

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

* * * *

Writ Petition Nos.44964 & 44967 of 2017

WP No.44964 of 2017:

Between:

Kwality Agro Products, rep. by its Proprietor
K. Srinivasa Rao

..Petitioner

And

Cana Bank, rep. by its Branch Manager/
Authorized Officer, Madikonda Branch, Warangal
& others

..Respondents

WP No.44967 of 2017:

Between:

Smt. K. Srilakshmi

..Petitioner

And

Cana Bank, rep. by its Branch Manager/
Authorized Officer, Madikonda Branch, Warangal
& others

..Respondents

DATE OF JUDGMENT PRONOUNCED: 31.10.2018

SUBMITTED FOR APPROVAL:

HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

HON'BLE SMT. JUSTICE KONGARA VIJAYA LAKSHMI

1. Whether Reporters of Local newspapers
may be allowed to see the Judgment?

Yes/No

2. Whether the copies of judgment may be
marked to Law Reporters/Journals

Yes/No

3. Whether Your Lordships wish to
see the fair copy of the Judgment?

Yes/No

KONGARA VIJAYA LAKSHMI, J

*** HON'BLE SRI JUSTICE RAMESH RANGANATHAN**
AND
HON'BLE SMT. JUSTICE KONGARA VIJAYA LAKSHMI

+Writ Petition Nos.44964 and 44967 of 2017

%31.10.2018

WP No.44964 of 2017:

Between:

Kwality Agro Products, rep. by its Proprietor
K. Srinivasa Rao

..Petitioner

And

Cana Bank, rep. by its Branch Manager/
Authorized Officer, Madikonda Branch, Warangal
& others

..Respondents

WP No.44967 of 2017:

Between:

Smt. K. Srilakshmi

..Petitioner

And

Cana Bank, rep. by its Branch Manager/
Authorized Officer, Madikonda Branch, Warangal
& others

..Respondents

! Counsel for petitioner : Mr. R.Raghunandan,
(both W.Ps.) learned senior counsel for Sri S.Maruti Rao

^Counsel for Respondents-R.1 : Mr.Deepak Bhattacharjee,
(in both W.Ps.) learned counsel for Sri Dishit Bhattacharjee
R.2 & R.4 - Sri Vedula Venkataramana, learned
Senior Counsel for Sri D.Jagadishwar Rao
R.3 - Learned Government Pleader
for Stamps & Registration
R.5- Smt. Dymani SC for Andhra Bank

< Gist:

> Head Note:

? Cases referred:

1. (2014) 5 SCC 651
2. (2018) 3 SCC 85
3. (2013) 3 SCC 594
4. 2017(5) ALD 4 (SC)

HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND
HON'BLE SMT. JUSTICE KONGARA VIJAYA LAKSHMI

Writ Petition Nos.44964 and 44967 of 2017

COMMON ORDER: (per Hon'ble Smt Justice Kongara Vijaya Lakshmi)

W.P.No.44694 of 2017 is filed by the borrower, to declare the e-auction sale conducted on 17.11.2017, by the 1st respondent bank, confirming the same in favour of the 2nd respondent and handing over the possession of the property upon payment of 25% of the bid amount, as illegal, arbitrary and violative of provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'SARFAESI Act') and Security Interest (Enforcement) Rules, 2002 (for short 'Rules'), made there under.

W.P.No.44967 of 2017 is filed by the guarantor, to declare the action of the 1st respondent bank in selling away the properties, without giving any notice and without following due process of law, as illegal and arbitrary.

WP No.44964 of 2017: Brief facts of the case, according to the petitioner, are that the petitioner firm obtained loan from the 1st respondent bank in the year 2012 to run the business of poultry farm with a capacity of 3.00 lakh eggs per day; it has been repaying the installments regularly without fail up to February, 2014; due to hailstorm on 04.03.2014, the unit was severely damaged and almost all the birds died; additional working capital was rejected and the bank advised the petitioner to restart the unit with its own funds; the 1st respondent bank did not follow RBI guidelines in restructuring the loan; it did not give any

moratorium as stipulated in the guidelines; demand notice dated 04.05.2016 was issued intimating that the loan was classified as NPA on 13.01.2016 and called upon the petitioner to pay the entire amount; petitioner expressed its inability to repay the entire amount; the petitioner requested for OTS scheme on 08.07.2016 for an amount of Rs.15.65 crores; on 09.02.2017, the 1st respondent bank accorded OTS for an amount of Rs.22.10 crores after lapse of seven months, which resulted in accumulation of sum of Rs.2.40 crores towards interest; as the petitioner was unable to honour the terms in OTS, petitioner vide letter dated 07.03.2017 requested the 1st respondent bank to grant eight weeks time to settle the issue; the 1st respondent bank, instead of considering the request, has withdrawn OTS vide letter dated 10.04.2017; another demand notice dated 24.05.2017 was issued under Section 13(2) of the SARFAESI Act calling upon the petitioner to pay the outstanding amount of Rs.27,85,63,659/- plus interest within 60 days; petitioner again reiterated the request for OTS, but the 1st respondent bank did not respond; 1st respondent bank has issued possession notice on 22.08.2017 under Section 13(4) of the SARFAESI Act and taken possession of the properties of the petitioner; subsequently, e-auction sale notice dated 12.10.2017 was issued fixing the date of auction as 17.11.2017; thereafter, petitioner addressed a letter dated 15.11.2017 to the 1st respondent bank requesting to stall the auction with a request that he will pay the OTS amount on its revival on or before 25.03.2018; petitioner received the letter dated 20.11.2017 stating that its request for OTS was rejected and that the auction was conducted on 17.11.2017; in the auction, the

property was knocked down for a meager sum of Rs.9.75 crores and that only a single bidder 4th respondent had participated; the said person is none other than the MLA, who happens to have close association with one of officials of the bank; even as per the basic value register, the property is worth more than Rs.35.00 crores; structures and plant and machinery worth Rs.14.00 crores were not mentioned in the sale notice; the 2nd respondent/4th respondent did not pay the balance amount as stipulated in the sale notice; at the time of inspection, the 1st respondent bank has certified constructed area as 2.75 lakh sq. ft. over the property; even in the possession notice, there is no mention of built up structures, which are covered in an area of Ac.15.00 guntas; there is no mention about the machinery, which is in the property; sale notice is defective and is contrary to Rule 8 and 9 of the Rules; value of construction is nearly Rs.11.00 crores; plant and machinery to accommodate 3.00 lakh birds were installed in the sheds along with feed plant etc.; the reserve price fixed by the bank is very low and the authorized officer has not obtained the correct valuation from its approved valuer as prescribed under Rule 8(5) of the Rules of 2002; the bank permitted the petitioner for a moratorium up to 12 months i.e. from 30.09.2014 to 30.09.2015; during the period of moratorium also bank has collected monthly installments of nearly Rs.2.21 crores from the petitioner and if that amount is adjusted after the moratorium period, the loan account would not have become NPA; had the bank permitted for renewal of OTS, the petitioner would have paid Rs.22.10 crore, which is more than double the auction amount of Rs.9.75 crore; the value of the property is more than Rs.35.00

crore in the year 2014 and now it would fetch much more than that.

On 05.01.2018, this Court recorded the undertaking given by Sri Vedula Venkata Ramana, learned Senior Counsel appearing for Sri D.Jagadeeshwar Rao, learned counsel for the 2nd and 4th respondents-auction purchaser, that the existing structures on the land would not be demolished till the next date of hearing.

On 25.06.2018, this Court directed the 4th respondent-auction purchaser not to create any third party interests or encumbrances on the subject property.

Counter-affidavit has been filed by the 1st respondent-Canara Bank stating *inter-alia*, that demand notice dated 04.05.2016 under Section 13(2) of the SARFAESI Act, 2002 was issued and sent to the borrower and all the guarantors and they acknowledged the same; but they did not choose to give any reply; loan was classified as non performing asset with effect from 14.01.2016; after expiry of 60 days from the date of service of demand notice, possession notice was issued on 22.08.2017 under Section 13(4) of the SARFAESI Act, 2002; date of auction was fixed after 30 days from the date of service of the notice under rule 8(6) and after expiry of 30 days from the date of publication in the news papers in terms of Rule 9(1) of the Rules; auction was conducted on 17.11.2017, sale certificate was issued on 20.12.2017 and the sale certificate was registered with the Sub-Registrar on 04.01.2018; it is denied that the value of the property was more than Rs.35.00 crores; built up area is not mentioned in the sale notice and the possession notice; property which was originally

mortgaged along with the structures was taken into consideration; there is no machinery in the property as alleged, except cages etc; the cages for the birds were part of the building and hence, they were not separately sold; reserve price is not lower than the prevailing market value; structures are very much taken into consideration for arriving at the valuation of the property; auction purchaser in whose favour, the auction was knocked down, offered Rs.10,000/- more than the upset price; possession was delivered only after the sale certificate was issued by the bank on 20.12.2017 and that the petitioner has got alternative remedy under Section 17 of the SARFAESI Act.

Reply-affidavit has been filed by the petitioner to the counter-affidavit filed by the 1st respondent-bank, stating *inter-alia* that the bank has intimated that the account of the petitioner was declared as non performing asset on 14.01.2016; moratorium was granted from 30.09.2014 to 30.09.2015; in that particular moratorium period, petitioner paid Rs.2.21 crore towards installments; bank informed the petitioner that the payments made by him during moratorium period will be adjusted and treated as installments after moratorium period i.e., from 30.09.2015; according to repayment schedule, payment of Rs.2.21 crore will serve up to 30.05.2016; hence declaring the account of the petitioner as NPA is bad; valuation reports are obtained by the bank from two different panel valuers; in the valuation report given by one of the valuer, namely M/s Nagendranath Aitha, the value of the properties is shown as Rs.8,02,51,000/-; in his report he reported that on the said land, structures and sheds admeasuring 2,56,300 sq. ft. are there; the second valuation report was given by

M/s Sysplan Association assessing the value of the property as Rs.6,15,09,000/- and he noted that there are 87,513 sq. ft structures and sheds on the said land and in the 1st respondent bank head office ACS report, the structures are identified as 2,82,483 sq. ft.; in the sale notice issued by the authorized officer, these sheds and structures were not disclosed; but in the registered sale certificate issued in favour of the auction purchaser, the bank has mentioned that there are 1,50,000 sq. ft. Structures on the said land; the bank did not take inventory of the movable properties; valuable plant and machinery like SS cages for accommodating 3.00 lakh birds valued at Rs.2.40 crore, aluminum feeders, water pipeline system, sprinklers, foggers, two number of feed plant with a capacity of each 8 MT/Hr, 4 MT/Hr, six number of feed silos each 6 ton capacity, plastic feeders, gas brooders, gas cylinders, panel boards, electrical installations, power generator, cables, egg trays, packing materials, PVBC curtains, egg and feed trolleys, feeding hoppers, motors, air conditioners, office furniture etc. are not taken into consideration; value of the above mentioned items would be more than Rs.4.00 crores, huge sheds admeasuring about 2,82,483 sq. ft. valued at Rs.12,69,00,000/- are also not disclosed in the sale notice; the 1st respondent bank has admitted in its counter that the structures and plant and machinery worth of Rs.14.5 crores was also sold in public auction; but the said line in the counter-affidavit was struck off, which is clearly visible; all these facts clearly disclose the fraud/collusion of the bank officers; single bidder participated in the auction; secured creditor must take bona fide measures to ensure that there is maximum benefit to the borrowers concerned from such sale; in

the sale notice bank did not mention any construction and movables, plant and machinery; there is plant and machinery in the mortgaged property; if the plant and machinery is not existing at the time of taking possession, the bank would have issued notice regarding non-availability of particular plant and machinery, since plant and machinery were purchased with the loan amount and were hypothecated to the same bank; the property comes under the commercial category and value is fixed as per square yard basis in the books of the Sub-Registrar; in the year 2015 when the land was acquired for National Highway, compensation was fixed at Rs.3,585/- per square yard and if the rate fixed by the National highway authority is adopted to the property, the value of the land itself would be Rs.38.62 crores; writ petition can be filed when there is allegation of fraud/collusion of the bank officials in respect of the sale; even though notices were received from the High Court on 02.01.2018, sale certificate was registered in the name of the auction purchaser on 04.01.2018; there is collusion between the auction purchaser, bank officials and the panel valuers, to knock away the prime property worth more than Rs.40.00 crores at a thrown away price of Rs.9.75 crores.

Additional counter-affidavit has been filed by the 1st respondent bank stating *inter-alia* that, secured asset sold by the bank in the e-auction held on 17.11.2017 covers seven immovable properties in Sy.Nos.289/A, 289/B, 290/A and 307; out of the seven properties, only in two properties layer sheds, feed go-down, egg go-down, labour quarters and supervisory quarters exist; panel valuers of the bank while valuing the subject properties have duly taken into consideration the land and the structures thereon in the

two properties and arrived at the value of the properties; as per the bank guidelines, upset price of the properties for e-auction shall be the realizable value; accordingly, the subject properties were put up for e-auction at realizable value of Rs.975.00 lakhs; upon release of the title deeds, the auction purchaser mortgaged the subject properties with Andhra Bank, Hanmakonda branch, the 5th respondent herein and the 5th respondent got the subject property valued through their valuer and as per their valuation report dated 03.12.2017, the market value of the property is Rs.12,00,63,000/-.

Additional reply-affidavit has been filed by the petitioner stating *inter-alia* that as the land is non-agricultural land, the market value of the property would be Rs.52,05,93,840/- but the valuation is taken as agricultural land, without mentioning the door number, valuation is shown as Rs.3,95,25,000/-; petitioners property was acquired, admeasuring an extent of 2,832 sq. yards for the purpose of 4-line express high way and an amount of Rs.3,588/- per sq. yard was awarded as compensation; there is huge difference in the extent of constructions on the subject land; in one valuation report, the extent of construction is shown as 2,56,300 sq. ft. and in the other valuation, the extent of construction is shown as 87,513 sq. ft. and according to the 5th respondent-Andhra Bank's valuation report, before sanctioning the loan to 5th respondent on 02.12.2017, the extent is shown as 2,56,299 sq. ft; the said valuer of Andhra Bank also stated that there is full infrastructure on the land including the plant and machinery required to run a poultry farm, which is not valued by the above three valuers; in both the notices under Rule 8(6) and 9(1) structures are not mentioned; sale certificate also does not

disclose any structures in the scheduled premises, but after filing of the writ petition, the 1st respondent has registered around 1,50,000 sq. ft. to the 4th respondent firm, which is not sold as per the public auction notice.

Additional reply-affidavit has been filed by the bank to the additional affidavit filed by the petitioner stating *inter-alia* that the poultry farm had no birds and there are no movables available when the possession was taken by the bank; the cages etc are embedded into the poultry farm sheds and hence, they were treated as fitments and fittings attached to the building; there is total compliance of Rule 8(6) including requirement of (a) to (f) as provided in the said Rule; all the structures were taken into account for valuation; value of the property is correctly arrived at by the valuers; valuers have taken into consideration the market value as per the certificate issued by the Sub-Registrar, which was Rs.15.00 lakhs per acre; bank has taken the average of both the valuation reports to fix the up set reserve price and the same was fixed at Rs.9.75 crores, which is just and reasonable; e-auction notice published under rule 9(1) of the Rules contained the description of the property, as was provided at the time of mortgage; the reserve price was fixed taking into consideration not only the value of the land but also value of all the structures available on the property; the petitioner never raised any dispute regarding the valuation of the property; in the auction, two bidders M/s Jaya Poultry Farm-4th respondent and M/s Sneha Farms Pvt. Ltd. logged in quoting a sum of Rs.9.75 crores and the 4th respondent increased the offer to Rs.9,75,10,000/-; thereafter,

second bidder did not logg in and hence, the bid of Rs.9,75,10,000/- was confirmed.

WP No.44967 of 2017: Brief facts of the case, according to the petitioner, are that she is the guarantor of the subject properties. Petitioner questioned the sale of the property without any notice to her and also on the ground that bank cannot sell agricultural land, as the provisions of the SARFAESI Act does not apply to the agricultural lands.

The 1st respondent-Canara Bank, filed counter-affidavit stating *inter-alia* that, the demand notice was sent separately to all the guarantors and the same were received and acknowledged by the principal borrower and also the guarantors and they did not choose to give any reply to the demand notice; the bank has issued notice under Rule 8(6) read with Rule 9(1) of the Rules to the principal borrower and the concerned guarantors; the paper publication was also made in terms of Rule 9(1) of the Act.

Additional counter-affidavit filed by the 1st respondent and the reply of the petitioner are more or less similar to the affidavits filed in WP No.44964 of 2017. Petitioner in WP No.44967 of 2017 is the wife of the petitioner in WP No.44964 of 2017.

Heard Sri R. Raghunandan, learned Senior Counsel, on behalf of Sri S.Maruti Rao, learned counsel for the petitioners in all the three writ petitions, Sri Deepak Battacharjee, learned Senior Counsel, on behalf of Sri Dishit Battacharjee, learned standing counsel for the 1st respondent-Canara Bank in all the three writ petitions, Sri Vedula Venkataramana, learned Senior Counsel on

behalf of Sri D.Jagadishwar Rao, learned counsel for respondents 2 and 4 in WP Nos.44964 and 44967 of 2017 and Smt. Dyumani, learned standing counsel for 5th respondent-Andhra Bank in WP Nos.44964 and 44967 of 2017.

Since the contentions raised in these two writ petitions are almost similar, they are being disposed of through a common order.

Even though, writ petitions are challenged, also on the ground that there is violation of Rule 8(6) and 9(1), it may not be necessary for us to go into those aspects, as the main contention of the writ petitioner is that possession notice and the auction sale notice do not give correct description of the property and that the structures, sheds etc. were not mentioned in the sale notice.

Sri R. Raghunandan, learned Senior Counsel for the petitioner contended that the plant and machinery like SS cages for accommodating 3.00 lakh birds, valued at Rs.2.40 crores, aluminum feeders, water pipeline system, sprinklers, foggers, two number of feed plant with a capacity of each 8 MT/Hr, 4 MT/Hr, six number of feed silos each 6 ton capacity, plastic feeders, gas brooders, gas cylinders, panel boards, electrical installations, power generator, cables, egg trays, packing materials, PVBC curtains, egg and feed trolleys, feeding hoppers, motors, air conditioners, office furniture etc. were not taken into account and that the value of those items would be above Rs.4.00 crores; there are RCC sheds on the said land admeasuring 2,82,483 sq. ft. and if they are valued at the rate of Rs.450/- per sq. ft., it comes to Rs.12,69,00,000/- and that the same is not mentioned in the sale

notice; that the bank has admitted at para 15 of the counter-affidavit that “the structures and plant and machinery worth of Rs.14.5 crore was also sold in public auction” and that they stuck off that line in the counter-affidavit, but the same is clearly visible and that it clearly discloses the fraud and collusion on the part of the bank officers with the auction purchaser; if there is no plant and machinery as alleged by the bank, nothing prevented the bank from issuing notice to the petitioner regarding the non availability of the same, since the plant and machinery were bought with the loan amount given by the 1st respondent-bank and were hypothecated to the 1st respondent; in the case of sale of immovable secured assets, it is the duty of the secured creditors to take *bona fide* measures to ensure that there is maximum benefit to borrowers concerned from such sale and if the properties are not properly described, the said sale notice should be treated as defective. In support of his contention, he relied on the decision of the Hon’ble Supreme Court in ‘**J.Rajiv Subramaniyan vs. Pandiyas**¹’.

Sri Deepak Bhattacharjee, learned Senior Counsel appearing on behalf of the 1st respondent Canara Bank contended that the value of the structures and sheds were taken into consideration at the time of valuation of the property; as the willing purchaser inspects the subject land before bidding, no prejudice is caused to the petitioner; there are no moveable assets at the time of taking possession; as the cages are imbedded into the earth they are not valued separately; petitioner never raised any dispute with regard to the valuation of the property after the notice was issued.

¹ (2014) 5 SCC 651

Sri Vedula Venkataramana, learned Senior Counsel for respondents 2 and 4 contended that the writ petition is not maintainable, since the petitioner has got alternative remedy under Section 17 of the SARFAESI Act and that the petitioner has not made out as to how the present writ petition can be entertained as an exceptional case without availing the alternative remedy.. In support of his contention, he relied upon the decision of the Hon'ble Supreme Court in '**Authorized Officer, State Bank of Travancore vs. Mathew K.C.**²'.

He further contended that, as no protest has been launched either to the validity of the notice under Rule 8(6) or Rule 9(1) or the auction sale publication, petitioners have allowed things to pass at normal phase and have allowed things to crystallize into a concrete right in favour of the auction purchaser; as per Rule 8(6) of the Rules, what is required to be published is only the description of the immovable property to be sold, no meticulous description is specified by the Rule; as the auction is on 'as is where is basis' and subject to physical inspection, full and meticulous description of the property is not the mandate of the Rule; proviso to Rule 8(6)(a) is only directory and not mandatory. In support of his contention, he relied upon the decision of the Hon'ble Supreme Court in '**State Represented by Inspector of Police, Chennai vs. N.S.Ganeswaran**³'.

He further contends that the borrower did not suffer any prejudice or hardship, even if the property is not meticulously

² (2018)3 SCC 85

³ (2013) 3 SCC 594

described and that the borrower himself could have bid and saved the property.

As seen from the material on record, valuation reports were obtained by the 1st respondent-bank from two different valuers. The first valuer fixed the value of the property at Rs.8,02,51,000/- and noted that, in the subject property there are structures and sheds admeasuring 2,56,300 sq. ft. According to second report, value of the property is Rs.6,15,09,000/- and that there are structures and sheds admeasuring 87,513 sq. ft. in the said property. In the bank head office ACS report dated 09.06.2014, the structures were identified as admeasuring 2,82,483 sq. ft. But in the sale notice and possession notice, there is no mention about the structures and sheds. After the auction, the bank has registered the said property in favour of the auction purchaser and at the time of registration of sale certificate, it is mentioned that there are structures admeasuring 1,50,000 sq. ft.

It is the contention of the petitioner that SS cages accommodating 3.00 lakh birds valued at Rs.2.40 crore and other plant and machinery worth about Rs.4.00 crores are there on the land, apart from structures and sheds worth Rs.12,69,00,000/-. And the Canara Bank itself admitted in their ACS report dated 09.06.2014, about the existence of the sheds, plant and machinery etc.

As seen from the counter-affidavit filed by the 1st respondent -Canara Bank, admittedly, out of seven properties, in two properties, there are sheds, feed godown, egg godown, labour quarters and supervisory quarters, and it is also admitted in para

7 of the additional reply affidavit filed by the bank that these sheds, godown and quarters etc. are not reflected in the sale notice. Bank has also categorically admitted in their counter-affidavit, at para 20 that the built up area is not mentioned in the sale notice or in the possession notice and that the property, which was originally mortgaged along with the structures alone was taken into consideration. If at all they were mentioned in the sale notice, any intending purchaser would have got more clarity about the property for which it can be used and the property would have fetched much more.

It is contended by the 1st respondent-bank that there was no machinery on the property except cages etc. and that as the cages were part of the building, they were not separately sold. After the sale certificate is registered in favour of the 4th respondent, he applied for a loan to the Andhra Bank-5th respondent, and according to its valuation report dated 02.12.2017, before sanctioning the loan to the 4th respondent, the extent of construction is shown as 2,56,999 sq. ft. and it was also mentioned that there is full infrastructure on the land **including plant and machinery** to run a poultry farm. Even according to the counter-affidavit of the 1st respondent-Canara Bank, the value of the property according to 5th respondent-Andhra Bank's valuers report is Rs.12,00,63,000/-. All these facts show that the property would have fetched much more if the sale notice contained a detailed description of the property, including its super structures, plant and machinery etc.

The contention of the 1st respondent bank, and the 4th respondent, that the petitioner did not raise any objection to the possession notice and sale notice, stating that, the property was not properly described, cannot be taken into consideration because after the sale notice dated 12.10.2017 was issued, fixing the date of auction on 17.11.2017, the petitioner in WP No.44964 of 2017 addressed a letter dated 15.11.2017 requesting to stall the auction and that he would pay the OTS amount on its revival, on or before 25.03.2018. The said request of the petitioner for OTS was rejected by the bank vide letter dated 20.11.2017, only after the sale on 17.11.2017. Only after his request was rejected he filed Writ Petition. Apart from that, merely because there is delay in questioning the notice, it cannot be said that the right of the petitioner to challenge the sale notice is taken away. Failure of 1st respondent-bank even to disclose huge extents of structures and plant and machinery, on the subject land, and in misleading prospective buyers by only referring to subject land, has resulted in preventing others who may also have been interested in participating in the auction. The action of the 1st respondent bank, in failing to disclose the existence of huge structures and plant and machinery in the subject land, is arbitrary and in violation of Article 14 of the Constitution of India. As the action of the bank is patently arbitrary, and in violation of Article 14 of the Constitution, mere delay will not justify non-suiting the petitioner.

The contention of the 1st respondent bank is that the auction notice contained the description of the property as was provided at the time of mortgage. The auction notice should contain the present status of the property, and not as it was in 2012 at the

time of obtaining the loan. The contention of the bank that valuation is done by taking structures into account, even if true, is not relevant and is not sufficient compliance of the mandate of proviso to Rule 8(6).

It is relevant to note that even though sale certificate does not disclose any structures in the schedule premises, the 1st respondent has registered around 1,50,000 sq. ft in favour of the 4th respondent firm, which was not even sold in the auction.

The contention of the 1st respondent bank that cages for the birds etc. are treated as fitments attached to the building is not tenable, and they ought to have described them and valued of them separately.

In **J.Rajiv Subramaniyan's** case (supra), the Hon'ble Supreme Court held as follows:

“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 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.”

As seen from the judgment in **J. Rajiv Subramaniyan**’s case, the secured creditors are expected to ensure that sale of the asset, provides maximum benefit to the borrower, by the sale of such asset. Therefore, the secured creditors should take all measures to ensure that the property is sold at the best possible price. The said judgment was again followed in ‘**Sanjay vs. Anil**⁴’ by the Hon’ble Supreme Court.

As the description of the property has not been properly and completely mentioned in the sale notice, the said notice is defective and is liable to be set aside. It is also relevant to notice that the bid amount is just Rs.10,000/- more than the upset price, only one bidder participated, and the second bidder only logged in and did not enhance the amount of the bid.

The contention of the learned Senior Counsel, for the auction purchaser, that the requirement of Rule proviso to Rule 8(6)(a) is only directory and not mandatory cannot be accepted. The proviso to Rule 8(6)(a) of the Rules say that the terms of the sale **shall** include the “description of the immovable property to be sold”, including the details of the encumbrances known to the secured creditor.

Clause (f) of Rule 8(6) reads as follows:

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

⁴ 2017 (5) ALD 4 (SC)

Even as per clause (f) of Rule 8(6), existence of sheds and structures is a material fact, which the prospective purchasers should have been made aware of, in order to enable them to judge the nature and value of the property. The purchaser of the property would naturally evaluate his bid basing on the description of the property.

In '**ITC Limited Vs. Blue Coast Hotels Ltd. & others**', the Hon'ble Supreme Court while construing whether Section 13 (3-A) of SARFAESI Act is mandatory or directory in nature, held as follows:

"The question that arises for consideration before us is whether the Parliament intended for a total invalidity to result from the failure to reply and give reasons for the non-acceptance of the borrower's representation. In other words, whether Sub-section (3A) of Section 13 is mandatory or directory in nature.

There is no doubt that if a reply with reasons is an integral and indispensable part of the statutory scheme, the Courts would not excuse a departure from it. But, on the other hand, if the reply is merely a direction and not of substance to the scheme, the non-compliance may be excused.

This question must be answered upon a construction of the statute according to its true intent by taking into account the language in which the intent is clothed. In a passage from Crawford's Statutory Construction, it is stated - "The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other".

This has been followed in several decisions of the Supreme Court in '**State of U.P. v. Babu Ram Upadhya**' [AIR 1961 SC 751] points out, "For ascertaining the real intention of the Legislature, the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the noncompliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered".

We find the language of Sub-section (3A) to be clearly impulsive. It states that the secured creditor "shall consider such representation or objection and further, if such representation or objection is not acceptable or tenable, he shall communicate the reasons for non-acceptance" thereof. We see no reason to marginalize or dilute the impact of the use of the imperative 'shall' by reading it as 'may'. The word 'shall' invariably raises a presumption that the particular provision is imperative.

There is nothing in the legislative scheme of Section 13(3A) which requires the Court to consider whether or not, the word 'shall' is to be treated as directory in the provision. As the Section stood originally, there was no provision for the above mentioned requirement of a debtor to make a representation or raise any objection to the notice issued by the creditor Under Section 13(2). As it was introduced via Sub-section (3A), it could not be the intention of the Parliament for the provision to be futile and for the discretion to ignore the objection/representation and proceed to take measures, be left with the creditor. There is a clear intendment to provide for a locus poenitentiae which requires an active consideration by the creditor and a reasoned order as to why the debtor's representation has not been accepted.

Moreover, this provision provides for communication of the reasons for not accepting the representation/

objection and the requirement to furnish reasons for the same. A provision which requires reasons to be furnished must be considered as mandatory. Such a provision is an integral part of the duty to act fairly and reasonably and not fancifully. We are not prepared in such circumstances to interpret the silence of the Parliament in not providing for any consequence for non-compliance with a duty to furnish reasons. The provision must nonetheless be treated as 'mandatory'."

As the word 'shall' has been used in the proviso to Rule 8(6) of the Rules, 2002, just as in Section 13(3-A) of the SARFAESI Act, the proviso to Rule 8(6) must also be held to be mandatory, and not directory. In the judgment relied upon by the 4th respondent in **N.S.Ganeswaran's** case (supra), the Hon'ble Supreme Court held that "the test to be applied is as to whether non-compliance of the provision could render the entire proceedings invalid or not". In this case, if the mandatory requirement of setting out the terms of sale, including description of the property, is not satisfied, the property would not fetch a price which it ought to have fetched, and would render the auction sale a mockery and invalid.

When the bank admits that there are sheds and other structures in the property, it ought to have given the details of the property in the sale auction notice. Not giving such description in the notice prejudices the rights of the petitioner- borrower. Though the petitioner in WP No.44967 of 2017 took the plea that it is an agricultural property, it is not pressed into service.

Extent of the construction according to the first valuer of the 1st respondent bank is 2,56,300 sq. ft. According to the second valuer, it is 87,517 sq. ft. According to the 1st respondent's report

dated 09.06.2014, it is 2,82,483 sq. ft. At the time of inspection, the 1st respondent certified it to be 2,75,000 sq. ft. According to the sale certificate that is registered with the Sub-Registrar, construction is shown as 1,50,000 sq. ft. Hence, even on a conservative estimate, the super structure on the subject land would be around 1,50,000 sq. ft.

The power of judicial review, exercised by the High Court under Article 226 of the Constitution of India, (**L. Chandra Kumar v. Union of India: AIR 1997 SC 1125**), is part of the basic structure of the Constitution and cannot be circumscribed or negated by a statutory provision. Existence of a statutorily prescribed alternate remedy would not, therefore, bar the exercise of jurisdiction by this Court under Article 226 of the Constitution of India. It is no doubt true that the jurisdiction which the High Court exercises, under Article 226 of the Constitution of India, is discretionary and one of the grounds, on which the High Court would refrain from exercising its discretion to interfere, is where there exists a statutorily prescribed alternative remedy. Despite existence of an alternate remedy, the High Court would be justified in exercising its discretion to entertain a Writ Petition in atleast three contingencies i.e., (1) where the Writ Petition has been filed for the enforcement of any of the fundamental rights; or (2) where there has been a violation of principles of natural justice or (3) where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (**Whirlpool Corporation v. Registrar of Trademarks, Mumbai: (1998) 8 SCC 1**). The action of the 1st respondent bank, in issuing a sale notice without disclosing that the land put to auction consists, even on a

conservative estimate, of about 1.5 lakh sq. ft. of superstructure, besides plant and machinery, is arbitrary and in violation of Article 14 of the Constitution of India. Existence of an alternative remedy is, therefore, not a bar for exercise of the discretionary jurisdiction under Article 226 of the Constitution of India.

The judgment in **Authorized Officer, State Bank of Travancore's** case (supra) relied upon by the 4th respondent does not come to the aid of the 4th respondent. In the said judgment, the Hon'ble Supreme Court observed as follows:

“The normal Rule is that a writ petition Under Article 226 of the Constitution ought not to be entertained if alternate statutory remedies are available, except in cases falling within the well defined exceptions as observed in **Commissioner of Income Tax and Ors. v. Chhabil Dass Agarwal** [2014(1) SCC 603, viz. (a) where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice.”

The judgment deals with exceptions as to when a writ petition can be entertained, if there is an alternative remedy. One of the exceptions mentioned in the said judgment is “where the statutory authority has not acted in accordance with the provisions of the enactment”. In this case, the 1st respondent did not comply with proviso to Rule 8(1) of the rules. Hence, though the petitioner has an alternative remedy of invoking the jurisdiction of the Tribunal, we are satisfied that the petitioners have made out a case, falling within the exception, for entertaining the Writ Petition.

As the impugned e-auction conducted on 17.11.2017 pursuant to the sale notice dated 12.10.2017 is liable to be set aside on this ground alone, it is wholly unnecessary for us to deal with any of the other contentions urged by Sri R. Raghunandan, Learned Senior Counsel appearing on behalf of the petitioners, in challenge to the validity of the impugned sale notice.

In view of the facts and circumstances discussed above, we hold that the e-auction conducted on 17.11.2017 pursuant to the sale notice dated 12.10.2017, the sale in favour of the auction purchaser dated 17.11.2017, the sale certificate dated 20.12.2017 and the subsequent delivery of possession, are contrary to the proviso to Rule 8(1) of the Rules and are accordingly set aside. As the auction sale in favour of the auction purchaser-4th respondent dated 17.11.2017 is set aside, the amount paid by the auction purchaser is liable to be re-paid to him. However, as the auction purchaser has paid the bid amount having obtained a loan from Andhra Bank, the amount due and payable by the 1st respondent-Canara Bank to the auction purchaser shall, instead, be paid by them to Andhra Bank. Immediately on receipt of the aforesaid amount from them, the Andhra Bank shall hand over the title deeds back to the 1st respondent-Canara Bank. The balance dues, if any, from the auction purchaser may be recovered from him by Andhra Bank. Mortgage of the subject property, by the petitioner, in favour of the 1st respondent bank, shall however continue. The order now passed by us shall neither disable the 1st respondent bank from issuing a sale notice afresh in accordance with law, and to put the subject property to sale, nor the petitioner from redeeming the property, in terms of the amended Section 13(8) of

the SARFAESI Act, before a sale notice is issued afresh by the 1st respondent-Canara Bank.

The writ petitions are disposed of accordingly. No order as to costs. Miscellaneous petitions, pending if any, in these writ petitions shall stand closed.

RAMESH RANGANATHAN, J

KONGARA VIJAYA LAKSHMI, J

Date: 31.10.2018
BSS

