correct proposition of law, and thus it is overruled. The reference is answered accordingly."

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CDJ 2015 MHC 1217 in the case of [Ramadass Vs. Chief Manager SBI]

"16. It is a well settled principle of law that any order passed by an authority without jurisdiction is void and non est and as such, any consequential action taken on the basis of the said order falls to the ground. (See Chief Justice of A.P. vs. L.V.A. Dixitulu⁵, A. Jithendernath vs. Jubilee Hills Cooperative House Building Society⁶, Ashok Leyland Ltd. vs. State of Tamil Nadu⁷, Union of India vs. Pramod Gupta⁸, National Institute of Technology vs. Niraj Kumar Singh⁹, Hasham Abbas Sayyad vs. Usman Abbas Sayyad¹⁰, Deepak Agro Foods vs. State of Rajasthan¹¹, Chandrabhai K. Bhoir vs. Krishna Arjun Bhoir and Union of India¹² vs. Association of Unified Telecom Service Providers of India¹³)."

61. The learned counsel for the petitioner would further argued that the findings of the DRAT that this steps taken by the petitioner only to protract the proceedings and there was no intention for the petitioner in cooperating with the respondents and the DRAT ought not to have dismissed the appeal on the ground that the petitioner had filed several Writ Petitions to protract the proceedings.

62. The learned counsel for the petitioner would also argue that efforts of the borrower to safe guard the assets secured with the bank cannot be termed as delaying tactics. The learned counsel also relied upon the following Judgment:

(2014) 5 SCC 651 in the case of [Rajiv Subramaniyan & another Vs. Pandiyas and Others]

"18. It must be emphasized that generally proceedings under the SARFAESI Act, 2002 against the borrowers are initiated only when the borrower is in dire-straits. The provisions of the SARFAESI Act, 2002 and the Rules, 2002 have been enacted to ensure that the secured asset is not sold for a song. It is expected that all the banks and financial institutions which resort to the extreme measures under the SARFAESI Act, 2002 for sale of the secured assets to ensure, that such sale of the asset provides maximum benefit to the borrower by the sale of such asset. Therefore, the secured creditors are expected to take bonafide measures to ensure that there is maximum yield from such secured assets for the



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borrowers. In the present case, Mr. Dhruv Mehta has pointed out that sale consideration is only Rs.10,000/- over the reserve price whereas the property was worth much more. It is not necessary for us to go into this question as, in our opinion, the sale is null and void being in violation of the provision of Section 13 of the SARFAESI Act, 2002 and Rules 8 and 9 of the Rules, 2002."

63. The learned counsel for the petitioner would further contend that the DRT is accepting the documents behind his back and relying on them without giving an opportunity to the petitioner. Registering the document which has been actioned and sale allegedly conducted by the respondent bank in a hurried manner, during the pendency of application before the DRT. The petitioner rely on the following Judgment:

(2016) 10 SCC 214 in the case of [Oasis Dealcom Private Limited Vs. Khazana Dealcomm Private Limited]

"22. Upon hearing the learned counsel and going through the concurrent findings of fact arrived at by the Debt Recovery Appellate Tribunal as well as the High Court, we have no doubt about the fact that undue haste was made by the creditor bank in holding the auction. The creditor bank could have waited for some time when the proceedings were pending before the Tribunal as well as the High Court before conducting the auction and confirming the sale. We do not find any reason to disturb the concurrent findings arrived at by the Debt Recovery Appellate Tribunal as well as the High Court about the irregularities committed in holding the auction."

64. According to him, there was no delaying tactics to protract the proceedings, when the entire dues were paid during the pendency of the SARFAESI application, reliance was placed on the decision reported in 2014 5 SCC 651, para 18 S.No.17 (already typed above) in the compilation. He would also further contend that DRT and the appellate Tribunal are empowered to set aside the measures taken by the secured creditor including the power to cancel the concluded sale and status quo ante to be ordered and for that proposition he relied upon the following Judgment:

(2009) 8 SCC 366 in the case of [Authorised Officer, Indian Overseas Bank Vs. Ashok Saw Mill]

"35. In order to prevent misuse of such wide powers and to prevent prejudice being caused to a borrower on account of an error on the part of the Banks or Financial Institutions, certain checks and balances have been introduced in Section 17 which allow any person,



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including the borrower, aggrieved by any of the measures referred to in Sub-Section (4) of Section 13 taken by the secured creditor, to make an application to the DRT having jurisdiction in the matter within 45 days from the date of such measures having taken for the reliefs indicated in Sub-Section (3) thereof.

36. The intention of the legislature is, therefore, clear that while the Banks and Financial Institutions have been vested with stringent powers for recovery of their dues, safeguards have also been provided for rectifying any error or wrongful use of such powers by vesting the DRT with authority after conducting an adjudication into the matter to declare any such action invalid and also to restore possession even though possession may have been made over to the transferee.

37. The consequences of the authority vested in DRT under Sub-Section (3) of Section 17 necessarily implies that the DRT is entitled to question the action taken by the secured creditor and the transactions entered into by virtue of Section 13(4) of the Act. The Legislature by including Sub-Section (3) in Section 17 has gone to the extent of vesting the DRT with authority to even set aside a transaction including sale and to restore possession to the borrower in appropriate cases. Resultantly, the submissions advanced by Mr. Gopalan and Mr. Altaf Ahmed that the DRT has no jurisdiction to deal with a post 13(4) situation, cannot be accepted.

39. We are unable to agree with or accept the submissions made on behalf of the appellants that the DRT had no jurisdiction to interfere with the action taken by the secured creditor after the stage contemplated under Section 13(4) of the Act. On the other hand, the law is otherwise and it contemplates that the action taken by a secured creditor in terms of Section 13(4) is open to scrutiny and cannot only be set aside but even the status quo ante can be restored by the DRT."

65. The learned counsel for the respondent bank, namely, Mr.M.Arunkumar, would vehemently argue that among 55 items of properties, only item 42, shown as item no 1 alone was sold in favour of the third respondent, and not all the properties, were brought on auction and that too only after following the prescribed norms under the SARFAESI Act. The petitioner is account was classified as NPA as early as 30.06.2008 on which day, the amount due towards the bank was more than 8 crores



including the bank guarantee over draft limit etc. Thereafter, 13(2) notice was issued only on 18.07.2008 as the debt remained unpaid even after a lapse of 3 years and the bank was constrained to bring the assets mortgaged for sale.

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66. Though the petitioner had remitted a sum of Rs.11,03,05,900/- on 08.04.2013, by the time, the bank had released entire dues of the petitioner and physical possession was also handed over to the third respondent. In view of the registration of the sale certificate dated 12.03.2012, the belated deposit made by the petitioner was refused, since the same was paid, 2 years after the conclusion of the sale by the bank, in favour of the third respondent. The learned counsel would also state that the amount deposited before the DRT, during the pendency of S.A.No.272 of 2011 would support the case of the respondents. The learned counsel for the respondents bank further relied on a decision reported in 1997 KLT 458 and 1967 KHC 40 wherein the Honourable Supreme Court, held that after the sale is concluded, the mortgagor has no right or authority to deposit any amount to redeem the mortgage or seek for postponing the date of payment of the redemption amount so as to accommodate the Judgment debtor.

67. The learned counsel for the respondents 1 and 2 would contend that both the possession notices dated 17.03.2011 and 18.03.2011 respondents were issued by following prescribed norms, as laid down under the Securitisation Rules. Possession notice was affixed in the concerned property and paper publication was also published in English Newspapers, viz. The Hindu Thiruvananthapuram Edition and the local Malayalam daily Mathruboomi on 03.07.2011. In reply to the contentions raised by the petitioner on violation of the norms relating to publication, learned counsel for the bank submitted that before bringing the properties for auction, the valuation was obtained from an approved valuer and reserve price was fixed as 10.10 crores and the highest bid by the third respondent was for Rs.15 crores. This issue has been raised before the DRT and to that effect, the respondents have already filed a necessary memo before the DRT to show the competency of the valuer as per the Act.

68. The learned counsel for the respondents 1 and 2 would also contend that the petitioner had earlier filed an application in S.A.No.196 of 2009 challenging the SARFAESI notice after a lapse of 2 years, and the petitioner has remitted a sum of Rs.2.26 crores and that too with regard non agricultural secured items.

69. The learned counsel also argued to sustain the order passed by DRT as well as DRAT and finally submitted that the petitioner, after failing in all his attempts to delay and



defeat the recovery proceedings initiated by the bank, finally has now taken up a plea of right of redemption, after the conclusion of the sale in favour of the third respondent. The bank has also relied on a decision of the Hon'ble Supreme Court Judgment in Mardia Chemicals case, reported in 2004 4 SCC page 311 "A mortgagor can exercise his right of redemption any time until the final sale of the property by execution of a conveyance, and not thereafter."

70. To conclude their arguments, learned counsel for the respondents 1 and 2 submitted that the auction purchaser, the third respondent herein, has purchased the subject property as early as in the year 2011 by investing a huge amount of Rs.15 crores which is above the reserved price fixed for sale, compared to the market value of the property and the petitioner, inspite of having full knowledge of the proceedings, failed to settle the dues in time and the deposit made by the petitioner belatedly after two years cannot be a ground to redeem the property, as the petitioner has lost the right of redemption, since the sale had taken place in the year 2011, he sought for dismissal of the Writ Petition.

71. On behalf of the third respondent, learned counsel Mr.PE.Vasantha Kumar Vishweshwaran, made submission to the effect that when the first respondent initiated proceedings under SARFAESI Act when 13(2) notice was issued, the petitioner could have very well exercised his right of redemption under Section 13(8) of the SARFAESI Act. When the sale was concluded on 19.08.2011 by the first and second respondent by following the statutory requirements under the SARFAESI Act, the petitioner cannot seek to set aside the sale, that too, when he had the right of redemption under Section 13(8) of the SARFAESI Act to be exercised, at the appropriate time and having lost the same, the petitioner, on technicalities cannot seek to redeem his right, after the conclusion of the proceedings.

72. The learned counsel for the third respondent would also contend that when the auction purchaser has paid the entire sale consideration within the stipulated time, the question of belated payment and the sale being vitiated due to belated payment does not arise, as there was no fraud nor collusion between the third respondent and the officials of the respondents 1 and 2. The learned counsel further argued that despite the upset price was fixed only at Rs.10.10 crores, the third respondent has offered Rs.15 crores and paid the earnest money as well as subsequent balance amount in time and therefore, the question of belated payment and not following the procedure do not arise. The valuer has valued the property peripherals, and the bidder has paid Rs.15 Crores, more than the upset price.



73. The learned counsel for the third respondent would further contend that the petitioner has lost his right of redemption, when the sale certificate was issued on 06.09.2011 and having taken physical possession of the property which was handed over on 05.03.2012, the subsequent amount deposited by the petitioner will not give raise to a fresh cause of action for the petitioner to seek for redemption of right that too after 2 years from 06.09.2011 when the petitioner made a deposit on 08.04.2013. For the above said reasons, the learned counsel for the third respondent prayed for dismissal of the Writ Petition.

74. In support of his claim, the 3rd respondent has also relied on the order of the Kerala High Court in O.P.(DRT) NOs. 4269 & 4281 OF 2011 & 455 OF 2012 dated 15.02.2012:

"26. When reasons are to be recorded in writing, such reasons O.P.(DRT) NOs. 4269 & 4281 OF 2011 & 455 OF 2012 should be based on the pleadings of the parties and should also stand judicial scrutiny. In Ext.P10 order, the relevant portion of which has already been extracted, the only reason stated by the Tribunal to justify the reduction of the amount is "in view of the facts and circumstances of the case, more particularly in view of the fact that the petitioner is claiming to be in a financial liquidity crisis". This order does not contain any explanation of the facts and circumstances that weighed with the Tribunal. Further, this order also does not indicate from where the Tribunal got the idea of liquidity crisis claimed by the defaulter. In this context, it will be relevant to mention that Ext.R1(j) is the copy of IA 1106/11, in which Ext.P10 order has been passed and in the affidavit, the defaulter has not even pleaded liquidity crisis. Thus, the Tribunal was inventing a reason which does not find a place in the pleadings, and this in my view, a statutory Tribunal could not have done. Therefore, the justification of the Tribunal for exercising its powers under the 3rd proviso to Section 18 is plainly untenable and for that reason Ext.P10 calls for interference.

27. I have considered whether the Tribunal should be asked to reconsider the matter. Such reconsideration would have been necessary in a case where inspite of pleadings and other materials, O.P.(DRT) NOs. 4269 & 4281 OF 2011 & 455 OF 2012 Tribunal had passed an order ignoring the same. In this case, even the defaulter was unable to show me any pleading or other material justifying the invocation of power under the 3rd proviso



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to Section 18. Therefore, I am not persuaded to accept the request that the Tribunal should be called upon to reconsider IA 1106/11 once again and pass fresh orders in the matter. For these reasons, Ext.P10 order is set aside and IA No.1106/11 will stand dismissed.

Accordingly, OP(DRT) Nos.4269/11 and 4281/11 filed by the purchaser and the Bank will stand allowed to the extent indicated above and OP(DRT) No.455/12 filed by the defaulter will stand dismissed. No costs."

75. The third respondent would also contend that the petitioner in O.A.No.212 of 2009 has filed a memo submitting to the decree for the amount claimed by the bank, with the prayer to consider the pendent-lite and post-lite interest. He would also submit that at the time of admission on 18.08.2017, upon hearing the submissions made by the learned counsel for the petitioner in W.M.P.No.22803 of 2017 in W.P.No.21791 of 2017 this Court granted status quo, which was subsequently extended. Upon hearing the counsel in the present Writ Petition, the issues to be decided would be:-

i) Whether both DRT and DRAT was right in holding that the petitioner has lost his right of redemption despite making the payment on 08.04.2013.

ii) Whether the respondent bank officials have acted as per the provisions of SARFAESI Act?, while dealing with the secured property of the petitioner?

iii) Whether the auction sale that took place on 19.08.2011 is in accordance with the provisions of SARFAESI Act and Rules.

iv) Whether the auction purchaser is a bonafide purchaser protected under the SARFAESI Act.

76. From the averments made by the petitioner, respondents 1, 2 and 3, arguments put forth by the learned counsel and upon perusal of the documents, it could be seen that as early as on 18.07.2008, the respondents 1 and 2 have issued a notice under Section 13(2) of the SARFAESI Act calling upon the petitioner to pay the dues, after classifying the account as NPA as early as on 30.06.2008, under the following terms.

"As stated above, No.1 among you as Principal Borrower and Nos.2 to 3 among you as Guarantors/Co-obligants are jointly and severally liable to pay (i)



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a sum of Rs.8,42,32,692.51 to the Bank as on 01.07.2008 with further interest @ 18.50% per annum with monthly rests and penal interest @ 2% per annum from 01.07.2008 in the OD account (2) a sum of Rs.94,72,049.40/- to the Bank as on 30.06.2008 with further interest @ 18.50% per annum with monthly rests and penal interest @ 2% per annum from 01.07.2008 in the OD (Deposit) account and a sum of Rs.60,51,848/- to the Bank as on 26.06.2008 with further interest @ 19% per annum with monthly rests and penal interest @ 2% per annum from 27.06.2008 in the FSL (o) account till the date of repayment of the dues in full and other costs and expenses. You have not cared to repay the loan/financial assistance, as agreed despite repeated requests and registered notices issued.

77. Bank has stated that the petitioner was liable to jointly and severally pay a sum of Rs.8,42,32,692.51 to the bank as on 01.07.2008 with further interest at the rate of 29% per annum from 01.07.2008 interest at the rate of 18.5% per annum with penal interest at 2% per annum from 01.07.2008 in the overdraft account. Thereafter, on 31.10.2008 an intimation to take possession of the property by registered post under Section 13(4) of the Act has been issued, for which, the petitioner by letter dated 08.11.2008, has replied and sought for restructuring of the credit facilities and permission to sell the secured properties especially items 4,5,8,9 to 15, 51 and 54 in a phased manner and in the petitioner's request, it is stated that if they were permitted to sell the properties, they will be able to liquidate the amount within a period of one year.

78. Since the respondent did not reply to the said representation, the petitioner has approached the Hon'ble High Court of Kerala by filing W.P.No.1053 of 2009 for a larger relief. The Hon'ble High Court of Kerala disposed of the Writ Petition directing the bank to look into the representation of the petitioner dated 06.11.2008, and to take a decision in accordance with law within a period of two weeks from the date of receipt of a copy of the Judgment. The bank by its letter dated 02.12.2008 in reply to the petitioner's representation dated 06.11.2008 had rejected the proposal of the petitioner on the ground that the bank has already issued SARFAESI notice, as part of recovering the dues to the bank since the petitioner failed to comply with the sanction stipulated for the advanced facilities granted by the bank.

79. Under the above circumstances, the bank had informed the petitioner that they have not considered the petitioner's request. Thereafter, the petitioner has sent a proposal for one time settlement on the following terms:



the petitioner has filed a second Writ Petition in W.P.No.1053 of 2009 seeking for a direction, directing the respondent bank to invoke Section 13(3) of the SARFAESI Act, to permit the petitioner to sell certain items of secured assets. Since Writ Petition was filed within 2 days after the representation sent, the High Court of Kerala, by order dated 16.01.2009 after recording the submissions made by the bank, if such representation has been received, the bank would decide the matter and take a decision within a period of two weeks and thus the Writ Petition was closed.

81. In compliance with the order of the High Court of Kerala, the respondent bank, again, by letter dated 19.01.2009, had rejected the one time settlement proposal sent by the petitioner on the ground it was very low and that the time limit stipulated by the petitioner was too long. Thereafter, the Petitioner filed a third Writ Petition No.2251 of 2009 seeking to declare the said decision of the bank to initiate proceedings against the petitioner under SARFAESI Act as illegal, arbitrary and challenged the 13(2) notice, as early as on 18.07.2008. The petitioner also challenged the possession notice dated 31.10.2008, as well as the notice issued under Section 13(4), the High Court of Kerala also disposed of the Writ Petition on 03.02.2009, as hereunder:

"Heard the learned counsel for the respondent bank also. He was asked to get instructions. Learned counsel for the bank would submit that keeping in mind the apprehension of the petitioner that the property where the residence of the petitioner is situated is being proceeded against under Section 13(4) of the Act under Ext.P10 the respondent bank will proceed against the properties other than the residential property at first and if only the amounts are not realised by the sale of the said two items, the respondent bank will proceed against the residential property of the petitioner. He further submits that it is open to the petitioner to arrange for private sale for which also the bank is agreeable. Learned counsel for the petitioner points out that Ext.P12 is bad for non-consideration of the request as such. Learned counsel for the bank points out that there is no legal right. I also note that the respondent bank is not an Authority under Article 12 of the Constitution of India. At any rate, i do not see that there is any legal right as such to see that the OTS is accepted."

82. Meanwhile, the bank also filed O.A.No.212 of 2009 before the DRT for recovery of the loan amount from the petitioner. The petitioner also filed a Writ Petition in W.P.No.18325 of 2009 before the High Court of Kerala seeking for a prayer to permit the petitioner to sell certain properties



within a time frame. This was also disposed of on 07.07.2009 directing the petitioner to deposit certain amount as a condition precedent for permitting to sell 3 properties from the secured assets of the respondent bank. It could be seen that there is no document or pleading, or arguments to the effect that the petitioner had complied with the condition imposed in the said Writ Petition. Again, the petitioner filed a Writ Petition in W.P.No.20533 of 2009 challenging the action taken by the respondent bank under Section 14 of the SARFAESI Act and the Kerala High Court again disposed of the Writ Petition on 28.07.2009 with the following directions.

"This Courts finds it fit and proper that the interest of Justice could be met, if the sale of the properties concerned is permitted as suggested by the learned counsel for the petitioner, which in turn is not likely to cause any prejudice to the Bank, whose interest stands well secured, especially when the sale of the residential properties concerned could also be conducted on the very same day, if the sale in respect of the other items does not procure the necessary amount. The submission made by the learned counsel for the petitioners that, the respondent bank need not proceed with Ext.P8 before the concerned Magistrate's Court and that petitioners are ready and willing to surrender the properties wherein the residential buildings are situated as and when necessitated is recorded. The petitioners will be at liberty to arrange prospective bidders or purchasers for sale of the properties and the sale consideration shall be deposited with the bank to the extent it is necessary to discharge the entire liability. It is also made clear that, such a step or course will never place any hurdle on the way of the Bank in proceeding with the sale as scheduled."

83. Thereafter, the petitioner moved another Writ Petition seeking stay of the operation of the order passed by the learned Chief Judicial Magistrate under Section 14 of the SARFAESI Act in C.M.P.No.2507 of 2009 dated 05.10.2009. The Honourable High Court of Kerala, by order dated 20.10.2009 granted interim stay of the operation of the order passed by the learned Chief Judicial Magistrate for a period of one month, except certain properties mentioned in Ex.P6 and P9, the other properties, whereby, the respondent bank issued public notice of taking over possession and to conduct sale with respect to all the secured assets except 2 residential properties. That apart, the abovesaid order dated 20.10.2009 was modified by another order dated 05.11.2009 permitting the respondent bank for taking possession under Section 13(4) except 2 items of residential properties on condition that the petitioner shall make the balance amount of Rs.50,00,000/- within a period of 2 months. Further, the same order was once again modified by another order



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dated 09.02.2011 by deferring the Writ Petition till the last week of March 2011 directing the respondent bank to proceed with the steps and further directed the respondent to consider the release of certain items if the petitioner comes forward with an offer of payment of the amount.

84. It could be seen from the material on record that the petitioner, was willing to pay Rs.6.5 Crores, as one time settlement provided, if the bank permitted another firm to take over the assets and liabilities of the petitioner and offered to settle the petitioner's liability. However, the bank has rejected the same on 03.03.2011, as the offer was very low. Possession notice under Section 13(4) was issued by the 1st respondent bank on the petitioner as early as on 18.03.2011, including all the immovable properties in the annexure along with valuation report dated 18.03.2011.

85. It could be seen from the material on record that the petitioner has filed Securitisation Application in S.A.No.272 of 2011 before the DRT Ernakulam, seeking for a declaration to declare the proceedings taken by the bank under SARFAESI Act 2002 as illegal and without Jurisdiction. In the said S.A.No.272 of 2011, the petitioner has also filed I.A.No.1076 of 2011. In the interim application No. 1076 of 2011 in S.A.No.272 of 2011 on 07.05.2011 DRT has passed the following order:

"5... Meanwhile, considering the balance of convenience and on grounds of equity and fair play and in order to secure the ends of justice, the respondents/defendants are hereby directed to maintain status quo as of date in respect of the impugned proceedings, subject to the condition that in order to show his bonafide, the petitioner/applicant shall deposit a sum of Rs.50,00,000/- on or before 11.06.2011 and another sum of Rs.50,00,000/- on or before 11.07.2011 and a further sum of Rs.50,00,000/- on or before 11.08.2011, to the respondents/defendants either by way of bank draft/pay order or cash, to be appropriated by the respondents/defendants to the credit of the petitioner's/applicant's dues recoverable under the impugned action. Upon remittance of further sums, the bank may also consider releasing securities to the extent of its worth."

86. Since the petitioner did not comply with the condition imposed by DRT, the respondent bank on 02.07.2011 issued a sale notice under Section 13(7). Thereafter, the sale notice dated 02.07.2011 has been published in daily newspapers, The Hindu and Sri Malayala Manorama. This sale notice has been sent to the petitioner, and seemed to have been acknowledged by the petitioner. The sale notice dated 02.07.2011 has categorically fixed the auction date as 19.08.2011 at Kollam branch in a



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sealed tender, under the terms and conditions of the sale notice. When the auction was forth coming, on 12.08.2011, a week before the date of auction, the petitioner has filed I.A.No.173 of 2011 in S.A.No.272 of 2011 and sought for a stay of the sale notice dated 02.07.2011 issued under Section 13(7) of the SARFAESI Act.

87. On 17.08.2011, DRT passed an order in I.A.No.1735 of 2011 in S.A.No.272 of 2011 which is as follows:

"7. However, notwithstanding the findings as above, taking note of the persuasive submissions made by the learned counsel for the petitioners/applicant, and on grounds of equity and fair play, the Tribunal reluctantly is inclined to grant one more final opportunity to find any amicable settlement. Accordingly, the respondents/defendants are hereby directed to defer the sale (i.e., the opening of the tenders only; and the tenders received, if any, upto the stipulated time - 18.08.2011 at 5.00 p.m., should be held intact in safe custody) till 06.09.2011, awaiting the further directions of the Tribunal, subject to the condition that in order to show his bonafide, the petitioner/applicant shall deposit a sum of Rs.1.50 crores before the scheduled sale (19.08.2011), and a further sum of Rs.1.50 crores on or before the 03.09.2011, to be appropriated towards the recoverable dues under the impugned action. In the event of prompt compliance, apart from this, the petitioner/applicant is also directed to submit a concrete action plan to settle the remaining dues within a time bound manner. It is made clear that if the first deposit of Rs.1.50 crores is not remitted as above, the respondents/defendants are at liberty to proceed with any further action (including the sale as scheduled) in accordance with law."

88. It could be seen from the records that when I.A.No.1735 of 2011 was filed, challenging the Section 13(7) notice, the petitioner has also filed a memo before the DRT Ernakulam, dated 17.08.2011 in O.A.No.212 of 2009, which is as follows:

"We are the defendants in the above Original Application. The above Original Application has been instituted by the applicants against us to recover a total sum of Rs.7,68,13,139.33 with interest at the rate of 19% with monthly rests. We submit that we have no objection in allowing the above Original Application fixing the pendent-lite and post-lite interest at a reasonable rate."

89. As per the memo filed, unequivocally the petitioner has submitted, no objections in allowing the Original Application fixing the pendent lite and post lite at a reasonable rate. However, after filing the memo by accepting for recovery by



bank, to the tune of Rs.7,68,13,139.33 with interest at 14% with monthly interest, the petitioner once again approached the Honourable High Court by filing W.P.No.22667 of 2011, challenging the sale notice dated 02.07.2011 issued under Section 13(7) of the SARFAESI Act by the respondent, fixing the auction date as 19.08.2011.

90. By order dated 19.08.2011, the High Court of Kerala had declined to interfere and dismissed the said Writ Petition on the ground that the petitioner having approached the Tribunal and obtained an interim order in I.A.No.1735 of 2011 and without complying with the same, the petitioner cannot seek discretionary Jurisdiction under Article 226 of Constitution of India. As scheduled, the said auction was held on 19.08.2011 and the third respondent herein has purchased the said schedule property for a sum of Rs.15 crores and remitted 25% of the amount on the very same day. Thereafter, on 06.09.2011, the sale certificate was issued in favour of the third respondent on receipt of the remaining 75% of the bid amount on 02.09.2011 paid by the third respondent herein. After the sale certificate was issued in AIR.(SA).No.740 of 2011 on the file of the DRAT, Chennai, the petitioner has approached the DRAT, Chennai, challenging the order dated 17.08.2011 in I.A.No.753 of 2011 in S.A.No.772 of 2011 on the file of Debt Recovery Tribunal, Ernakulam, seeking waiver of 50% deposit. DRAT, after hearing the parties, passed the following order:

"Call this IA on 15.11.2011 for awaiting the final order in OA.No.212/2009 and in the meanwhile the Authorized Officer shall stand restrained from in any way proceeding further under the provisions of the SARFAESI Act in any manner including the taking of physical possession of the secured asset set out in the notice issued by the Advocate Commissioner dated 12.09.2011 pursuant to the order of the Chief Judicial Magistrate, Kollam, Kerala State or causing taking of physical possession of the said secured asset till further orders."

91. The DRAT has stayed taking over physical possession by the respondent. It could be seen from the material on record that this order dated 11.10.2011 made in I.A.No.1106 of 2011 in AIR.SR.No.740 of 2011 came to be challenged by the respondent bank and by the third respondent in O.P.(DRT).No.3472 of 2011 and 3545 of 2011. Meanwhile, final order has been passed in O.A.No.212 of 2009 filed by the respondent bank, by allowing the OA and directing the respondent bank to file statement, detailing the particulars of recovery effected subsequent to the filing of O.A. and further directed the bank to lodge the original title document before the Tribunal.

92. Meanwhile, by order dated 25.11.2011, the High Court of



Kerala, by a common Judgment, remanded the matter back to DRAT, Chennai, to decide the issue of waiver, under Section 18 of the Act. The third respondent and the bank approached the High Court of Kerala in O.P.(DRT).Nos.4269 and 4281 of 2011, challenging the order passed by DRAT and its order dated 08.12.2011 in I.A.No.1106 of 2011 in AIR.SR.No.740 of 2011 directing the petitioner to deposit a sum of Rs.2,52,991,656 on or before 14.02.2012. At the same time, the petitioner has also filed O.P.No.455 of 2012. This Writ Petition came up for hearing on 15.02.2012 before the High Court of Kerala. While setting aside the order passed in I.A.No.1106 of 2011 dated 08.12.2011, allowed the O.P.No.4284 filed by the third respondent and bank respectively, and dismissed the O.P.No.455 of 2012 filed by the petitioner herein on the following grounds.

"26. When reasons are to be recorded in writing, such reasons O.P.(DRT) NOS. 4269 & 4281 OF 2011 & 455 OF 2012 should be based on the pleadings of the parties and should also stand judicial scrutiny. In Ext.P10 order, the relevant portion of which has already been extracted, the only reason stated by the Tribunal to justify the reduction of the amount is "in view of the facts and circumstances of the case, more particularly in view of the fact that the petitioner is claiming to be in a financial liquidity crisis". This order does not contain any explanation of the facts and circumstances that weighed with the Tribunal. Further, this order also does not indicate from where the Tribunal got the idea of liquidity crisis claimed by the defaulter. In this context, it will be relevant to mention that Ext.R1(j) is the copy of IA 1106/11, in which Ext.P10 order has been passed and in the affidavit, the defaulter has not even pleaded liquidity crisis. Thus, the Tribunal was inventing a reason which does not find a place in the pleadings, and this in my view, a statutory Tribunal could not have done. Therefore, the justification of the Tribunal for exercising its powers under the 3rd proviso to Section 18 is plainly untenable and for that reason Ext.P10 calls for interference.

27. I have considered whether the Tribunal should be asked to reconsider the matter. Such reconsideration would have been necessary in a case where inspite of pleadings and other materials, O.P.(DRT) NOS. 4269 & 4281 OF 2011 & 455 OF 2012 Tribunal had passed an order ignoring the same. In this case, even the defaulter was unable to show me any pleading or other material justifying the invocation of power under the 3rd proviso to Section 18. Therefore, I am not persuaded to accept the request that the Tribunal should be called upon to reconsider IA 1106/11 once again and pass fresh orders in the matter.



For these reasons, Ext.P10 order is set aside and IA No.1106/11 will stand dismissed.

Accordingly, OP(DRT) Nos.4269/11 and 4281/11 filed by the purchaser and the Bank will stand allowed to the extent indicated above and OP(DRT) No.455/12 filed by the defaulter will stand dismissed. No costs."

93. It could be seen from the material on record that the above order of High Court of Kerala came to be challenged by the petitioner in SLP.Nos.9376 and 9378 of 2012 and the Honourable Supreme Court on 02.04.2012, without expressing anything on the merits of the impugned order, directed DRAT Ernakulam to dispose of the petition in S.A.No.272 of 2007 on merits without insisting on pre deposit dated 17.08.2011 as expeditiously as possible practicably, and in any case by not later than 3 months from the date of receipt of a copy of the order and further held that it is open to the parties before the Tribunal to urge all the contentions as may be available to them in accordance with the law before the Tribunal.

94. After the order of the Hon'ble Supreme Court, the third respondent has also been impleaded in S.A.No.272 of 2011 on the file of DRT Ernakulam. DRT Ernakulam, after hearing the parties, by order dated 15.01.2014, dismissed SA.No.272 of 2011 filed by the petitioner and held that the petitioner has no right to redeem the subject property sold to the third respondent, as the same was sold in accordance with law. Again the petitioner approached the DRAT, Chennai in AIR.I.A.No.50 of 2014 challenging the order dated 15.01.2014 made in S.A.No.272 of 2011. However, the Appellate Tribunal also dismissed the appeal filed by the petitioner, concurring with the view taken by DRT, Ernakulam, paving way to the petitioner, to file the present Writ Petition.

95. Based on the submission made by the learned counsel for either parties, this Court has to analyse as to whether the auction taken by the respondent bank, is as per the procedures laid down under the securitisation and whether DRT as well as the DRAT were justified in holding that the petitioner has lost the right of redemption of the property purchased by the third respondent, in the auction held on 19.08.2011.

96. It could be seen from the provisions of the Act that in the case where the borrower or guarantor fails to discharge the liability, the bank is empowered to issue demand notice under Section 13(2) as secured creditor has recourse to one or more measures under Section 13(4) to recover its secured debt. Whoever aggrieved, by any of the measures, initiated by bank,



may approach DRT, challenging the same.

97. It is not in dispute that the bank commenced its proceedings by issuing Section 13(2) notice on 18.07.2008, followed by possession notice dated 18.03.2011. It could be seen from the material on record that at every stage, the petitioner had approached the High Court of Kerala, challenging every action of the bank, and many interim orders were passed by the High Court of Kerala. Between 18.07.2008, when 13(2) notice was issued by the bank and possession notice 13(4) was issued by the bank on 18.03.2011, there was a gap of almost 32 months between 13(2) notice and 13(4) notice. Despite sufficient time given to the petitioner to comply with the condition, the petitioner failed to comply with the same. The petitioner had the benefit of several orders passed by the High Court of Kerala, at every stage, and provided with extension of time granted by the High Court of Kerala, till when the sale notice was issued on 02.07.2011, fixing the date of auction on 19.08.2011. In fact, even after the sale had taken place on 19.08.2011, the Hon'ble Supreme Court of India, directed the Debt Recovery Tribunal to dispose of S.A.No.272 of 2011 filed by the petitioner, he has not come forward to pay the amount due to the bank.

98. It is to be seen from the demand notice issued under Section 13(2) of the SARFAESI Act, outstanding dues have been clearly mentioned indicating the further interest payable by the petitioner. No material has been produced by the petitioner raising any objections to the notice dated 18.07.2008 issued under Section 13(2) of the SARFAESI Act, which would mean, that the petitioner had no grievance on the quantum of amount claimed in the notice by the respondent bank. No where in the pleadings or even in the arguments, the petitioner has come forward to dispute the amount claimed in the 13(2) notice.

99. After the issuance of notice dated 18.07.2008, only O.A.No.212 of 2009 was filed by the respondent bank under RDDBFI Act against the petitioner before DRT, Ernakulam, for realising a sum of Rs.9,17,52,019.33. It is not in dispute that the respondent bank after realisation of some amounts due from the petitioner, filed I.A.No.320 of 2011, in O.A.No.212 of 2009 and reduced the claim amount from Rs.9,17,52,019.33 to Rs.7,68,13,139.33, which the petitioner also accepted on 02.07.2011.

100. Though the Original Application No.212 of 2009 was filed on 18.05.2009, subsequently on 27.11.2011 the amount has been reduced from Rs.9,17,52,019.33 to Rs.7,68,13,139.33. In the meanwhile, the respondent bank issued a sale notice dated 02.07.2011, bringing Item Nos.1,2,3 alone, for auction, fixing the date of auction on 19.08.2011. Even at that point of time, the petitioner had not taken any steps, despite acknowledging



the sale notice. The respondent bank has filed valid acknowledgment card before DRT, Ernakulam in S.A.No.272 of 2011 as Ex.B15. Hence, the plea and the arguments put forth by the learned counsel for the petitioner that sale notice was not received by the petitioner cannot be accepted. The said plea is taken only before this Court for the purpose of making a ground, despite accepting the same.

101. Insofar as the contention raised by the petitioner with regard to publication made in English daily at Ernakulam, Exs.B3 and B4, before this Court, copy of the publication has been filed by the respondent bank apart from the same being filed before the DRT as Exs.B12 and B13, which is a photo copy of the paper publication of the sale notice dated 02.07.2011.

102. Under these circumstances, the contention raised by the learned counsel for the petitioner with regard to paper publication, as well as the receipt of sale notice dated 02.07.2011 and the respondent bank has violated the procedures, as laid down by the SARFAESI Act cannot be accepted. The next plea raised by the learned counsel for the petitioner that in the valuation report of the properties and the sale notice, correct valuation was not given, and that the petitioner, being the borrower was deprived of his right to redemption mortgaged, as provided under the Statute. Apart from that, the petitioner has contended that there is discrepancy in the amount calculated by the respondent bank.

103. It could be seen from the material on record that on the statement of accounts, produced before the DRT, the petitioner who has challenged the sale notice dated 02.07.2011 in I.A.No.1735 of 2011 in S.A.No.272 of 2011. DRT by order dated 17.08.2011, has passed a conditional order directing the petitioner to deposit certain amount. This order was not complied with by the petitioner and instead, he has approached the High Court of Kerala, by filing W.P.No.22667 of 2011 which came to be dismissed, at the initial stage itself, stating that the petitioner having not complied with the conditional order in I.A.No.1735 of 2011, cannot take the course, on the concept of right to redeem the mortgage property. Whenever the petitioner approached the Tribunal or the High Court of Kerala, the petitioner has also always expressed only his inability to discharge the liability, and at no point of time, came forward to settle the dues or complied with the conditional order imposed by the Tribunal or the High Court of Kerala, respectively. Hence, there was no other way then to complete the auction sale proceedings on 19.08.2011.

104. It is clear from the events extracted by various orders of High Court of Kerala and Tribunal, on several occasions indulgence has been shown to the petitioner by



imposing certain conditions against the bank and in favour of petitioner, by giving sufficient opportunity, so as to enable the petitioner to settle the debt amount, but there is not even a single piece of paper, produced by the petitioner neither before the Tribunal nor before the High Court of Kerala, that the petitioner had complied with any of the conditions in the various proceedings before the Tribunal or the High Court of Kerala. From the above, it could be seen that the attitude of the petitioner was to protract the proceedings.

105. This Court also cannot ignore the fact that petitioner himself filed a memo dated 17.08.2011, in O.A.No.212 of 2009 submitting to decree, to recover a total sum of Rs.7,68,13,139.33 with interest at the rate of 19% with monthly rest. The petitioner therein had only chosen to request the Tribunal fixing the pendent-lite and post-lite interest at reasonable rate. The petitioner having accepted to a decree, by filing memo on 17.08.2011 in O.A.No.212 of 2009 accepting all the contentions raised in the original application filed by the respondent bank is precluded from further agitating the proceedings in S.A.No.272 of 2011 on a different footing. The petitioner having consented for the recovery of amount as claimed by the bank in O.A.No.212 of 2009 except on interest, has lost his right to question the proceedings initiated under SARFAESI Act.

106. Borrower, in the case on hand, namely, the petitioner, cannot be permitted to agitate the securitisation application filed by the respondent bank, questioning the proceedings initiated by bank, under the Act when he has given consent for recovery in the Original Application No.212 of 2009 filed by the secured creditor for recovery of amount due from the borrower, accepting the procedure adopted by the bank. All along, the petitioner had only expressed inability to settle the due and given consent to proceed with the sale. In fact, it could also be seen from the affidavit filed in support of I.A.No.1735 of 2011 in S.A.No.272 of 2011 seeking to stay the sale notice dated 02.07.2011, nowhere in his affidavit the petitioner has complained on the quantum of amount claimed by the bank. Even the conditional order passed was also not complied with, by the petitioner and it could be inferred that he was only interested to protract the issue and he failed to make use of the opportunities to redeem the property and at each and every stage, the Tribunal and High Court of Kerala, interfered and protected his interest and passed orders in favour of the petitioner. Material on record indicate that action of the petitioner was not bonafide. The petitioner has relied on various judgments on the right of redemption under Section 52 of the Transfer of Property Act, 1832 which reads as follows:

"52. Transfer of property pending suit relating



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thereto. - During the [pendency] in any Court having authority [within the limits of India excluding the State of Jammu and Kashmir] or established beyond such limits] by [the Central Government] [***] of [any] suit or proceedings which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Explanation - For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."

107. On perusal of Judgments, on the right of redemption, each case differ from the other on factual circumstances and the decisions relied on by the learned counsel for the petitioner, are totally different from that of the case on hand. Though the general principles relating to transfer of property, during the pendency of the suit, has to be considered, in terms of Section 52 of Transfer of Property Act, this Court has to see whether DRT as well the DRAT were right in coming to a conclusion that the petitioner has lost the right of redemption of his properties, when the properties were brought for auction, by the sale notice dated 02.07.2011.

108. The respondent bank has initiated proceedings, as early as on 18.07.2008 and issued Section 13(2) notice against the petitioner. At various stages, the petitioner had approached the High Court of Kerala and DRAT seeking redressal against each and every proceeding initiated by the bank under the SARFAESI Act. W.P.No.33745 of 2008 was filed by the petitioner which was disposed of directing the bank to consider the request of the petitioner for one time settlement. This one time settlement proposed by the petitioner was not accepted as early as on 06.11.2008. Thereafter, the petitioner filed W.P.No.1053 of 2009 to declare the proceedings initiated by the respondent bank under SARFAESI Act as illegal and arbitrary. The said Writ Petition was closed as the Writ Petition was filed 2 days immediately after the representation, sent to the respondent



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bank, requesting for one time settlement for the second time. Thereafter, when the rejection order issued against the one time settlement on 29.12.2008, the said rejection order was challenged by the petitioner in W.P.No.2251 of 2009 with a similar prayer, as prayed in W.P.No.1053 of 2009.

109. The Honourable High Court of Kerala while making certain observations with regard to the residential property disposed of the said Writ Petition. Thereafter, the petitioner again filed another W.P.No.18325 2009, seeking for a prayer to release certain secured assets to sell the assets to settle the dues. The said Writ Petition also came to be disposed of, by partly allowing in favour of the petitioner, directing the respondent bank to release certain properties to enable the petitioner to sell the same and to discharge the liability. Not stopping with that, the petitioner had filed another W.P.No.20533 of 2009 which was also decided in favour of the petitioner, wherein, the petitioner was given liberty to arrange a prospective buyer, for purchase of properties, and direction was also issued to deposit the sale consideration to the extent it is necessary to discharge the entire liability by the petitioner. Thereafter, the petitioner has again filed W.P.No.29172 of 2009 challenging the order passed in C.M.P.2507 of 2009 dated 05.10.2009 proceedings initiated by the bank under Section 14 of the SARFAESI Act. Even in this Writ Petition, the petitioner was able to secure an interim stay against the operation of the orders passed by the learned Chief Judicial Magistrate with respect to two residential properties, on condition that the petitioner shall make a payment of Rs.40,00,000/- which came to be modified, enabling the petitioner to comply with the conditional order. Since the conditional order was not complied with, possession notice came to be issued under Section 13(4) and subsequently, sale notice came to be issued on 02.07.2011.

110. The petitioner, has filed S.A.No.272 of 2011 challenging the possession notice issued under Section 13(4) of the SARFAESI Act. On 09.05.2011, the Tribunal imposed certain conditions in I.A.No.1076 of 2011 in S.A.No.272 of 2011, even this condition has not been complied with by the petitioner. Thereafter, sale notice was issued and the petitioner once again filed I.A.No.1735 of 2011 in S.A.No.272 of 2011, sought for stay against the sale notice. The Tribunal by order dated 17.08.2011, passed a conditional order which the petitioner has failed to comply with. Meanwhile, on 17.08.2011, the petitioner filed a memo in O.A.No.212 of 2009 which was filed by the respondent bank, submitting to a decree in O.A.No.212 of 2009. Thereafter, the petitioner filed W.P.No.22667 of 2011, challenging the proceedings initiated by the respondent bank fixing the auction sale on 19.08.2011. This writ petition was dismissed at the admission stage itself.



111. It could be seen from the above record and from the case of the petitioner that at each and every stage, that is, from the material on record, on 9 occasions, the petitioner had approached the Honourable High Court of Kerala and obtained interim order, in his favour, but the conditional orders were not complied with, at any point of time by the petitioner. Apart from the Writ proceedings, the petitioner had the benefit of indulgence shown by DRT almost, on 4 occasions by obtaining conditional interim orders. Even those orders were not complied with by the petitioner, as he was not able to comply with those orders. Finally, the petitioner has also filed a memo submitting to the decree in O.A.No.212 of 2009.

112. It could be seen from the material on record that proceedings dated 18.07.2008, issued under Section 13(2) and the final proceedings, by sale of property dated 19.08.2011, have been completed by the bank, in accordance with the procedures contemplated under the SARFAESI Act and Rules framed. The petitioner having obtained several interim orders, from the High Court of Kerala, as well as DRT, has failed to comply with the orders. From this, it could be inferred that the petitioner was unable to raise any amount of money, to comply with the conditions imposed by the High Court of Kerala, as well as DRT Ernakulam.

113. Section 52 of Transfer of Property Act, can be invoked and applied to a bonafide person, who shows interest, in securing his properties on the right of redemption of properties during the pendency of a suit, in the case on hand, SARFAESI proceedings. On the facts and circumstances of the case on hand, for the reasons which we recorded in the foregoing paragraphs, the said principles cannot be applied. If such benefit, if extended to the petitioner, then it would be prejudicial to the third respondent herein, who is a bona fide purchaser, under the auction sale dated 19.08.2011, who had remitted the entire sale consideration of Rs.15 crores on 02.09.2011 and obtained a sale certificate on 06.09.2011 and registered the same on 12.03.2012, and thus, the 3rd respondent has obtained a right and become an absolute owner of the property purchased under the auction sale conducted by the respondent/bank.

114. Upon perusal of the material on records, it could be seen that the first and second respondents have conducted the sale, strictly in accordance with law, and complied with the statutory requirement as contemplated under the Act and Rules.

115. On the facts extracted supra, when the petitioner has not complied with the legal obligations and not established any violation committed by the bank regarding the statutory



requirement, it would be untenable to hold in favour of the petitioner that he has the right of redemption. Judgment relied on by the petitioner is inapplicable to the present case on hand, as the petitioner cannot take shelter under Section 52 of Transfer of Property Act, as he had no bonafide intention to redeem his property before 19.08.2011, when he was sufficiently provided with opportunities, by way of interim orders in various Writ proceedings and orders of the DRT and DRAT.

116. Various Judgments referred to by the petitioner differ on the facts to the present case, wherein, in those cases, the borrowers had shown their bona fide, by tendering amount due to the creditor. But, in the case on hand, the same principles cannot be applied to the petitioner, as he has failed to avail several opportunities extended, by the Court and Tribunals. Sale was effected on 19.08.2011 and the petitioner has failed to establish any violation of the procedures contemplated under the SARFAESI Act.

117. Even though, the petitioner has made submission that he has not lost of right of redemption, because sale was concluded during the pendency of SARFAESI application, and urged on the Doctrine of redemption, and supporting the same submitted that he has deposited the entire dues to the bank on 08.04.2013, exercising his right of redemption and further submitted that the final order was passed in the said S.A.No.272 of 2011 was only on 15.01.2014, and the lis was pending. We are of the view that once the sale is effected and when the petitioner has failed to establish any violation in the procedures contemplated under the SARFAESI Act, right of borrower to redeem the property extinguishes immediately, after the sale is concluded, and there is no legal right to the borrower, once the auction purchaser has remitted the entire sale consideration and sale certificate is being issued in favour of the auction purchaser, after following the procedures contemplated under the Act. In other words, after the sale is effectively concluded and when the borrower fails to establish that there is violation or illegality in the auction made by the bank, the resultant conclusion is that borrower, has lost his right of redemption.

118. At this juncture, it would be appropriate to refer to the judgment in State of Uttar Pradesh and others Vs. Swadeshi Polytex Limited and others reported in (2008) 12 SCC 596:

"37. The question of valuation is to our mind of the utmost importance as it is designed to ensure the best price for the property and it is essential in this circumstance that wide publication and notice of the proposed sale should be given as per Rule 285-A which postulates a notice of 30 days between the date of issuance of the sale proclamation and the date of auction. It can hardly be over emphasized that the proper valuation



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of the property and wide publicity of the proposed auction is intimately linked with the price that the auction fetches. As already mentioned above, the auction had been held on 2nd May 2005. The sale proclamation had been issued on the 1st April 2005, and served on the Chowkidar on the 21st April 2005, the publication made in "Amar Ujala" on 22nd April 2005 whereas rule 285 itself postulates a notice period of 30 days to be counted from the date of issuance of the sale proclamation. While dealing with a similar situation, this is what this Court had to say in S.J.S.Business Enterprises (P) Ltd. vs. State of Bihar (2004) 7 SCC 166:

"17. We are of the view that the sale effected in favour of Respondent 6 cannot be sustained. It is axiomatic that the statutory powers vested in State financial corporation under the State Financial Corporations Act, must be exercised bona fide. The presumption that public officials will discharge their duties honestly and in accordance with the law may be rebutted by establishing circumstances which reasonably probabalise the abuse of that power. In such event it is for the officer concerned to explain the circumstances which are set up against him. If there is no credible explanation forthcoming the court can assume that the impugned action was improper. (See Pannalal Binjraj v. Union of India, AIR at p.409.) Doubtless some of the restrictions placed on State financial corporations exercising their powers under section 29 of the State Financial Corporations Act, as prescribed in Mahesh Chandra v. Regional Manager, U.P.Financial Corpn. Are no longer in place in view of the subsequent decision in Haryana Financial Corpn. Vs. Jagdamba Oil Mills. However, in overruling the decision in Mahesh Chandra this Court has affirmed the view taken in Chairman and managing Director, SIPCOT v. Contromic (P) Ltd. and said that in the matter of sale under section 29, State financial corporations must act in accordance with the statute and must not act unfairly i.e. unreasonably. If they do, their action can be called into question under Article 226. Reasonableness is to be tested against the dominant consideration to secure the best price for the property to be sold.

12...This can be achieved only when there is a maximum public participation in the process of sale and everybody has an opportunity of making an offer. Public



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auction after adequate publicity ensures participation of every person who is interested in purchasing the property and generally secures the best price."

18. Adequate publicity to ensure maximum participation of bidders in turn requires that a fair and practical period of time must be given to purchasers to effectively participate in the sale. Unless the subject-matter of sale is of such a nature which requires immediate disposal, an opportunity must be given to the possible purchaser who is required to purchase the property on "as-is-where-is basis" to inspect it and to give a considered offer with the necessary financial support to deposit the earnest money and pay the offered amount, if required."

We must, therefore, repel Mr. Dwivedi's argument that as SPL had suffered no prejudice in the auction proceedings, the sale should not be interfered with."

119. Before concluding, it would be appropriate to refer paragraph 5 of the latest Judgment, reported in 2018 4 MLJ 57 (Dwarika Prasad Vs. State of U.P.) by the Hon'ble Supreme Court, which reads as follows:

"5. Section 13(8) of the SARFAESI Act provides as follows:

"(8) If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset."

These provisions have fallen for interpretation before this Court in Mathew Varghese (supra). Dwelling on Section 60 of the Transfer of the Property Act, this Court held that the right of redemption is available to a mortgagor unless it stands extinguished by an act of parties. The right of the mortgagor to redeem the property survives until there has been a transfer of the mortgagor's interest by a registered instrument of sale. Applying these principles in the context of the SARFAESI Act this Court held as follows:

"39. When we apply the above principles stated with reference to Section 60 of the T.P.



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Act in respect of a secured interest in a secured asset in favour of the secured creditor under the provisions of the SARFAESI Act and the relevant Rules applicable, under Section 13(1), a free hand is given to a secured creditor to resort to a sale without the intervention of the Court or Tribunal. However, under Section 13(8), it is clearly stipulated that the mortgagor, i.e. the borrower, who is otherwise called as a debtor, retains his full right to redeem the property by tendering all the dues to the secured creditor at any time before the date fixed for sale or transfer. Under Sub-section (8) of Section 13, as noted earlier, the secured asset should not be sold or transferred by the secured creditor when such tender is made by the borrower at the last moment before the sale or transfer. The said Sub-section also states that no further step should be taken by the secured creditor for transfer or sale of that secured asset. We find no reason to state that the principles laid down with reference to Section 60 of the T.P. Act, which is general in nature in respect of all mortgages, can have no application in respect of a secured interest in a secured asset created in favour of a secured creditor, as all the above-stated principles apply in all fours in respect of a transaction as between the debtor and secured creditor under the provisions of the SARFAESI Act".

120. The contention in the present case is that, sale notice was issued on 02.07.2011, fixing the sale on 19.08.2011. The sale notice was published in Malayalam and English daily newspapers on 03.07.2011. Though the petitioner had filed W.P.No.22667 of 2011, challenging the sale notice, the High Court of Kerala, dismissed the Writ Petition, by order dated 19.08.2011 and that the third respondent herein declared as successful bidder, has paid 25% of EMD on the very same day and paid the balance 75% amount on 02.09.2011, that is, within 15 days, the time stipulated under the terms and conditions of the auction sale. Thereafter, the sale certificate has been issued on 06.09.2011. Physical possession was also handed over to the third respondent on 05.03.2012. Subsequently, sale has been registered on 12.03.2012, as Document No.1247 of 2012, on the file of the Sub-Registrar, Kundara, Kerala State.

121. On the material on record, the latest Judgment rendered by the Hon'ble Supreme Court, squarely applies to this case. In the present case, transfer of interest has taken place,



by the issuance of sale certificate dated 06.09.2011 and subsequently, sale certificate was registered on 12.03.2012 in favour of the third respondent, as such Transfer of Interest has come into effect immediately, on the registration of sale certificate, in favour of the third respondent. Hence, this Court following the dictum laid down by the Full Bench of the Hon'ble Supreme Court, is of the view that the petitioner has lost his right of redemption, when the sale certificate was registered on 12.03.2002 and the possession was handed over.

122. It may not be out of place to refer to paragraph 8 of the Judgment in Tamilnadu Industrial Investment Corporation Vs. Millenium Business Solutions Private Limited, reported in 2004 (5) CTC 689 by the Hon'ble Madras High Court, which is as follows:

"18. Before parting with the case we would like to mention that recovery of tens of thousands of crore rupees of loans of banks and financial institutions has been held up by Court orders under Article 226 proceedings which were really unwarranted. However, much sympathy a Court may have for a party, a Writ Court must exercise its jurisdiction on well settled principles, and not on mere sympathy or compassion. No doubt, there may be hardship to a party, but unless violation of law is shown the Court cannot interfere. Holding up recoveries of loans by unwarranted Court orders is causing incalculable harm to our economy, since unless the loan is recovered a fresh loan cannot be granted to need persons. The Courts must keep these considerations in mind."

123. SARFAESI Act is an enactment of the parliament. The basic object of the enactment is to recover the dues from a Non Performing Assets, in speedy manner, to achieve the rapid developing economy of the country. When the Parliament has enacted a law and evolved a mechanism, the same should be permitted by the Courts, for effective implementation. SARFAESI Act is an Act which has self contained procedure to achieve the ends of justice and the purpose for which the enactment has been made. High Court should not ordinarily interfere with the procedure of the SARFAESI Act, unless, shown and substantiated that the procedure adopted by the secured creditor is patently illegal, which in the facts and circumstances of this case, is not.

124. In the present case, it is evident that the High Court of Kerala has interfered and granted several interim orders in favour of the petitioner but he has not complied with the directions. Act contemplates certain procedures and the test is whether finality reached is correct or not and High Courts should ensure the procedure has been duly followed.



125. In the light of the above discussion, we are of the view that the order passed by the DRAT confirming the order passed by the DRT in S.A.No.272 of 2011 does not warrant interference from this Court as both the Tribunals have evaluated each and every aspect that were raised in the present Writ Petition and the DRAT has given every reason in support of the decision which is well founded and in accordance with law.

126. Under these circumstances, the Writ Petition fails and this Court is not inclined to interfere with the order passed by the DRAT. Accordingly, the Writ Petition is dismissed. No Costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

raja

1. The Branch Manager.
South Indian Bank Ltd.,
Chinnakada Branch,
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Commercial Complex,
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+1cc to M/s.Sampath Kumar & Associates SR.67893
+1cc to Mr.F.B.Benjamin George, Advocate SR.68243

W.P.No.21791 of 2017
and
W.M.P.No.22803 of 2017

NRL (CO)
CB(05/11/2019)