

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH**

WRIT PETITION NO.36677 OF 2017

Between:

M/s Venshiv Pharma Chem (P) Ltd. and another ... Petitioners

and

State Bank of India, Stressed Assets Recovery
Branch, Koti, Hyderabad and others ... Respondents

DATE OF JUDGMENT PRONOUNCEMENT: 6th APRIL, 2018

SUBMITTED FOR APPROVAL:

**THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE P.KESHAVA RAO**

- 
1. Whether Reporters of Local newspapers may be allowed to see the judgment? Yes/No
 2. Whether copies of the judgment may be marked to Law Reporters/Journals Yes/No
 3. Whether His Lordship wishes to see the fair copy of the judgment? Yes/No

SANJAY KUMAR, J

P.KESHAVA RAO, J

***THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE P.KESHA RAO**

+ WRIT PETITION NO.36677 OF 2017

% DATED 6th APRIL, 2018

Between:

M/s Venshiv Pharma Chem (P) Ltd. and another ... Petitioners

and

\$ State Bank of India, Stressed Assets Recovery
Branch, Koti, Hyderabad and others ... Respondents

<Gist:

>Head Note:

! Counsel for petitioners : Sri C.B. Ram Mohan Reddy

^Counsel for respondents 1 and 2 : Sri M.Narender Reddy and
Sri M.Srikanth Reddy

^Counsel for respondent 3 : Sri P.Nagendra Reddy

? CASES REFERRED:

1. (2018) 3 SCC 85
2. (2018) 1 SCC 626
3. (2010) 8 SCC 110
4. AIR 1950 SC 163
5. 2017 (1) ALD 193 (DB) = 2016 (6) ALT 426
6. (2013) 10 SCC 83
7. 2016 (5) ALD 354 (DB) = 2016 (4) ALT 193 (DB)
8. (2017) 4 SCC 735
9. (2014) 5 SCC 610
10. AIR 2014 (Orissa) 83 = 2014 LawSuit (Orissa) 42
11. AIR 2017 SC 4481 = 2017 (3) Scale 266
12. (2015) 1 SCC 1 = 2014 SCC Online SC 712
13. AIR 2014 SC 1947
14. AIR 2008 MADRAS 108 = (2007) 6 MLJ 488 = (2009) 152 Comp
Cases 196
15. 2016 (6) ALD 409 (DB)
16. 2012 SCC OnLine Mad 3055 = (2012) 5 CTC 1 = (2012) 6 MLJ
717
17. AIR 2014 SC 1710

**THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE P.KESHA RAO
WRIT PETITION NO.36677 OF 2017**

ORDER

(Per Sri Justice Sanjay Kumar)

By way of their amended prayer in this writ petition, Venshiv Pharma Chem (P) Limited and its Managing Director, the petitioners, assail the auction sale of their properties by the State Bank of India (*hereinafter*, 'the bank') on 30.11.2016 (wrongly shown as 30.11.2017 in the prayer) pursuant to the e-auction sale notice dated 21.10.2016 (wrongly shown as 23.09.2017 in the prayer). They seek a consequential direction to set aside the said sale.

At the outset, it may be noted that the petitioners herein already filed S.A.No.513 of 2016 under Section 17(1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (*for brevity*, 'the SARFAESI Act') before the Debts Recovery Tribunal (*hereinafter*, 'the Tribunal') at Hyderabad. Their prayers therein read as follows:

i) Declare that the 'E-Auction Sale Notice' dated 21.10.2016 issued by the Respondent Bank and fixing the date of auction on 30.11.2016 against the schedule properties as arbitrary, illegal and not maintainable under the Act and Rules, 2002,

ii) Declare that the 'Notice issued under Rule 8 (6) of the Rules, 2002' dated 23.09.2016 and 03.11.2016 issued by the Respondent Bank against the alleged secured assets as arbitrary, illegal and not maintainable under the Act and Rules, 2002,

iii) Set aside all the measures initiated by the Respondent Bank under Section 13 (4) of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act read with the Security Interest (Enforcement) Rules, 2002 including the Demand Notice issued by the Respondent Bank against the schedule property,

iv) Declare that taking physical possession of the unit along with plant and machinery belongs to the Applicant No.1 without following Rule 4 read with Rule 8 of the Rules, 2002 by the Respondent Bank as illegal and arbitrary,

v) Order to re-deliver the schedule property to the Applicants with a proper Inventory and Panchanama henceforth,

vi) Declare that the Demand Notice issued by the Respondent Bank has no *locostandi* and consequently direct the Respondent Bank to issue a fresh Demand Notice in accordance with law,

vii) Set aside all the measures initiated by the Respondent Bank under Section 13 (2) and (4) of the SARFAESI Act and Rules, 2002 against the schedule properties,

viii) Direct the Respondent Bank to pay costs including the compensatory costs and damages to the extent of Rs.25 lakhs,

ix) and pass such other order(s) as the Hon'ble Tribunal deems fit and proper in the circumstances of the case.'

This S.A. is still pending consideration before the Tribunal.

Sri M.Narender Reddy, learned senior counsel representing Sri M.Srikanth Reddy, learned counsel for the bank, would contend that it is not open to the petitioners to come before this Court by way of the present writ petition reiterating their challenge to the auction sale when the same issue is pending consideration before the Tribunal. He would rely on case law in support of his contention that the writ petition should be dismissed on this short ground.

On the contrary, Sri C.B.Ram Mohan Reddy, learned counsel for the petitioners, would argue that the writ petition is maintainable as the statutory alternative remedy proved to be ineffective and that pendency of the same would not bar his clients from invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution. He would further submit that his clients would withdraw the pending securitization application, if necessary, and that this Court may adjudicate upon the merits of this case.

It is no doubt true that the Supreme Court has time and again cautioned High Courts not to entertain writ petitions arising under the SARFAESI Act, given the hierarchy of statutory remedies provided under the enactment itself. However, it must be remembered that refusal by High Courts to entertain writ petitions due to availability of alternative remedies is a self-imposed restraint and discretion in this regard has to be exercised judiciously on a case-to-case basis depending upon the individual facts obtaining therein.

Recently, the Supreme Court had occasion to consider this issue in **AUTHORIZED OFFICER, STATE BANK OF TRAVANCORE V/s. MATHEW K.C.**¹. The case arose out of the interim order passed by the Kerala High Court in a writ petition staying further proceedings at the stage of measures being taken under Section 13(4) of the SARFAESI Act. The Supreme Court observed that the SARFAESI Act is a complete code in itself and the High Court ought not to have entertained the writ petition in view of the alternative remedies available thereunder. On facts, the Supreme Court found that the writ petition was not instituted *bonafide* but only to stall further action for recovery. There was no pleading as to why the remedy under Section 17 of the SARFAESI Act was not efficacious and no compelling reasons were cited for bypassing the same. Referring to case law on the subject, the Supreme Court concluded that the writ petition ought not to have been entertained and that the interim order was granted for the mere asking without assigning special reasons and without even allowing a hearing to the bank.

Similar was the view taken by the Supreme Court a little earlier in November, 2017, in **AGARWAL TRACOM PVT. LTD. V/s. PUNJAB**

¹ (2018) 3 SCC 85

NATIONAL BANK². This case also arose out of proceedings initiated under the SARFAESI Act which culminated in the sale of the secured asset. The appellant before the Supreme Court was the auction purchaser who failed to pay the bid amount in terms of the sale conditions. The Delhi High Court had refused to entertain the writ petition filed by the appellant assailing forfeiture of its deposit holding that the proper remedy was to file a securitization application under Section 17 of the SARFAESI Act before the jurisdictional Tribunal. In appeal, the Supreme Court observed that the expression ‘any of the measures referred to in Section 13(4) taken by the secured creditor’ in Section 17(1) of the SARFAESI Act would include forfeiture of the deposit made by the auction purchaser. The Supreme Court accordingly concurred with the view taken by the Delhi High Court that the auction purchaser ought to have availed the statutory remedy. While holding so, the Supreme Court recalled that in **UNITED BANK OF INDIA V/s. SATYAWATI TONDON**³ it had occasion to examine in detail the provisions of the SARFAESI Act and invocation of the extraordinary power of the High Court under Article 226 of the Constitution to challenge the actions taken thereunder. The observations made therein were to the effect that the High Court would ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that, in all such cases, the High Court must insist that a person aggrieved must exhaust the remedies available under the relevant statute before availing the remedy under Article 226 of the Constitution. It may however be noted that after saying so, the Supreme Court, in **SATYAWATI TONDON**³, also observed as under:

² (2018) 1 SCC 626

³ (2010) 8 SCC 110

‘44. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution.

45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.’

Much earlier, in **RASHID AHMAD V/s. MUNICIPAL BOARD OF KAIRANA**⁴, the Supreme Court had observed that though existence of an alternative legal remedy was something to be taken into consideration while granting writs, when the authority concerned acted in violation of the relevant law, resulting in infringement of fundamental rights, the person aggrieved is entitled to have his grievance redressed without being relegated to a statutory remedy which may not, in such circumstances, be an alternative remedy.

Significantly, in **R.VIMALA V/s. STATE BANK OF INDIA**⁵, a decision of a Division Bench of this Court in which one of us, SK,J, was a member, relying on observations made by the Supreme Court

⁴ AIR 1950 SC 163

⁵ 2017 (1) ALD 193 (DB) = 2016 (6) ALT 426

in **SRI SIDDESHWARA COOPERATIVE BANK LTD. V/s. IKBAL**⁶, it was affirmed that the rule of exhaustion of an alternative remedy was only a rule of discretion and not one of compulsion.

The aforesaid case law makes it clear that it is ultimately for the High Court to decide as to whether the individual case before it requires adherence to the self-imposed restraint from entertaining it or warrants deviation therefrom.

In the case on hand, the petitioners have already invoked the statutory remedy under Section 17(1) of the SARFAESI Act. They filed the said application on 21.11.2016, aggrieved by the publication of the sale notice dated 21.10.2016 proposing to sell the secured assets on 30.11.2016. The auction sale notice mentioned the following secured assets: (a) the hypothecated plant and machinery of the first petitioner company and (b) the land admeasuring 20 acres, along with factory and buildings, in Survey Nos.1212 (part), 1213 (part), 1214 (part) and 1215 (part), Mega Industrial Park (APIIC-IALA), Koppa, Y.S.R. District, Andhra Pradesh.

The petitioners also filed I.A.No.3189 of 2016 in the S.A. seeking stay of all further proceedings, including the auction sale to be held on 30.11.2016. By Docket Order dated 30.11.2016 passed therein, the Tribunal noted their contention that the impugned sale notice was not in accordance with the statutory scheme but opined that the issue required to be examined in the main S.A. However, the Tribunal granted interim stay of the sale scheduled to be held on 30.11.2016 subject to the petitioners depositing 30% of the reserve price of Rs.8,03,00,000/-, fixed for the properties, in two equal instalments. The first instalment of 15% was to be paid by 4.00 PM

⁶ (2013) 10 SCC 83

on 30.11.2016 and the second instalment of 15% was to be paid within three weeks. The Tribunal also made it clear that failure to make the deposit of either of the instalments would enable the bank to proceed with the sale in accordance with law. In effect, the petitioners had to deposit a sum of Rs.1,20,45,000/- by 4.00 PM on the very same day so as to have the benefit of the stay order.

Be it noted that as on 30.11.2016, when the Tribunal passed this conditional order, the law laid down by this Court on 11.04.2016 in **M.AMARENDER REDDY V/s. CANARA BANK**⁷ was holding the field. In the light of the *ratio* laid down therein, the bank necessarily had to maintain a clear 30 days gap after issuance of the notice under Rule 8(6) of the Rules of 2002 and another clear 30 days gap after publication of the sale notice under Rule 9(1) thereof. On facts, it was manifest that issuance of the sale notice on 23.09.2016 followed by publication of the sale notice under Rule 9(1) of the Rules of 2002 on 23.10.2016 did not satisfy the said requirement. Despite the same, the Tribunal found it fit to grant a conditional order and as the petitioners failed to comply with the same, the auction sale was held by the bank on 30.11.2016, notwithstanding clear transgression by the bank in abiding by the mandate of **M.AMARENDER REDDY**⁷. It is no doubt true that the decision of this Court in **M.AMARENDER REDDY**⁷ was reversed by the Supreme Court in **CANARA BANK V/s. M.AMARENDER REDDY**⁸ on 02.03.2017 and it was held therein that it is permissible to simultaneously issue the notice under Rule 8(6) of the Rules of 2002 and publish the sale notice under Rule 9(1) thereof, as long as 30 days clear gap is maintained between both the notices taken individually and the actual date of sale. Therefore, the ground

⁷ 2016 (5) ALD 354 (DB) = 2016 (4) ALT 193 (DB)

⁸ (2017) 4 SCC 735

urged by the petitioners in this regard may no longer hold good on that count, but significantly, it did have merit on the date of passing of the conditional order on 30.11.2016, but the Tribunal remained unmindful of the legal position as on that day.

This Court is also constrained to note the rather distressing practice that is being followed by Debts Recovery Tribunals in the States of Telangana and Andhra Pradesh. In all applications filed by aggrieved borrowers seeking stay of further proceedings, be it at the stage of taking possession or at the time of public auction of the secured assets, the Tribunals are adopting a uniform procedure of granting stay by directing the applicants/borrowers to deposit a percentage of the total outstanding dues or the reserve price and in most cases, 30% thereof. No endeavour is being made by the Tribunals at that stage to examine the merits of the case so as to ensure that the interest of justice is protected. It may well happen that in a wholly undeserving case, the Tribunal grants interim relief conditionally and on the other hand, in a deserving case also, where the actions of the secured creditor are demonstrably unsustainable in law, being in violation of the statutory procedure, the Tribunal still puts the applicants/borrowers on terms, though they may be justifiably entitled to unconditional protection.

It must be remembered that the secured creditor is armed with the power of recovering its dues under the SARFAESI Act without intervention of the normal judicial process and such great power would invariably bring with it the responsibility of scrupulously adhering to the procedure prescribed under the enactment. If, in a particular case, the secured creditor does not do so, the proper corrective measure is for the jurisdictional Tribunal to interfere at the

stage of the first hearing of the securitization application for consideration of interim relief, so as to sensitize the secured creditor of the error in its ways. However, this is not happening as the Tribunals deal with all applications routinely.

The failure on the part of the Tribunals to distinguish between a deserving and an undeserving case, in so far as interim relief is concerned, may cause irreparable injustice to one or the other party. Grant of an interim stay in an undeserving case at the stage of sale of the secured asset would put the secured creditor and the innocent auction purchaser to hardship as the secured creditor would not be in a position to realize the full sale consideration and conclude the sale transaction. The rights of such secured creditor and auction purchaser would be put on hold unfairly at the behest of the applicants/borrowers, even though they have no tangible merit in their case. On the other hand, the uniform approach adopted by the Tribunals of granting interim relief by invariably directing payment of a percentage of the dues/reserve price, irrespective of the merits of the case, not only causes irreparable injustice to the applicant/borrower in a deserving case, but also defeats the very purpose of creation of this statutory remedy under the SARFAESI Act.

It is also to be noticed that Section 17(5) of the SARFAESI Act requires the Tribunal to deal with a securitization application made under Section 17(1) as expeditiously as possible and endeavour to dispose it of within 60 days from the date of filing. The *proviso* thereunder empowers the Tribunal to extend the said period, for reasons to be recorded in writing, subject to the total period of pendency of the application not exceeding 4 months from the date of making of such an application. The unfortunate truth, however, is

that Tribunals are not adhering to this temporal stipulation. In some cases, it is the applicant/borrower who is responsible for the delay by making one application after the other but in others, it is the secured creditor which is to blame for not filing its pleadings expeditiously.

In the case on hand, the petitioners raised crucial issues in their securitization application, relating to statutory procedure in the context of the impugned sale notice. Having adverted to these issues, the Tribunal did not even deem it appropriate to consider them so as to form a *prima facie* opinion as to whether their contentions had merit. Baldly stating that the said issues would be considered in the main S.A., the Tribunal allowed the bank to proceed with the sale if the petitioners failed to deposit 15% of the reserve price by 4.00 PM on the same day. The approach of the Tribunal was neither in the interest of the petitioners nor in the interest of the bank and the auction purchaser, who would come into the picture, as the very validity of the sale notice was in question.

This Court therefore finds no merit in the contention of Sri M.Narender Reddy, learned senior counsel, that the writ petition should not be entertained on the ground that the petitioners have already invoked the statutory remedy under Section 17 of the SARFAESI Act. We find from the very fact that the Tribunal failed to recognize the merit in their contentions and put them on terms while granting a conditional order, incapable of compliance due to time constraints, and also the fact that the said application is still pending though it was instituted in November, 2016, despite the mandate of Section 17(5) of the SARFAESI Act, that the S.A. has not proved to be an effective alternative remedy. Further, we find merit in the contentions urged as to fatal defects in the sale notice and the

procedure followed by the bank, in the context thereof and thereafter. Lastly, legal issues of far reaching impact and consequence have been raised which need to be addressed by this Court for the guidance of Tribunals in future cases. We are therefore of the opinion that this is not a fit case to non-suit the petitioners on the ground that they have already invoked the statutory remedy under the SARFAESI Act.

Nutshelled, the facts of the case: The first petitioner company availed two term loans and working capital facilities, with a total limit of Rs.670.00 lakh, from the bank in May, 2011. Various properties were mortgaged/hypothecated as security therefor. Due to irregularities in the operation of the loan accounts, the bank classified them as non-performing assets on 28.06.2014. Recovery proceedings under the SARFAESI Act were initiated by issuing demand notice dated 15.09.2014 under Section 13(2) thereof. The outstanding dues mentioned therein were Rs.7,20,51,842/- as on 11.09.2014. This demand notice detailed the hypothecated movable property and mortgaged immovable properties. The hypothecated movable property included current assets, plant and machinery, vehicles, etc., as set out in Schedule-C appended thereto. The mortgaged immovable properties were the 20 acres of land at the Mega Industrial Park, Koppaithy, YSR District, with buildings; house property at V.V.Nagar Colony, Kukatpally, Balanagar Mandal, Ranga Reddy District; Industrial Plot of Ac.0.20 cents in Modameedhipalli Village, Proddaturu Mandal, Kadapa District; and a house property in Balaji Nagar, Proddatur Town, Kadapa District.

Possession notice under Section 13(4) of the SARFAESI Act was issued by the bank on 10.12.2014 and it was published in

newspapers on 13.12.2014. Physical possession of the secured assets at Kadapa was taken over by the bank on 09.12.2015, pursuant to the order dated 12.04.2015 passed by the District Magistrate, Kadapa, in exercise of power under Section 14 of the SARFAESI Act.

In the meanwhile, the petitioners challenged the possession notice dated 10.12.2014 by filing S.A.No.838 of 2014 before the Tribunal. This S.A. was dismissed on 17.08.2015 and aggrieved thereby, the petitioners filed Appeal No.49 of 2016 before the Debts Recovery Appellate Tribunal at Kolkata. The appeal was also dismissed on 30.08.2016. Thereafter, the first petitioner company filed W.P.No.16658 of 2016 before this Court, in the context of the action taken by the bank in relation to the house property at Kukatpally, Hyderabad. The writ petition was dismissed on 01.11.2017. In the course of the recovery proceedings, the bank issued sale notice dated 16.06.2016, fixing the date of sale of the same secured assets now brought to sale, as 29.08.2016. The reserve price was fixed at Rs.8.90 crore. However, the said auction failed for want of bidders. Thereafter, the bank issued notice dated 23.09.2016 under Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 (*for brevity*, 'the Rules of 2002') informing the petitioners that the sale of the secured assets would be held on 30.11.2016. This notice was served on the petitioners on 01.10.2016. The subject sale notice dated 21.10.2016 under Rule 9(1) of the Rules of 2002 was published in newspapers on 23.10.2016. Aggrieved thereby, the petitioners filed S.A.No.513 of 2016 before the Tribunal. However, though an interim order of stay was granted therein on 30.11.2016, subject to conditions, the petitioners failed to deposit the amount by 4.00 PM on that day, as directed. Pursuant to the liberty granted by the

Tribunal, if the petitioners failed to deposit the said amount, the bank held the sale on 30.11.2016 and the secured assets were sold to Hetero Labs Limited, the third respondent company, which was the highest bidder at Rs.9.80 crore. The sale consideration, in full, was however paid by the third respondent company only on 17.01.2017. This amount was credited to the term loan and C.C. accounts of the first petitioner company. After adjustment of the realized amounts, the outstanding dues that still remained, according to the bank, aggregated to Rs.34,18,037.65 ps. as on 31.03.2017.

It appears that the bank thereafter came out with a 'One Time Settlement' scheme for outstanding dues of over Rs.20,00,000/- as on 31.03.2017. This scheme was applicable to cases pending before Courts/Tribunals and also where the bank had initiated proceedings under the SARFAESI Act. As the remaining outstanding dues of the petitioners were over Rs.20,00,000/- as on 31.03.2017, the bank issued letter dated 14.09.2017 informing the petitioners that they were eligible to avail the benefit of the scheme. The petitioners however misunderstood this offer to mean that they could pay the total outstanding dues by way of a 'One Time Settlement', so as to nullify the sale held on 30.11.2016. This was the grievance that was originally put forth by them in this writ petition. Be that as it may.

Primarily, two issues arise for consideration, apart from some incidental ones, which may be equally critical in their import.

Firstly, it may be noted that the statutory scheme of Rules 8 and 9 of the Rules of 2002, prior to their amendment with effect from 04.11.2016, mandated that the borrower should be allowed a clear 30 days notice period after the notice under Rule 8(6) thereof, so as to enable him to exercise his right of redemption under Section 13(8)

of the SARFAESI Act. This mandate was recognized and affirmed by the Supreme Court in **MATHEW VARGHESE V/s. M.AMRITHA KUMAR**⁹. Further, publication of the sale notice under Rule 9(1) of the Rules of 2002, must maintain a gap of 30 days before the date of the stipulated sale. In any event, the sale cannot take place before expiry of the 30 days notice period in terms of Rule 8(6). On facts, it is clear that even before expiry of a clear 30 days, be it from 23.09.2016, the date of the Rule 8(6) notice, or from 01.10.2016, the date of receipt of the said notice, the sale notice under Rule 9(1) of the Rules of 2002 was published on 23.10.2016. No doubt, the date of sale stipulated thereunder was 30.11.2016, beyond the required 30 days gap, and all would have been well in terms of the law laid down by the Supreme Court in **CANARA BANK**⁸, but for an intervening amendment to Section 13(8) of the SARFAESI Act, with effect from 01.09.2016, which assumes fatal significance in this context, as will be demonstrated hereinafter.

Secondly, it may be noted that the third respondent company, the highest bidder in the auction sale held on 30.11.2016, made an earnest money deposit of 10% of the reserve price on 24.11.2016 and was required to deposit, in all, 25% of the bid amount on the date of the sale itself, i.e., on 30.11.2016. However, it paid the balance due to make good 25% of the bid amount only on 01.12.2016. To compound matters further, the balance 75% of the bid amount, which should have been paid by the third respondent company within 15 days from the date of confirmation of the sale, was paid long thereafter on 17.01.2017.

⁹ (2014) 5 SCC 610

Addressing the second issue first, it may be noted that in terms of Rule 9 of the Rules of 2002, as it stood prior to its amendment with effect from 04.11.2016, the sale of immovable property had to be effected after expiry of 30 days from the date on which the notice of sale was published in newspapers. Rule 9(2) of the Rules of 2002 provided that the sale should be confirmed in favour of the purchaser who offered the highest sale price in his bid or tender or quotation or offer to the authorized officer, subject to confirmation by the secured creditor. The first *proviso* thereunder stipulated that no sale should be confirmed if the amount offered by way of the sale price was less than the reserve price. The second *proviso*, however, stipulated that if the authorized officer failed to obtain a price higher than the reserve price, he could, with the consent of the borrower and the secured creditor, effect the sale at such price. Rule 9(3) provided that on every sale of immovable property, the purchaser should immediately deposit 25% of the sale price with the authorized officer and in default of such deposit, the property should forthwith be sold again. Rule 9(4) stipulated that the balance of the purchase price should be paid by the purchaser to the authorized officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the parties. Rule 9(5) provided that in default of payment within the period mentioned in Rule 9(4), the deposit should be forfeited; the property should be resold; and the defaulting purchaser should forfeit all claims to the property or to any part of the sum for which it may be sold subsequently.

This being the statutory milieu obtaining prior to the amendment of the Rules of 2002 with effect from 04.11.2016, Sri

M.Narender Reddy, learned senior counsel, would contend that as the auction sale in the present case was held by the bank on 30.11.2016, the amended provisions of the Rules of 2002 would apply and not the un-amended provisions thereof.

Before adverting to this argument, it would be necessary to note certain relevant facts. The third respondent company submitted its bid on 24.11.2016 along with 10% of the reserve price towards the EMD, *viz.*, Rs.80,30,000/-. The auction sale was held on 30.11.2016 between 4.00 PM and 5.00 PM. Sri P.Nagendra Reddy, learned counsel for the third respondent company, would state that as the auction concluded after banking hours, the balance payable towards 25% of the bid of his client could not be paid to the bank on the same day. It was paid on the next day, i.e., 01.12.2016.

It appears that the bank issued sale confirmation advice to the third respondent company on 01.12.2016. This advice demonstrates that the third respondent company was informed thereunder that it was the successful bidder in the auction held on 30.11.2016 for the properties at Kadapa. The bank acknowledged receipt of Rs.2,45,00,000/-, in all, towards 25% of the bid amount and advised the third respondent company to remit the sum of Rs.7,35,00,000/-, the balance due, within 15 days from 30.11.2016. The bank also informed the third respondent company that sale of the property was subject to the final outcome of S.A.No.513 of 2016 filed by the borrowers. The bank cautioned the third respondent company that if it failed to remit the balance within the specified period, i.e., on or before 14.12.2016, the amount remitted by it would stand forfeited.

The third respondent company then addressed letter dated 05.12.2016 to the bank informing it that it was ready to remit the

balance of Rs.7,35,00,000/-, subject to the readiness of the bank to register the property without any encumbrances of whatsoever nature. By letter dated 14.12.2016, the bank informed the third respondent company, that as advised earlier, the borrowers had filed a securitization application which was coming up for hearing on 20.12.2016 and asked the third respondent company to pay the balance amount after 20.12.2016. The third respondent company addressed reply dated 14.12.2016, i.e., the same day, acknowledging the bank's letter and requesting 45 days time to remit the balance, due to internal adjustment of funds. By response dated 14.12.2016, i.e., the very same day, the bank informed the third respondent company that, having considered the request, it was permitting 45 days time to pay the balance sum of Rs.7,35,00,000/-.

In effect, the bank granted extension of time beyond the statutorily stipulated 15 days period. In this regard, Sri M.Narender Reddy, learned senior counsel, would point out that with effect from 04.11.2016, Rule 9(4) of the Rules of 2002 stood amended, whereby the bank could unilaterally extend the period for making payment of the balance sale consideration. Rule 9(4) of the Rules of 2002, as it stood after the amendment *vide* G.S.R.No.1046(E) dated 03.11.2016, which came into effect from 04.11.2016, reads as under:

‘(4) The balance amount of purchase price payable shall be paid by the purchaser to the authorized officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the purchaser and the secured creditor, in any case not exceeding three months.’

However, the un-amended Rule 9(4) of the Rules of 2002 read differently and is extracted hereunder:

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

The connotation of the word ‘parties’ appearing in the un-amended Rule 9(4) of the Rules of 2002 fell for consideration before the Supreme Court in **IKBAL**⁶. Therein, the Supreme Court categorically declared that the word ‘parties’ means the ‘borrower’, the ‘secured creditor’ and the ‘auction purchaser’. Hence, as per the regime of the un-amended Rule 9(4) of the Rules of 2002, any extension of time to pay the balance sale consideration had to be by taking the borrower into confidence and by obtaining his consent.

In the present case, it is an admitted fact that the petitioners, being the borrowers, were not even consulted before extension of time by a further period of 45 days was granted by the bank to the third respondent company, on 14.12.2016. The contention of Sri M.Narender Reddy, learned senior counsel, is that the regime of the un-amended Rule 9(4) of the Rules of 2002 would not apply to the case on hand as the auction sale was held on 30.11.2016, well after the amended Rule 9(4) came into operation on 04.11.2016.

We, however, find this argument to be specious.

If the argument of Sri M.Narender Reddy, learned senior counsel, is to be accepted that the amended Rules of 2002 should be made applicable to the subject sale, the amended rules would have to be made applicable to the entire transaction, i.e., right from its initiation by issuance of the notice under Rule 8(6) of the Rules of 2002. Doing so, would entail the amendments made under G.S.R.No.1046(E) dated 03.11.2016, which came into effect from

04.11.2016, being given effect to cover a sale process which was already initiated by that date, i.e., with retrospective effect.

Sri M.Narender Reddy, learned senior counsel, placed reliance on the Full Bench judgment of the Orissa High Court in **SARTHAK BUILDERS PVT.LTD. V/s. ORISSA RURAL DEVELOPMENT CORPORATION LIMITED**¹⁰. The issue under consideration was as to whether the SARFAESI Act would apply to a loan transaction entered into prior to coming into force thereof. The Full Bench observed that the SARFAESI Act intends to provide a remedy in respect of pre-existing loans and the interpretation that it would apply only to future debts would defeat the very purpose of that law, which was to reduce non-performing assets. Reference was made by the Full Bench to *Halsbury's Laws of England*, wherein the position was crisply summarized thus:

The presumption against retrospection does not apply to the legislation concerned merely with matters of procedure or of evidence; on the contrary, provisions of that nature are to be construed as retrospective unless there is a clear indication that such was not the intention of Parliament.'

The Full Bench summed up the following conclusions:

- (i) Presumption against retrospectivity is not applicable to enactments which merely affect procedure or change forum or are declaratory;
- (ii) Retroactive/retrospective operation can be implicit in a provision construed in the context where it occurs;
- (iii) Given the context, a provision can be held to apply to cause of action after such provision comes into force, even though the claim on which the action may be based may be of an anterior date; and

¹⁰ AIR 2014 (Orissa) 83 = 2014 LawSuit (Orissa) 42

- (iv) A remedial statute applies to pending proceedings and such application may not be taken to be retrospective if application is to be in future with reference to a pending cause of action;
- (v) SARFAESI Act is a remedial statute intended to deal with problem of pre-existing loan transactions which need speedy recovery.

Observing that a notification in respect of a financial institution under Section 2(1)(m) of the SARFAESI Act would bring such an institution on par with statutory institutions covered by the said provision prior to such notification, the Full Bench concluded that from the date of such notification, remedies under the SARFAESI Act would be available to the institution even if the loan was advanced by it earlier. It was further observed that the SARFAESI Act would apply to pre-existing loans and it could not be said to be retrospective.

A similar view was taken by the Supreme Court recently in **M.D.FROZEN FOODS EXPORTS PVT. LTD. V/s. HERO FINCORP LTD**¹¹. One of the issues framed for consideration by the Supreme Court in this case was whether resort could be had to Section 13 of the SARFAESI Act in respect of debts which had arisen out of a loan agreement/mortgage created prior to application of the SARFAESI Act to the said institution. A linked question thereto was whether a lender could invoke the SARFAESI Act when the notification of it being a financial institution under Section 2(1)(m) thereof was issued after the account became a non-performing asset under Section 2(1)(o) thereof. Observing that the SARFAESI Act was brought into force to solve the problem of recovery of large debts locked in non-performing assets, the Supreme Court held that the very

¹¹ AIR 2017 SC 4481 = 2017 (3) Scale 266

rationale for the said Act to be brought into force was to provide an expeditious procedure where there was a security interest. Pointing out that it did not apply retrospectively from the date when it came into force, the Supreme Court held that it would apply to all claims which were alive at the time when it was brought into force. Thus, *qua* an institution which was subsequently notified under Section 2(1)(m) of the SARFAESI Act, it would be applicable similarly from the date when it was so made applicable to it. Referring to the decision of the Orissa High Court in **SARTHAK BUILDERS PVT.LTD.**¹⁰, the Supreme Court approved the view taken therein. Dealing with the argument that such a construction would give retrospective operation to the provisions of the SARFAESI Act, the Supreme Court observed that retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. It was further observed that the SARFAESI Act was to provide a measure against security interests and its scheme is really to provide a procedural remedy against the security interests already created. Opining that the definition clauses in the SARFAESI Act clearly convey the legislative intent that the SARFAESI Act applies to all existing agreements, irrespective of the fact whether the lender was a notified financial institution on the date of the execution of the agreement with the borrower or not, the Supreme Court pointed out that the scheme of the SARFAESI Act sets out an expeditious procedural methodology enabling the bank to take possession of the property for non-payment of dues, without intervention of the Court. *Per* the Supreme Court, the mere fact that a more expeditious remedy is

provided under the SARFAESI Act does not mean that it has created an altogether new right and to accept the argument of the borrowers to the contrary would imply that they have an inherent right to delay enforcement against security interests.

In **COMMISSIONER OF INCOME TAX (CENTRAL)-I, NEW DELHI V/s. VATIKA TOWNSHIP PRIVATE LIMITED**¹², the question of law which was considered by a Constitution Bench was whether the *proviso* appended to Section 113 of the Income-tax Act, 1961, which was inserted by the Finance Act, 2002, was to operate prospectively or whether it was clarificatory and curative in nature, thereby having retrospective operation. This *proviso* was with regard to a surcharge being made applicable to the tax chargeable for the assessment year relevant to the previous year in which a search ensued under Section 132 or a requisition was made under Section 132A of the Income-tax Act, 1961. Two co-ordinate Benches of the Supreme Court had taken different views on the character of this *proviso* and the matter accordingly came up for consideration before the Constitution Bench. On the issue of retrospectivity of legislation, the Constitution Bench observed that a legislation, be it a statutory Act or a statutory Rule or a statutory Notification, may physically consist of words printed on papers but conceptually, it would be a great deal more than ordinary prose. Of the various rules guiding how a legislation has to be interpreted, the Supreme Court found that one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have retrospective operation and the idea behind the rule is that a current law should govern current activities. It was further observed that the obvious

¹² (2015) 1 SCC 1 = 2014 SCC Online SC 712

basis of the principle against retrospectivity is the principle of 'fairness', which must be the basis of every legal rule. Thus, legislations which modify accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect. It was however noted that if legislation confers a benefit on some persons without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislator's object, then the presumption would be that such legislation, giving it a purposive construction, would warrant a retrospective effect. The Constitution Bench therefore observed that the rule against retrospective operation is a fundamental rule of law that no statute should be construed to have retrospective operation unless such construction appears very clearly in the terms of the Act or arises by necessary and distinct implication. A distinction was however made by the Constitution Bench in so far as clarificatory or declaratory amendments were concerned. On facts, the Constitution Bench held that an assessment would create a vested right and an assessee cannot be subjected to re-assessment unless a provision to that effect is inserted by amendment, either expressly or by necessary implication, with retrospective effect. It was therefore held that the *proviso* to Section 113 of the Income-tax Act, 1961 could not be treated as a declaratory/curative amendment and, hence, it would not have retrospective effect.

The SARFAESI Act, as pointed out in **SARTHAK BUILDERS PVT.LTD.**¹⁰, is a remedial statute and not just a procedural one. Substantive rights and duties were created under the provisions and

prescriptions of the SARFAESI Act and the Rules of 2002, be it in the context of the secured creditor; the borrower, as defined thereunder; or, the auction purchaser, the most important one being the right of the secured creditor to bypass the ordinary time-consuming legal process for realizing its dues. Further, the amendments to the Rules of 2002 took away existing rights and created new ones. Therefore, giving retrospective effect to such amendments, by holding them to be declaratory, clarificatory or curative, does not arise.

Pertinent to note, G.S.R.No.1046(E) dated 03.11.2016, which was published in the Gazette of India, Extraordinary, Part II-Section 3(i) on 04.11.2016, specifically stated that the Security Interest (Enforcement) (Amendment) Rules, 2002 notified thereunder shall come into force on the date of their publication in the Official Gazette. Therefore, these rules cannot be given retrospective effect going even by the explicit intentment, as set out in the Gazette Notification itself. There is no indication in G.S.R.No.1046 (E) dated 03.11.2016, even by implication, that the amendments brought about by it in the Rules of 2002 should be given effect retrospectively. This is obviously because, as stated *supra*, various changes were made thereby, which had the effect of denuding vested rights that stood crystallized under the un-amended rules, if given retrospective effect.

For instance, Rule 9(4) of the Rules of 2002 has undergone a sea change in as much as, earlier; extension of time to make the balance payment of the purchase price could be only upon the agreement in writing between the parties, viz., the borrower, the auction purchaser and the secured creditor. However, after the amendment, the Rule now reads to the effect that such agreement can be made in writing between the auction purchaser and the

secured creditor, without the borrower being taken into confidence. The borrower therefore lost his earlier right. Similarly, Rule 9(5) of the un-amended Rules of 2002 provided that in default of payment within the period mentioned in Rule 9(4), the auction purchaser's deposit should be forfeited and the benefit of such forfeiture was being given to the borrower by crediting the said amount to the loan account. However, the amended provision now states that the deposit which would stand forfeited, upon the default of payment within the period mentioned in Rule 9(4), would be to the benefit of the secured creditor. The amendments brought about therefore cannot be said to be declaratory, clarificatory or procedural and were, in consequence, only prospective in operation.

It may be noted that the provisions of Section 13 of the SARFAESI Act were amended before the amendment of the Rules of 2002. The amendments to the SARFAESI Act were brought about by Act No.44 of 2016 with effect from 01.09.2016. Significantly, Section 13(8) of the SARFAESI Act also stood amended thereby. The un-amended Section 13(8) of the SARFAESI Act, as it stood prior to 01.09.2016, was as under:

‘(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.’

The amended Section 13(8) of the SARFAESI Act, after 01.09.2016, reads as under:

‘(8) Where the amount of dues of the secured creditor together with all costs, charges and expenses incurred by him is tendered to the secured creditor at any time before the date

of publication of notice for public auction or inviting quotations or tender from public or private treaty for transfer by way of lease, assignment or sale of the secured assets,—

- (i) the secured assets shall not be transferred by way of lease, assignment or sale by the secured creditor; and
- (ii) in case, any step has been taken by the secured creditor for transfer by way of lease or assignment or sale of the assets before tendering of such amount under this sub-section, no further step shall be taken by such secured creditor for transfer by way of lease or assignment or sale of such secured assets.’

Notably, in **VASU P.SHETTY V/s. M/S.HOTEL VANDANA PALACE**¹³, the Supreme Court referred to its earlier judgment in **MATHEW VARGHESE**⁹ and reiterated that the provisions of the Section 13(8) of the SARFAESI Act, as it then stood, were specifically for the protection of the borrowers in as much as ownership of the secured asset was a Constitutional right vesting in such borrowers, protected under Article 300A of the Constitution, and therefore, the secured creditor as a trustee of the secured asset cannot deal with the same in any manner it likes and such an asset could be disposed of only in the manner prescribed in the SARFAESI Act. The Supreme Court further observed that the creditor should ensure that the borrower was clearly put on notice as to the date and time, by which either the sale or transfer would be effected, in order to provide the required opportunity to the borrower to take all possible steps for retrieving his property. The Supreme Court noted that such a notice was also necessary to ensure that the secured asset would be sold to provide maximum benefit to the borrower. Earlier, in **MATHEW VARGHESE**⁹, the Supreme Court observed as under:

¹³ AIR 2014 SC 1947

‘29.2. When we analyse in depth the stipulations contained in the said sub-section (8), we find that there is a valuable right recognised and asserted in favour of the borrower, who is the owner of the secured asset and who is extended an opportunity to take all efforts to stop the sale or transfer till the last minute before which the said sale or transfer is to be effected. Having regard to such a valuable right of a debtor having been embedded in the said sub-section, it will have to be stated in uncontroverted terms that the said provision has been engrafted in the SARFAESI Act primarily with a view to protect the rights of a borrower, inasmuch as, such an ownership right is a constitutional right protected under Article 300-A of the Constitution, which mandates that no person shall be deprived of his property save by authority of law.

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

As pointed out by the Supreme Court *supra*, though recovery of public dues should be made expeditiously, it should be in accordance with the procedure prescribed by law and should not frustrate the Constitutional right as well as the human right of a borrower to hold property and in the event of a fundamental procedural error occurring in the same, the sale should be set aside.

Construing the provisions of the un-amended Section 13(8) of the SARFAESI Act, Courts have held time and again that the right of redemption available to the borrower thereunder would extend upto the actual ‘transfer’ of the secured asset sold, as the provision itself

states that upon the deposit being made by the borrower of all dues, the secured asset should not be 'transferred'. In effect, it was held that the right of redemption of the borrower extended upto the date of payment of the total sale consideration and issuance of the sale certificate, which would conclude the 'transfer' of the secured asset sold. In **K.CHIDAMBARA MANICKAM V/s. SHAKEENA**¹⁴, the Madurai Bench of the Madras High Court held that it is only upon issuance of the sale certificate that the auction purchaser becomes the absolute owner of the property.

Sri M.Narender Reddy, learned senior counsel, would argue that the un-amended Section 13(8) of the SARFAESI Act was similar in its wording to the amended version thereof, as regards the right of redemption being linked to the date fixed for sale or transfer of the secured asset. However, it may be noted that the amended version contains a new insertion to the effect that the tendering of the dues by the borrower to the secured creditor has to be 'at any time before the date of publication of notice for public auction or inviting quotations, or tender from public or private treaty for transfer.' The language of the un-amended version did not contain such a bar and allowed the right of redemption to operate till the date fixed for 'sale or transfer' of the secured asset.

Though Sri M.Narender Reddy, learned senior counsel, would point out that Clause (i) in the amended Section 13(8) would indicate that if the dues are tendered by the borrower to the secured creditor, the secured assets should not be 'transferred' by way of lease, assignment or sale by the secured creditor and under Clause (ii), in case any step has already been taken by the secured creditor for

¹⁴ AIR 2008 MADRAS 108 = (2007) 6 MLJ 488 = (2009) 152 Comp Cases 196

'transfer' by way of lease or assignment or sale of the assets, before tendering of such amount under this sub-section, no further step should be taken by the secured creditor and therefore, the right of redemption has to be construed accordingly. However, it may be noticed that the amended Section 13(8) attaches vital importance to the date of 'publication of the notice'. In so far as the date of publication of the notice under Rule 9(1) is concerned, be it for a public auction or for inviting tenders from the public, the secured creditor is bound to wait for 30 days from the date on which such publication is carried out before proceeding to the actual sale. Prior to this date, no steps could possibly be taken by the secured creditor for 'transfer' of the secured asset. Therefore, it is only in the other two situations, that is, where the secured creditor resorts to sale of the secured asset by inviting quotations under Rule 8(5)(a) or by private treaty under Rule 8(5)(d) of the Rules of 2002, that the possibility of a step being taken by the secured creditor for 'transfer' would arise. The situation covered by clauses (i) & (ii) of amended Section 13(8) therefore would not arise where the sale is through public auction by publication of a sale notice under Rule 9(1).

Further, under the new Section 13(8), the right of redemption available to the borrower stands drastically curtailed. Now, such right is available to the borrower only up to the date of publication of the notice for public auction or inviting quotations or tender from public for transfer by way of lease, assignment or sale of the secured asset. Thus, when the secured creditor resorts to sale through public auction under Rule 8(5) of the Rules of 2002, the date of publication of such sale notice under Rule 9(1) of the Rules of 2002 would effectively clinch the right of the borrower to redeem the secured

asset. However, Rule 8(6) of the Rules of 2002 remained unchanged, despite the amendments in November, 2016. This rule continues to provide that the authorized officer should serve upon the borrower a notice of 30 days before sale of the immovable secured asset. Obviously, this notice is intimation to the borrower of the intention of the secured creditor to recover its dues by sale of such asset, thereby enabling him to exercise his right of redemption under Section 13(8) of the SARFAESI Act. Therefore, a clear 30 days would have to be maintained between the date of service of such notice under Rule 8(6) of the Rules of 2002 and the expiry of the right of redemption under the amended Section 13(8) of the SARFAESI Act.

This brings us to the first issue of sufficient time not being given to the petitioners to exercise their right of redemption after the Rule 8(6) notice, in terms of the statutory mandate. In **MATHEW VARGHESE⁹**, the Supreme Court made it clear that the cycle under the un-amended Rules of 2002 would start afresh with issuance of a notice under Rule 8(6) of the Rules of 2002, if a sale fails for reasons not attributable to the borrower. Therefore, once the bank initiated the sale process again after the earlier sale failed for want of bidders, by issuing a notice under Rule 8(6) of the Rules of 2002 on 23.09.2016, on which date the un-amended Rules of 2002 were still in force, the entire process pursuant thereto necessarily had to be governed by the un-amended Rules of 2002 only. However, as stated *supra*, by the date of issuance of the notice under Rule 8(6) on 23.09.2016, the amendment to Section 13(8) of the SARFAESI Act was already operative, as it came into effect on 01.09.2016, and the amended Section 13(8) applied in full force to the right of redemption available to the petitioners pursuant to the Rule 8(6) notice dated

23.09.2016. In consequence, the right of redemption extended to them would have been alive only up to the date of publication of the notice of public auction under Rule 9(1) of the Rules of 2002.

In this context, the date of service of the Rule 8(6) notice dated 23.09.2019 assumes importance. According to the petitioners, they were served with the said notice only on 01.10.2016. This averment stands un rebutted. Even otherwise, given the fact that the notice was issued on 23.09.2016 and the notice of sale by public auction was published in newspapers on 23.10.2016, there was no clear thirty days gap available even between the said two dates. In this regard, it may be noted that in **R.VIMALA⁵**, this Court held that in computing the 30 clear days notice to be afforded to a borrower in the scheme of the Rules of 2002, the day of publication of the notice in the newspapers and the day of the actual sale have to be excluded. Though this observation was made in the context of the 30 days gap to be maintained under Rule 9(1), the same analogy would apply to the 30 days notice that is to be given to a borrower under Rule 8(6) of the Rules of 2002. Thus, taking into account the date of service of the notice, i.e., 01.10.2016, or even otherwise, taking the date of the notice itself, viz., 23.09.2016, the bank failed to abide by the statutory mandate of maintaining a clear 30 days gap between such notice and the date of expiry of the petitioners right of redemption upon publication of the sale notice under Rule 9(1), in terms of the amended Section 13(8) of the SARFAESI Act.

Significantly, the judgment of the Supreme Court in **CANARA BANK⁸**, rendered in the context of the un-amended provisions of the SARFAESI Act and the Rules of 2002, cannot be applied to the post-amendment scenario, in view of the truncated right of

redemption available to a borrower under the amended Section 13(8) of the SARFAESI Act. The petitioners are therefore entitled to succeed even on the first issue as regards violation of the statutory mandate to give them 30 days time for redemption pursuant to the Rule 8(6) notice dated 23.09.2016, in terms of **MATHEW VARGHESE**⁹.

Further, as it is an admitted fact that the bank did not take the petitioners into confidence while extending time under Rule 9(4) of the un-amended Rules of 2002 and did not obtain their consent in writing, the very extension granted by the bank to the third respondent company to make the balance payment stands vitiated.

POLISETTY HARANADH MURALIDHAR V/s. AUTHORIZED OFFICER, INDIAN OVERSEAS BANK, VISAKHAPATNAM¹⁵ was a decision delivered by a Division Bench of this Court in which one of us, SK,J, was a member. That was also a case where the statutory mandate was not followed in so far as payment of the sale consideration was concerned. Leaving aside the fact that the initial 25% of the sale consideration was not paid on the date of the auction, there was an extension of time granted by the bank to the auction purchaser behind the back of the borrower, as in the present case. It was accordingly held that, in the light of the law laid down in **IKBAL**⁶, the bank could not have extended time for deposit of the balance sale consideration without taking the borrower into confidence and without obtaining his consent.

Therefore, the statutory mandate could not have been watered down by the bank unilaterally without the active participation of the petitioners. Further, it is not the bank's case that the petitioners

¹⁵ 2016 (6) ALD 409 (DB)

waived their rights under the rule. In the absence of any clear waiver being pleaded and established, the bank was bound by the mandate.

Another irregularity that was committed by the bank in the course of the sale is that though the third respondent company participated in the auction sale held on 30.11.2016, the sale certificate pursuant thereto was ultimately issued in the name of AmaroX Pharma Pvt. Ltd., as per the nomination of the third respondent company. It appears that sale certificate dated 13.01.2017 was initially prepared by the bank in the name of the third respondent company but later, a fresh sale certificate was made out in the name of AmaroX Pharma Pvt. Ltd. The question is whether this change could have been permitted. A bidder in an auction sale held under the SARFAESI Act cannot undertake such participation in furtherance of real estate opportunism or by way of a business venture, so as to nominate a third party subsequently, after making a tidy profit for himself. If any such profit is made by an auction purchaser between the date of his bidding in the auction sale and issuance of the sale certificate, it would undermine the very purpose of the auction sale and reflect negatively upon the authorized officer, who conducts the auction sale. That apart, the sale notice dated 21.10.2016 contained a clear condition under Clause 13 of the 'Terms and Conditions of the e-auction', which reads as follows:

'The Sale Certificate will be issued in the name of the purchaser(s)/applicant(s) only and will not be issued in any other name(s).'

Sri P.Nagendra Reddy, learned counsel, would submit that the tender/quotation form submitted by the third respondent company indicated against Col.5, which requires the bidder to state whether he

is participating for self or for others, that the bid was submitted by it for the Hetero Group of Companies. Learned counsel would state that Amaro Pharma Pvt. Ltd. is a sister concern of the third respondent company and therefore, issuance of the sale certificate in its name does not constitute an irregularity. However, this Court cannot lose sight of the fact that the bank specifically made it a condition of the sale that the sale certificate would be issued only in the name of the bidder and not in any other name. That being so, it could not have acceded to the request of the third respondent company to issue the sale certificate in the name of its sister concern.

In this regard, it may be noticed that in **HEMALATHA RANGANATHAN V/s. THE AUTHORISED OFFICER, INDIAN BANK, CHENNAI**¹⁶, the Madras High Court frowned upon the authorized officer of the bank for confirming the sale in the name of a third party after accepting 75% of the sale consideration after a period of 18 months and ultimately selling the property to yet another person. The Madras High Court found that in the sale notification under consideration, there was no provision permitting the authorized officer to issue the order of confirmation in favour of a person other than the successful bidder and observed that the 'purchaser' would mean only a person in whose name the auction was confirmed originally and not a person who offers subsequently, as a nominee of the successful bidder. It was categorically held that the authorized officer has no authority to accept the request of the highest bidder to issue the sale certificate in favour of a third party and that the sale should be confirmed in the name of the highest bidder and not in the

¹⁶ 2012 SCC OnLine Mad 3055 = (2012) 5 CTC 1 = (2012) 6 MLJ 717

name of his nominee, as privity of contract would be only between the successful bidder and the bank.

Further, even if AmaroX Pharma Pvt. Ltd. is a sister concern of the third respondent company, they are both independent and separate legal entities, and in the event any transfer is to take place between them, it would entail payment of revenue to the State in the form of stamp duty, which now stands obviated by nomination of the sister concern by the third respondent company and acceptance thereof by the bank. Thus, this irregularity further taints the sale.

One last issue that merits mention is that the bank resorted to fixation of the reserve price of Rs.8,03,00,000/- in the sale notice dated 21.10.2016, without proper valuation of the properties put to sale. The petitioners would point out that in the sale notice dated 16.06.2016, whereunder the bank had proposed to sell the same properties on 29.08.2016, the reserve price was Rs.8.90 crore but the said auction failed for want of bidders, and surprisingly, the bank then resorted to the sale under the impugned sale notice dated 21.10.2016, whereunder the reserve price was reduced to Rs.8.03 crore. Though this Court would normally not sit in appeal over valuation of secured assets, leading to fixation of the reserve price by the authorized officer in consultation with the secured creditor, the bank must *prima facie* satisfy the mandate of Rule 8(5) of the Rules of 2002, by getting the valuation of the property to be sold made by a Government Approved Valuer. The petitioners would point out that the valuation, which was the basis for the sale notice dated 21.10.2016, dated back to an inspection made on 09.12.2015, leading to valuation report dated 05.01.2016. As more than 11 months elapsed since that inspection, the petitioners contend that

such a valuation report could not have been the basis, after such a long lapse of time. In response, Sri M.Narender Reddy, learned senior counsel, would assert that as per the policy of the bank, the valuation report dated 05.01.2016 could be taken into consideration for fixing the reserve price in the sale notice dated 21.10.2016. A copy of the letter dated 20.05.2015, addressed by the Deputy Managing Director and Chief Credit Officer of the bank to all the General Managers at various levels, demonstrates that the competent authority accorded approval for change of validity of valuation reports and conditions for obtaining second valuation report as under:

Particulars	Existing Instructions	Revised Instructions
Validity of Valuation Report for fixing Reserve Price and considering compromise settlement proposals.	The valuation report should be less than 6 months old based on which the Reserve Price is to be approved and compromise settlement proposals are to be considered.	The valuation report should be less than 1 year old for sale of properties under Private Treaty/SARFAESI Act 2002 and Settlement of dues through compromise.
Obtention of Second Valuation	Two valuation reports should be obtained from Bank's approved valuers in case of loans above Rs.1.00 crore in case of compromise settlement & in case of securities of Rs.1.00 crore & above for fixation of Reserve Price.	The second valuation report should be obtained only if the value of property is Rs.1.00 crore and above in case of compromise settlement & fixation of Reserve Price under SARFAESI Act 2002.

On the strength of the above decision of the Board, Sri M.Narender Reddy, learned senior counsel, would assert that as

the valuation report in the present case was less than a year old, the bank could rely upon the same for fixing the reserve price.

In this regard, it may be noted that Rule 8(5) of the Rules of 2002 specifically provides that 'before effecting sale of the immovable property', the authorized officer should obtain valuation thereof from an Approved Valuer and thereafter fix its reserve price in consultation with the secured creditor, so as to sell it by any of the modes/ methods prescribed thereunder. The policy of the bank however seems to be that a valuation which is less than one year old can be taken into account for this exercise. Given the fluidity and volatility of the real estate market, this Court finds that the broad time frame of one year adopted by the bank is not in the interest of the borrower.

In this regard, reference may also be made to **RAJIV SUBRAMANIYAN V/s. M/S. PANDIYAS**¹⁷, wherein the Supreme Court, while referring to **MATHEW VARGHESE**⁹, observed as under:

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

¹⁷ AIR 2014 SC 1710

the borrowers. The notice is also necessary to ensure that the secured creditor or anyone on its behalf is not allowed to exploit the situation by virtue of proceedings initiated under the SARFAESI Act, 2002.

17. 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 2002 Rules 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 bona fide measures to ensure that there is maximum yield from such secured assets for the 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 2002 Rules.'

(emphasis is ours)

It is therefore not open to the bank to fall back upon a valuation of over 11 months vintage to fix the reserve price for sale of the secured assets. All the more so, when such a reserve price indicates a radical fall, when compared with the reserve price in the earlier sale notice issued less than four months earlier. This Court therefore finds that this is one more irregularity which adversely impacts the subject sale.

On the above analysis, this Court finds that the sale held by the bank on 30.11.2016 pursuant to the notice dated 23.09.2016 under Rule 8(6) of the Rules of 2002 followed by the sale notice dated

21.10.2016, published in newspapers on 23.10.2016 under Rule 9(1) of the Rules of 2002, fell foul of the statutory mandate at its very inception, as the petitioners were not afforded the required 30 days clear notice to exercise their right of redemption, as the requisite gap was not maintained between the date of receipt of the Rule 8(6) notice dated 23.09.2016 and the publication of the Rule 9(1) sale notice on 23.10.2016, whereupon their right of redemption under the amended Section 13(8) of the SARFAESI Act stood prematurely extinguished.

To compound matters further, the bank thereafter committed the error of permitting extension of time to the third respondent company, the auction purchaser, to pay the balance 75% of the sale consideration without taking the petitioners into confidence and without obtaining their written consent. Other irregularities in the shape of the valuation not being obtained with proximity for fixing the reserve price before sale of the property, but in falling back on an inspection made 11 months previously, and the fact that the bank permitted the third respondent company, the auction purchaser, to nominate its sister concern, also taint the sale further. Given these incurable defects in the sale process, this Court necessarily has to set aside the sale held on 30.11.2016 and the consequential sale certificate dated 13.01.2017.

The writ petition is accordingly allowed holding that the sale held by the bank on 30.11.2016 stands vitiated on grounds more than one. Consequently, the sale certificate dated 13.01.2017 shall also stand cancelled. No further steps need be taken in this regard, as the said sale certificate has not been registered. This order shall however not preclude the bank from initiating measures afresh for recovery of its dues by taking further steps in accordance with the

due procedure prescribed under the SARFAESI Act and the Rules of 2002.

Pending miscellaneous petitions, if any, shall stand closed in the light of this final order. No order as to costs.

SANJAY KUMAR, J

P.KESHAVA RAO, J

6th APRIL, 2018

**Note: LR copy to be marked
B/o Svv**

