

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 08.04.2019

Date of Decision : 30.04.2019

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

Q.A.No.199 of 2019

&

A.Nos.1637 and 1639 of 2019

in

C.S.(Comm.Div) No.636 of 2018

Hanudev Investments Pvt. Ltd.,
represented by its Director
Mrs.Shobana Ravi,
having office at RR Tower III,
TVK Industrial Estate,
Guindy, Chennai-600 032.

.. Applicant
in all applications

Vs.

1.Oriental Bank of Commerce,
63, Dr.Radhakrishnan Salai,
Mylapore, Chennai-600 004.

2.JM Financial Asset Reconstruction Co. Ltd.,
represented by its Directors,
having office at 7th Floor, Cnergy,
Appasaheb Marathe Marg,
Prabhadevi, Mumbai-400 025.

.. Respondents
in all applications

For Applicant : Mr.Vineet Subramani

For Respondent : Mr.Srinath Sridevan for R-2
Mr.E.Venkatesh Babu for R-1

COMMON ORDER

This common order will dispose of these three applications.

2. In the main suit, there is a sole plaintiff and there are two defendants. All these three applications have been taken out by the plaintiff in the main suit arraying Defendants 1 and 2 in the main suit as Respondents 1 and 2 respectively in the three applications. In this order, from hereon, parties to these three applications shall be referred to by their respective ranks in the main suit for the sake of convenience and clarity. In other words, sole applicant in these three applications, namely 'Hanudev Investments Pvt. Ltd.,' shall be referred to as 'Applicant'. Respondent No.1 in these three applications, namely 'Oriental Bank of Commerce' shall be referred to as 'Defendant No.1' and Respondent No.2 in these three applications, namely 'JM Financial Asset Reconstruction Co. Ltd.,' shall be referred to as 'Defendant No.2'. 'Respondents 1 and 2' in these three applications shall be collectively referred to as 'Defendants'.

3. Pivotal to these three applications is an e-auction notice dated 06.02.2019 for auction/sale on 01.03.2019 being a re-auction notice issued by the second defendant post common order dated 20.12.2018 made by this Court in O.A.Nos.854 and 855 of 2019.

4. As far as the instant three applications are concerned, A.No.1639

of 2019 has been taken out *inter alia* under Order XXXIX Rule 2-A of 'The Code of Civil Procedure, 1908' ('CPC' for brevity) alleging that the re-auction notice is in breach of common order dated 20.12.2018 made by this Court in O.A.Nos.854 and 855 of 2018. In other words, plaintiff's complaint is that the second defendant has disobeyed the said order of this Court in issuing the re-auction notice. In the light of such a complaint of breach/disobedience of the common order of this Court in issuing the re-auction notice, O.A.No.199 of 2019 has been taken out with a prayer *inter alia* for an interim injunction restraining the auction/sale on 01.03.2019 and A.No.1637 of 2019 has been taken out with a prayer for stay of auction /sale on 01.03.2019.

5. Notwithstanding the nature of these three applications and the pivotal complaint therein, plaintiff has not chosen to file the common order of this Court dated 20.12.2018 made in O.A.Nos.854 and 855 of 2018 as part of the typed-set of papers filed in support of the instant three applications. Likewise, second defendant, who is defending the complaint of disobedience/breach of the said order, has also not chosen to file the said order dated 20.12.2018 along with the common counter affidavit dated 06.03.2019. To be noted, plaintiff has filed a common reply affidavit in these three applications dated 12.03.2019.

6. When this was pointed, learned counsel on both sides, namely

Mr.Vineet Subramani, counsel on record for the plaintiff and Mr.Srinath Sridevan, learned counsel for the second respondent requested this Court to refer to the said order dated 20.12.2018 that is available as part of the case file before this Court.

7. To be noted, Mr.E.Venkatesh Babu, learned counsel for first defendant submitted that he has no role in the instant applications and has therefore, not filed any pleadings. It was the specific submission of learned counsel for first defendant that as the lead bank of Consortium of Banks, which had lent monies to a borrower company, which goes by the name 'RR Info Park Private Limited', the first defendant, has no role as it has admittedly assigned the entire loan to the second defendant and received the agreed consideration in full from the second defendant. It was submitted by learned counsel for first defendant that such assignment was in favour of second defendant and other asset reconstruction entities, which go by the name Edelweiss and Arcil. It was submitted that such assignment was on 07.03.2014 after ceding *pari passu* charge qua the property, which is subject matter of the instant applications and the main suit on 29.04.2014 in favour of the plaintiff, owing to the plaintiff having lent Rs.50 Crores to the aforesaid borrower company.

8. In the light of the aforesaid narrative, it becomes necessary to

advert to the common order of this Court dated 20.12.2018 made in O.A.Nos.854 and 855 of 2018. As this order dated 20.12.2018 captures the factual matrix also and as it has not been filed as part of typed-set of papers by any of the parties to these three applications, this Court deems it appropriate to extract the entire order dated 20.12.2018, which reads as follows:

'This common order will dispose of two interlocutory applications, namely, O.A.Nos.854 and 855 of 2018.

2 In the main suit, there is a sole plaintiff and there are two defendants. Sole plaintiff in the main suit is the sole applicant in both these applications, i.e., O.A.Nos.854 and 855 of 2018. Likewise, defendants 1 and 2 are respondents 1 and 2 respectively in these two applications. In this common order, parties to these two applications shall be referred to by their respective ranks in the main suit for the sake of convenience and clarity.

3 Immovable property in the form of land admeasuring 165 grounds or thereabouts comprised in S.Nos.425-429 parts, Ambattur village and S.Nos.24, 26, 27, 29, 140, 141 to 151, 154, 167 and 169 parts of Mannurpet village being part of plot Nos.18, 19 and 20 (SP) Industrial Estate, Ambattur, Chennai-58 together with the building thereon as well as movable properties in the form of furnitures, fixtures, plant and machinery, electrical equipment, etc., situate therein is the nucleus of this lis and therefore, these immovable and movable properties together shall collectively be referred to as 'suit properties' for the sake of convenience and clarity.

4 Suit properties belong to an entity which goes by

the name 'RR Info Park Private Limited' which shall hereinafter be referred to as 'borrower' for the sake of convenience and clarity. To be noted, borrower company is not a party in the main suit or in the instant two interlocutory applications.

5 Before this Commercial Division proceeds further with this common order, it is deemed appropriate to set out the factual matrix of this lis in a nutshell for the purpose of appreciating this order. Factual matrix of this lis in a nutshell is set out infra under the caption 'Precise of Facts'.

6 Precise of Facts :

(a) It is not in dispute that borrower company had borrowed from five different banks by mortgaging suit properties in favour of those banks. Borrower company has borrowed Rs.70 Crores from first defendant bank and Rs.50 Crores each from four other banks.

(b) Subsequently, in the light of the direction which the loan accounts took led to five creditor banks forming a consortium with first defendant as lead bank. The first defendant, in its capacity as lead bank of consortium of creditor banks, gave a letter dated 29.04.2009 (plaint document No.1) captioned 'LETTER CEDING PARI PASSU CHARGE', wherein and whereby first defendant in its capacity as lead bank of the consortium, ceded pari passu charge in favour of plaintiff.

(c) Thereafter, plaintiff on 07.05.2009 lent Rs.50 Crores to the borrower company inter-alia on the basis of charge on suit properties. Such charge on suit properties, i.e., mortgage in favour of plaintiff has been duly registered with the jurisdictional Registrar of companies and the certificate in this regard dated 03.06.2009 has been placed before this Commercial Division as part of suit file and the same is plaint document No.4.

(d) Subsequently, first defendant and four other banks arraying themselves as five applicants filed an application in O.A.No.121 of 2011 before the Debts Recovery Tribunal-III ('DRT' for brevity), Chennai, arraying the borrower company and its Managing Director as respondents 1 and 2 respectively inter-alia seeking recovery certificates. In the proceedings before DRT, plaintiff filed an application in I.A.No.578 of 2012 seeking to implead itself and the DRT vide order dated 13.12.2012 held that first defendant and the other four banks have agreed to pay their proportionate share after sale of the property and realisation of the sale proceeds in accordance with law after admitting pari passu charge in favour of plaintiff and therefore, there is no need to implead the plaintiff. To be noted, there is no dispute or disagreement before this Commercial Division in the hearing that this order of DRT dated 13.12.2012 is operating and binding on parties to this lis. This order of DRT dated 13.12.2012 has been placed as part of suit file and it is plaintiff document No.5.

(e) When things stood as above, first defendant bank assigned the debt in favour of second defendant in its capacity as lead bank of consortium of banks and issued an intimation in this regard vide letter dated 29.04.2014 which is plaintiff document No.6. Pursuant to this, second defendant had written a letter dated 07.10.2015 to the plaintiff and one of the five banks stating that in relevant records, second defendant has now been shown as charge holder.

(f) When things stood as above, second defendant issued an auction notice scheduling the sale on 27.7.2017, this was assailed by plaintiff in DRT vide S.A.SR. No.6146 of 2017 and notice was issued in the same. Thereafter, the plaintiff had filed a suit in this Court in C.S.No.583 of 2017 in this regard and

the suit came to be disposed of on 11.10.2017 as the auction did not take place. The suit was disposed of holding that the cause of action did not survive. However, while disposing of the suit, this Court had permitted the second defendant to reauction in accordance with law after following due procedure.

(g) In the interregnum, it is submitted that a creditor's winding up petition in Company Court (Madras High Court), was filed against the borrower company vide C.P.No.202 of 2013 by one Globe Detective Agency Private Limited, plaintiff filed an application therein in C.A.No.540 of 2016 and paid petitioning creditor two cheques. It is also not in dispute that this application taken out by plaintiff to stay the winding up proceedings was acceded to by an order dated 20.10.2016 made by Company Court after hearing secured creditor of borrower company which includes second defendant and Corporation Bank.

(h) Under the aforesaid circumstances, an e-auction notice dated 13.8.2018 was issued by second defendant fixing auction on 17.09.2018 for auctioning the suit properties, realising the sale proceeds therefrom to satisfy the debts qua borrower company. It is also not in dispute that second defendant is an Asset Reconstruction Company ('ARC' for brevity) and that second defendant is an ARC within the meaning of Section 2(1)(ba) of 'The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002)' ('SARFAESI Act' for brevity).

(i) Under such obtaining circumstances, stating that the aforesaid e-auction notice dated 13.8.2018 is a trigger, instant suit has been filed by plaintiff with prayers for injunction and damages. Injunctive relief sought for is for an injunction

restraining defendants from discharging plaintiff's pari passu charge over suit properties as adumbrated in letter dated 29.04.2009 (plaint document No.1) which has been referred to supra.

(j) *When these two interlocutory applications were taken out along with the plaint, in O.A.No.854 of 2018, an ex parte interim order restraining conduct of e-auction on 17.9.2018 was granted and the same was extended until further orders on 26.9.2018 as both defendants had entered appearance on the said day.*

(k) *Both these applications are supported by a common affidavit dated 10.9.2018. Complaining that interim order is operating against them and seeking disposal of these two interlocutory applications, a common counter affidavit dated 26.9.2018 has been filed by second defendant and first defendant has filed an adoption memo dated 05.10.2018 adopting the counter affidavit of second defendant. Plaintiff has filed a common reply dated 27.9.2018. Thus, pleadings were completed in these two interlocutory applications.*

7 *Having set out the factual matrix of this lis in a nutshell, this Commercial Division now moves on to rival submissions.*

8 *Mr.Vineet Subramani, learned counsel on behalf of plaintiff made submissions which can be summarised are as follows :*

(a) *The prayer in the main suit itself is very limited and the plaintiff only wants to protect its pari passu charge qua suit properties and this is evident from the limited prayer in the main suit.*

(b) *The e-auction notice dated 13.8.2018 issued by second defendant says that suit properties being sold by way of e-auction are free from encumbrance of plaintiff and this would*

tantamount to giving a go-by to plaintiff's pari passu charge over suit properties.

(c) If second defendant sells suit properties in the auction, giving a go-by to plaintiff's pari passu charge over suit properties, plaintiff will be left high and dry.

9 Submissions made by Mr.Srinath Srideven, counsel on record for second defendant which has been adopted by Mr.E.Venkatesh Babu, counsel on record for first defendant can be summarised as follows :

(a) Plaintiff has not come to Court with clean hands as plaintiff obtained the interim order without setting out all facts which are imperative.

(b) Plaintiff company holds 28% stakes in borrower company and therefore, plaintiff has filed the instant suit more to protect the borrower company than its own pari passu charge over suit properties.

(c) While Ms.Shobana Ravi, who has verified and signed the plaint in her capacity as Director of plaintiff company, her spouse Mr.Ravi is on the board of borrower company and is Managing Director of borrower company. These spouses are two Directors in plaintiff company and there are only two Directors in all in plaintiff company, which is a private limited company.

(d) Plaintiff has remedy before DRT against the e-auction notice inter-alia under Section 17 of SARFAESI Act and therefore, the instant suit is not maintainable and it is hit by Section 34 of SARFAESI Act.

10 Having set out the rival submissions, this Commercial Division now proceeds to examine the rival

submissions and find an answer to the issues that have been brought into sharp focus in these two applications. This Commercial Division does so under the caption 'Dispositive reasoning' infra.

11 Dispositive reasoning :

(a) *In the course of dispositive reasoning, there shall be elaboration of rival submissions made by both sides. Rival submissions made by both sides have been summarised and set out supra so as to have focus on central issues which are imperative for deciding these applications. Therefore, elaboration of these submissions in the course of dispositive reasoning is necessary.*

(b) *Elaborating on the first submission of plaintiff that this suit has been filed with a limited prayer to injunct defendants from discharging plaintiff's pari passu charge over suit properties, learned counsel for plaintiff submitted that the primordial objective of the suit is protection of pari passu charge of plaintiff. Referring to e-auction notice dated 13.8.2018, plaintiff's counsel submitted that e-auction notice says that sale of suit properties will be free from encumbrance of plaintiff company.*

(c) *Responding to this, learned counsel for second defendant submitted that there would be no auction purchaser and even if there be one, price offered by such auction purchaser would get drastically reduced if the auction purchaser were to purchase the suit properties with task of clearing one more secured creditor who has charge over suit properties, the same will be seen as onerous by intending auction purchasers. Saying so, learned counsel submitted that sale proceeds would be distributed amongst consortium banks and the plaintiff*

proportionately. In other words, learned counsel submitted that pari passu charge of plaintiff will not be given a go-by. To support this contention, learned counsel submitted an affidavit dated 22.11.2018 sworn to by the Vice President of second defendant company, wherein it has been stated that the consortium of lenders, i.e., second defendant ARC, shall recognise plaintiff's right as a secured creditor. This affidavit says that this is subject to plaintiff withdrawing the present suit. It was pointed out that this affidavit was exchanged in the course of exploring the possibility of settlement and therefore, is now pressed into service for the limited purpose of affirming that the second defendant ARC confirms that sale proceeds will be distributed amongst consortium banks as well as plaintiff in its capacity as pari passu charge holder/ mortgagee.

(d) Responding to this, learned counsel for plaintiff submitted that an affidavit sworn to by the Director of plaintiff company dated 08.12.2018 has been placed before this Commercial Division which is in response to the aforesaid affidavit of second defendant. Averments touching upon several conversations have been referred to in the said affidavit. However, these two affidavits are being referred to for the limited purpose of noticing the stated position of second defendant that pari passu charge in favour of plaintiff will not be given a go-by and that sale proceeds would be distributed strictly in accordance with pari passu charge amongst all mortgagees, i.e., consortium of banks and plaintiff.

(e) This stated position of second defendant is buttressed by the aforesaid affidavit. In all other aspects, these two affidavits shall not be looked into as they were exchanged in the course of exploring the possibility of settlement. Be that as it may, learned counsel for second defendant on instructions submitted that this stated position that sale proceeds will be

distributed equally amongst consortium of banks as well as plaintiff strictly in accordance with pari passu charge is affirmed. This is taken on record.

(f) *Second and third points raised by learned counsel for plaintiff about e-auction giving a go-by to pari passu charge and plaintiff being left high and dry if that happens forms part of the discussion qua first point supra.*

(g) *This takes us to the points raised by learned counsel for second defendant.*

(h) *Before we go into the points raised by second defendant, it is necessary to notice that it was submitted by second defendant that it has statutory backing to issue e-auction notice in the light of section 13(9) of SARFAESI Act which reads as follows :*

“13.Enforcement of security interest.--

(9)Subject to the provisions of the Insolvency and Bankruptcy Code, 2016, in the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than sixty per cent in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors;

Provided that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529-A of the Companies Act, 1956 (1 of 1956):

Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing

the workmen's dues with the liquidator in accordance with the provisions of section 529-A of that Act:

Provided also that the liquidator referred to in the second proviso shall intimate the secured creditor the workmen's dues in accordance with the provisions of section 529-A of the Companies Act, 1956 (1 of 1956) and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator:

Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

Explanation.--For the purposes of this sub-section,---

(a)"record date" means the date agreed upon by the secured creditors representing not less than sixty per cent in value of the amount outstanding on such date;

(b)"amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor."

(i) Referring to section 13(9) of SARFAESI Act, learned counsel pointed out that even according to e-auction notice, while the total amount due to second defendant in its capacity as ARC is Rs.423,20,25,818.28, it is Rs.50 Crores in favour of plaintiff and therefore, second defendant certainly has more than the statutory requirement of 60% adumbrated in

section 13(9) of SARFAESI Act. In this regard, learned counsel for plaintiff pointed out that the claim of plaintiff is not restricted to Rs.50 Crores, but it is entitled to interest also. Responding to this, learned counsel for second defendant, on instructions, submitted that distribution of sale proceeds as per pari passu charge amongst mortgagees will include interest, the only deduction being auction charge.

(j) The aforesaid reasoning in discussion is sufficient and good enough to dispose of these two applications. However, for the purpose of making this order as complete and as comprehensive as possible, this Commercial Division deems it appropriate to have a short discussion about the other points raised by learned counsel for second defendant.

(k) Learned counsel for second defendant submitted that plaintiff ought to have disclosed in the plaint that plaintiff holds 28% stakes in the second defendant company and that as between spouses, wife is a Director in plaintiff company and husband is Managing Director of borrower company. It is also his submission that the plaintiff ought to have disclosed the fact that DRT was approached against the sale scheduled last year, i.e., on 27.7.2017. In support of this submission, learned counsel pressed into service **Morgan Stanley** principle set out in **Morgan Stanley Mutual Fund v. Kartick Das** reported in (1994) 4 SCC 225. Relevant paragraph in this regard is paragraph 36 and the same reads as follows :

“Q. 4:What are the guiding principles in relation to the grant of an ad interim injunction in such areas of the functioning of the capital market and public issues of the corporate sector and whether certain ‘venue restriction clauses’ would require to be evolved judicially as has been done in cases such as Sanchaita case [(1982) 1 SCC 561 : 1982 SCC (Cri) 283] etc.?”

36. As a principle, ex parte injunction could be granted only under exceptional circumstances. The factors which should weigh with the court in the grant of ex parte injunction are—

- (a) whether irreparable or serious mischief will ensue to the plaintiff;
- (b) whether the refusal of ex parte injunction would involve greater injustice than the grant of it would involve;
- (c) the court will also consider the time at which the plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is prevented;
- (d) the court will consider whether the plaintiff had acquiesced for sometime and in such circumstances it will not grant ex parte injunction;
- (e) the court would expect a party applying for ex parte injunction to show utmost good faith in making the application.
- (f) even if granted, the ex parte injunction would be for a limited period of time.
- (g) General principles like prima facie case, balance of convenience and irreparable loss would also be considered by the court.”

According to learned counsel for second defendant, though **Morgan Stanley** facts pertain to Consumer Protection Act, the principles nonetheless apply.

(l) This Commercial Division is of the considered view that it would have been an ideal situation for the plaintiff to disclose about the plaintiff approaching DRT with regard to earlier auction notice last year. With regard to plaintiff holding 28% stakes in borrower company and plaintiff company's Director Ms.Shobana Ravi's spouse being Managing Director of borrower company, as plaintiff and second defendant are juristic persons, coupled with the trajectory these applications are now taking, it is considered not necessary to go into these aspects in these interlocutory applications.

(m) This takes us to the last point raised by second defendant with regard to suit itself not being maintainable and

the suit being hit by Section 34 of SARFAESI Act and Order XXXIV Rule 1 of CPC which read as follows :

“Section 34 of SARFAESI Act :

34.Civil Court not to have jurisdiction.-- No Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993).

Order XXXIV Rule 1 of CPC :

1.Parties to suits for foreclosure, sale and redemption.-- Subject to the provisions of this Code, all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.

Explanation.--A puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit; and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage.”

(n) In support of the suit being hit by section 34 of SARFAESI Act, learned counsel for second defendant pressed into service a judgment of Hon'ble Supreme Court in **Jagdish Singh Vs. Heeralal and others** reported in **(2014) 1 SCC 479** and relevant paragraph is paragraph 19, which reads as follows :

“19.The expression “any person” used in Section 17 is of wide import and takes within its fold not only the borrower but also the guarantor or any other person who may be affected by action taken under Section 13(4) of the Securitisation Act. Reference may be made to the judgment of this Court in Satyawati Tondon case[United Bank of India v. Satyawati Tondon, (2010) 8 SCC 110 : (2010) 3 SCC (Civ) 260] .“

(o) Learned counsel for second defendant submitted that in the light of **Jagdish Singh** principle, nothing prevents the plaintiff and there is no impediment for the plaintiff to approach DRT against e-auction notice and therefore, this suit is clearly hit by Section 34 of SARFAESI Act.

(p) Learned counsel also pressed into service a judgment of Division Bench of Andhra Pradesh High Court in **Bank of India Vs. Development Credit Bank Ltd.** reported in **2012 SCC OnLine AP 71**. In the light of Supreme Court judgment in **Jagdish Singh** case, it may not be necessary to look into Andhra Pradesh High Court Division Bench judgment in **Bank of India** case.

(q) With regard to Order XXXIV Rule 1 of CPC, learned counsel for second defendant submitted that plaintiff ought to have arrayed borrower company as a party to the suit and plaintiff having filed the suit without making borrower company a party to the suit, particularly without joining borrower company as party to the suit is fatal and the suit is liable to be dismissed by way of rejection of plaint.

(r) Responding to this, learned counsel for plaintiff pointed out that second defendant cannot be heard to contend that the suit is not maintainable and that it is hit by Section 34 of SARFAESI Act and Order XXXIV Rule 1 of CPC without taking out an application for rejection of plaint inter-alia under Order VII Rule 11 CPC.

(s) In an attempt to meet this, learned counsel for second defendant relied on **Suresh Chandra Jaipuria** case being **The Municipal Corporation of Delhi Vs. Suresh Chandra Jaipuria and another** reported in **(1976) 4 SCC 719**.

Learned counsel referred to paragraph 10 of **Suresh Chandra Jaipuria** case. Supreme Court left open the question as to whether the suit in that case was barred by Section 41(h) of the Specific Relief Act, 1963. That is a case where the plaintiff purchased a house in South Extension, New Delhi free from all encumbrances, but subsequently, it came to light that there were proceedings for realisation of certain dues and plaintiff filed a suit for permanent injunction against Municipal Corporation of New Delhi stating that assessment of house tax had proceeded on an erroneous basis. In this context, as the plaintiff has a remedy against wrong assessment, Section 41(h) of the Specific Relief Act, which lays down that an injunction which is a discretionary and equitable relief, cannot be granted when an equally efficacious remedy is obtainable in any other usual mode or procedure. In the considered opinion of this court, **Suresh Chandra Jaipuria** case is clearly distinguishable on facts as that was a case where it was noticed that a regular appeal is available under Section 169 of the Delhi Municipal Corporation Act, 1957. In the instant case, second defendant is relying on Section 34 of SARFAESI Act which is a case of ouster of civil court jurisdiction. To be noted, Section 34 of SARFAESI Act has already been extracted supra. Likewise the plea predicated on Order XXXIV Rule 1 of CPC is one that turns on non joinder of necessary parties. Therefore, the plea of second defendant for all practical purposes is that the suit is barred by law, i.e., proviso to Order I Rule 9 of CPC. Therefore, the facts of this case are clearly distinguishable qua **Suresh Chandra Jaipuria** case. If it is a case of second defendant that the suit is barred by law, as rightly pointed out by learned counsel for plaintiff, second defendant has to necessarily take out an application inter-alia under Order VII Rule 11 of CPC. To be precise, under sub-clause (d) of Order VII Rule 11 of CPC

and the same has to be tested on its own merits and on uncontroverted averments in the plaint.

(t) *In this regard, this Commercial Division is of the considered view that whenever an application for rejection of plaint inter-alia under Order VII Rule 11 of CPC is taken out, that has to be first decided without reference to any other application and any other issues in the suit as the application for rejection of plaint goes to the root of the matter. It is made clear that if the second defendant had taken out such a rejection of plaint application in the instant case, the same would have been first decided and further proceedings in the instant suit and these interlocutory applications would have been only subject to the outcome of the reject the plaint application. In other words, if the prayer in the reject the plaint application had been acceded to, that would have been the end of the suit, subject of course to an intra-court appeal. Only if the prayer in the reject the plaint application had been negatived, these applications would have been taken up for consideration.*

(u) *However, all these are legal issues. In the light of the celebrated judgment of Hon'ble Supreme Court in **I.T.C. Limited Vs. Debts Recovery Appellate Tribunal** reported in **AIR 1998 SC 634 : (1998) 2 SCC 70**, wherein Supreme Court held that an application for rejection of plaint can be taken out at any stage of the suit, this Commercial Division deems it appropriate to leave it open to second defendant to pursue such course and take out an application for rejection of plaint, if so advised and if second defendant desires to do so.*

(v) *After 1998, in **Sopan Sukhdeo Sable Vs. Assistant Charity Commissioner** reported in **(2004) 3 SCC 137**, Supreme Court referred to **1998 ITC** principle and reiterated the*

same. Thereafter, recently in 2016, in **R.K.Roja Vs. U.S.Rayudu** reported in (2016) 14 SCC 275, though 1998 ITC case has not specifically been referred to, the principle that an application for rejection of plaint can be filed at any stage of the suit has been laid down by Hon'ble Supreme Court.

(w) In the discussion thus far, there has been reference to submission made by learned counsel for second defendant and it has also been recorded supra that learned counsel for first defendant has filed a memo adopting the counter affidavit of the second defendant. Besides adopting the counter affidavit of second defendant, learned counsel for first defendant Mr.E.Venkatesh Babu, submitted that he adopts the submissions made by learned counsel for second defendant.

(x) From the dispositive reasoning, it emerges clearly that the interim order already granted deserves to be modified holding that second defendant can proceed with the auction of suit properties by rescheduling the date of auction sale by issuing e-notification in this regard, but sale proceeds shall be distributed strictly in accordance with the pari passu charge of plaintiff. Such distribution will include interest and the deduction will be proportionate auction charges.

12 Conclusion :

(a) Second defendant can auction the suit properties of borrower company by rescheduling the date of auction sale, but subject to the condition that sale proceeds shall be distributed amongst all mortgagees including the plaintiff strictly in accordance with plaintiff's pari passu charge qua suit properties of borrower company which has been captured in first defendant's letter to plaintiff dated 29.04.2009.

(b) While issuing the notification for the rescheduled date of auction, it shall be made clear in the said notification that the plaintiff's (Hanudev Investments Pvt. Ltd.) pari passu charge over properties which are subject matter of auction, shall be cleared by ARC second defendant, albeit proportionately in accordance with the order of DRT dated 13.12.2012 in O.A.No.121 of 2011 which is admittedly operating between the parties.

13 Decision :

Both applications, namely, O.A.Nos.854 and 855 of 2018 are disposed of by modifying the interim order dated 12.09.2018 granted in O.A.No.854 of 2018 to the effect that there can be sale pursuant to e-auction notice dated 13.8.2018, by rescheduling the original auction scheduled to be held on 17.09.2018 subject to the condition that sale proceeds should be distributed proportionately between second defendant and plaintiff in accordance with plaintiff's pari passu charge on suit properties as evidenced by first defendant's letter dated 29.04.2009 which is not disputed. Parties are left to bear their respective costs.

9. To be noted, in the aforesaid common order dated 20.12.2018, which has been reproduced in its entirety supra, factual matrix has been captured as already mentioned supra. There is one other reason as to why this court has chosen to extract the order in its entirety. A reading of the order in its entirety would throw light and clarity on the spirit and objective behind the order as well as the backdrop of the submissions on the basis of

which the order came to be passed so that the complaint of breach of the order can be examined with enhanced clarity.

10. This takes us to the complaint of disobedience/breach of aforesaid common order dated 20.12.2018.

11. Before this Court proceeds with the exercise of examining the complaint of breach/disobedience of the aforesaid order, it is to be noted that it is nobody's case in these applications that there is ambiguity or ambivalence in the aforesaid order. In other words, both contesting parties have submitted that the order is clear. As it is not anybody's case that there is ambiguity or ambivalence in the order, the issue of interpreting and clarifying the language of the order does not arise.

12. Adverting to the common order dated 20.12.2018, learned counsel for plaintiff submitted that the order has made it clear that the second defendant can go ahead with the auction by re-scheduling the same subject to the condition that the sale proceeds should be distributed proportionately between the second defendant and the plaintiff in accordance with the pari passu charge. It was also pointed out that the question of maintainability of the suit is left open.

13. As there is a mention about the maintainability of the suit being left open, it is deemed appropriate to mention here that the second defendant has taken out an application in A.No.1697 of 2019 *inter alia* under Order VII Rule 11 CPC with a prayer to reject the plaint. The prayer for rejection of plaint is predicated primarily on the ground that the plaint is liable to be rejected as one barred by law and more particularly, barred by Section 34 of the SARFAESI Act. To be noted, in the common order dated 20.12.2018, which has been extracted and reproduced in its entirety supra, certain abbreviations have been used and those abbreviations will continue to be used. Also to be noted, 'SARFAESI' is one such abbreviation. It is also to be borne in mind that in the common order dated 20.12.2018 also, the parties to the instant application have been referred to by their respective ranks in the main suit.

14. With regard to rejection of plaint application, under the normal circumstances, the moment an application for rejection of plaint is taken out, the same will be heard out first (without reference to any other interlocutory applications in the suit) as it goes to the root of the matter. In the event of prayer for rejection of plaint being acceded to or in other words, answered in the affirmative, there will be no further proceedings in other interlocutory applications as the plaint itself gets rejected and the interlocutory applications have no legs to stand on their own. In the instant case, owing to the trajectory of the applications and the suit, it has become

necessary to dispose of these three applications even when a reject the application is pending. To make it clear, this Court, as a matter of sound first principle and fundamental policy, would not embark upon the exercise of adjudicating upon other interlocutory applications when a reject the plaintiff application is on board. Axiomatically, the moment a reject the plaintiff application is on board, the same will be first heard out and disposed of without reference to any other applications. In the instant case, a perusal of the order dated 20.12.2018 will reveal that the issue of maintainability of the suit was raised and this Court had made it clear that the same can be adjudicated by way of taking out an application under Order VII Rule 11 CPC. Though the order came to be passed on 20.12.2018, reject the plaintiff application being A.No.1697 of 2019 was not filed immediately thereafter. Reject the plaintiff application, being A.No.1697 of 2019, has been filed only on 28.02.2019 after the filing of the instant three applications by the plaintiff on 26.02.2019. This does not present any problem, in the light of the oft-quoted **Tadikonda family** case being *I.T.C. Limited Vs. Debts Recovery Appellate Tribunal* reported in *AIR 1998 SC 634 : (1998) 2 SCC 70* wherein the Hon'ble Supreme Court held that an application for rejection of plaintiff can be taken out at any stage of a suit. To be noted, this **Tadikonda** family principle was subsequently reiterated and referred to with affirmation by Hon'ble Supreme Court in *Sopan Sukhdeo Sable Vs. Assistant Charity Commissioner* reported in *(2004) 3*

SCC 137 and also in ***R.K.Roja Vs. U.S.Rayudu*** reported in **(2016) 14 SCC 275**. While what is being adverted to as **Tadikonda Family** principle laid down by Hon'ble Supreme Court in ***I.T.C. Limited Vs. Debts Recovery Appellate Tribunal*** was in 1998, whereas ***Sopan Sukhdeo Sable*** case is of the year 2004 and **U.S.Rayudu** case is of the year 2016. In other words, this reference is being made only to emphasize that **Tadikonda Family** principle that rejection of plaint can be filed at any stage of the suit continues to be good law.

15. In this backdrop counsel for second defendant, who has taken out the reject the plaint application, was given the option to argue the reject the plaint application also.

16. However, it was made clear that order dated 20.12.2018, which is the epicentre / nucleus of the complaint of disobedience/breach was operating from 20.12.2018 and it is not in dispute that it is continuing to operate until this day as reject the plaint application has been filed only on 28.02.2019. If there had been a breach/disobedience, the same cannot be given a go by and sidestepped solely because the reject the plaint application has been taken out on 28.02.2019. Therefore, it was made clear that the reject plaint application will be heard out, but the question as to whether there has been any violation/disobedience of the order dated 20.12.2018 as complained or in any other manner between 20.12.2018 and

the date of disposal of the reject the plaint will certainly to be examined even if the rejection of plaint application is ultimately answered in the affirmative. To this, learned counsel for second defendant submitted that he would adhere to and go by the well established sanctus principle that the moment there is an allegation of contempt, the party facing such an allegation should purge itself of contempt before arguing any other application on merits of the matter.

17. In this regard, this Court deems it appropriate to make a reference to a judgment of the Hon'ble Division Bench of the Allahabad High Court being *Smt. Jaganathiya Vs. State of UP* reported in **2006 (3) AWC 2600** authored by Hon'ble Justice Chauhan, as his lordship's then was, wherein it was held that provisions of Order XXXIX Rule 2-A of CPC are such that principles governing an application under Order XXXIX Rule 2-A are akin to proceedings under Section 12 of the Contempts of Court Act and as such, proceedings /provisions pertaining to alleged violation of orders of court are intended to preserve majesty of the Court and to ensure utmost respect and honour for the Rule of Law. In other words, the principle is, unsullied stream of justice cannot be disturbed in any manner by violation of orders of Court as that would have a direct and deleterious effect on the majesty of the Rule of Law.

18. In the instant case, learned counsel for second defendant submitted that he would have these three applications heard out first and thereafter, subject to outcome of these applications, pursue the reject the plaint application.

19. Therefore, the course of action of hearing out these three applications has been adopted in the instant case.

20. Be that as it may, as already alluded to supra, it is nobody's case before this Court that there is any ambiguity or ambivalence in the common order dated 20.12.2018 made by this Court. Besides this, it is also submitted by all the parties to the lis that there is no intra-court appeal against the common order dated 20.12.2018 and all the parties to this lis have given legal quietus to the order. In other words, all the parties to this lis are governed by common order dated 20.12.2018.

21. This takes us back to the complaint of disobedience/breach of said common order as alluded to supra.

22. Learned counsel for plaintiff submitted that order of this Court permitting second defendant to go ahead with the auction by rescheduling the same subject to the condition that sale proceeds should be distributed

proportionately between the second defendant and the plaintiff in accordance with the pari passu charge only means that the original auction should be held again on the same terms. Saying so, learned counsel for plaintiff submitted that the re-auction notice dated 06.02.2019 (for auction on 01.03.2019) has violated / breached orders of this Court on two counts. Referring to the re-auction notice dated 06.02.2019, learned counsel submitted that a note in the re-auction notice says that there is pari passu charge in favour of plaintiff as set forth in the orders of Debts Recovery Tribunal dated 13.02.2012 made in O.A.No.121 of 2011. The note, which was referred to in the re-auction notice, reads as follows:

'Note: In addition to the abovementioned outstanding dues of the consortium, there is a pari passu charge for an amount of Rs.50,00,00,000/- (Rupees Fifty Crore Only) along with interest thereon in favour of one M/s. Hanudev Investments Private Limited as set forth in the order of the Hon'ble Debts Recovery Tribunal, Chennai, dated 13.12.2012 in O.A.No.121 of 2011. In accordance with the orders of the Hon'ble High Court dated 20.12.2018 in O.A.No.854- 855 of 2018 in C.S.No.636 of 2018, JM Financial Asset Reconstruction Company Limited has been permitted to proceed with the present sale, and M/s. JM Financial Asset Reconstruction Company Limited, will distribute the sale proceeds amongst the above mentioned lenders as well as the said M/s. Hanudev Investments Private Limited. In accordance with the order of the Hon'ble Debts Recovery Tribunal aforementioned.'

23. Advancing his arguments further, learned counsel for plaintiff

submitted that second count on which the re-auction notice disobeys /violates orders of this Court is that the aggregate reserve price, which was fixed at Rs.2,21,00,00,000/- (Rupees Two Hundred and Twenty One Crores only), in the original e-auction notice, has now been reduced to Rs.1,83,00,00,000/- (Rupees One Hundred Eighty Three Crores only) for the immovable assets and Rs.7,00,00,000 (Rupees Seven Crores only) for the movable assets. In other words, the aggregate reserve price being reserve price for immovable and movables, which was pegged at Rs.221 Crores in the original auction notice, has now been brought down to Rs.190 Crores in the re-auction notice. This, according to learned counsel for plaintiff, is disobedience/violation of order of this Court and this Court permitting re-auction only means that there should be re-scheduling of the original auction on the same terms.

24. Responding to the aforesaid complaint of disobedience/breach of common order of this Court dated 20.12.2018 on two counts, learned counsel for second defendant submitted that re-auction permitted by this Court necessarily means re-auction in accordance with law. It was submitted that re-auction was intended to ensure that plaintiff's pari passu charge is not given a go by. Advancing the submissions on re-auction in accordance with law, learned counsel for second defendant referred to Rule 8(5) of the SARFAESI Rules. Rule 8(5) reads as follows:

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

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

(b) by inviting tenders from the public;

(c) by holding public auction; or

(d) by private treaty.'

25. After referring to Rule 8(5), learned counsel for second defendant pressed into service a judgment of the Hon'ble Supreme Court being ***Mathew Vargheese Vs. M.Amrita Kumar & Others*** reported in ***AIR 2015 SC 50***. Paragraphs 6, 7 and 8 of the said judgment give the facts in a capsule and the same read as follows:

'6. On 14-8-2007, the 4th Respondent-Bank issued a notice to Respondents 1 and 2, as well as others of its intention to sell the property under Rule 8(6) of the Rules, 2002 by fixing a reserve price of Rs. 1,25,00,000/-. On 23-8-2007, the 4th Respondent-Bank published its notice of sale of property in Indian Express and Mathrubhoomi, inviting tenders-cum-auction from the public. The 1st and 2nd Respondents were informed by the 4th Respondent-Bank by its notice dated 30-8-2007, about the publication made on 23-8-2007 and also enclosed a tender form along with the terms and conditions for participation in the tender. The Appellant and one M/s Kent Construction stated to have submitted their tenders on

30-8-2007 and 1-9-2007.

7. On 20-9-2007, the 1st and 2nd Respondents filed W.P. No. 27182 of 2007 challenging the proceedings initiated under the SARFAESI Act. The said writ petition was disposed of by a learned Single Judge of the Kerala High Court by Order dated 20-9-2007. By the said order, the High Court after taking note of the O.A. filed by the 4th Respondent-Bank, as well as S.A. filed by the 1st and 2nd Respondents, directed the DRT to hear the parties and dispose of both the cases or at least the Securitisation Application filed by the 1st and 2nd Respondents without any delay. The High Court also noted that at that point of time, the DRT had fixed 12-10-2007 as the date for disposal of both the applications. While issuing the said directions, the learned Judge gave liberty to the parties to settle the liability and also directed the 4th Respondent-Bank to defer the sale posted on 25-9-2007 by six weeks, by imposing a condition on Respondents 1 and 2 to deposit a sum of Rs. 10,00,000/- before the date of sale, i.e. 25-9-2007. It was also observed therein that since the 4th Respondent-Bank had agreed for OTS in a sum of Rs. 55,00,000/-, the bank should waive interest if the 1st and 2nd Respondents offer a settlement within a reasonable time and by making payment of the said amount.

8. It is common ground that pursuant to the said Order dated 20-9-2007, the sale which was scheduled to be held on 25-9-2007 was postponed. In fact, though the six weeks period prescribed in the Order dated 20-9-2007 expired by 10-11-2007, it is stated that even thereafter the sale was not effected. Pursuant to the said order, the 1st and 2nd Respondents stated to have deposited the sum of Rs. 10,00,000/- with the 4th Respondent-Bank. On 27-12-2007, the DRT passed Orders in S.A. No. 20 of 2007 dismissing the said application with costs. On the next day i.e. on 28-12-2007, the 4th

Respondent-Bank accepted the tender of the Appellant who offered a sum of Rs. 1,27,00,101/- and asked the Appellant to deposit 25% of the amount i.e. Rs. 31,75,025/- on that day itself and pay the balance amount within 15 days. The Appellant is stated to have deposited the 25% of the total bid amount offered by it with the 4th Respondent-Bank. The Appellant is also stated to have deposited the balance amount on 11-1-2008. After deposit of 25% of the bid amount on 31-12-2007, the 4th Respondent-Bank confirmed the sale in favour of the Appellant and gave further time of 15 days for depositing the balance amount.'

26. Principle is articulated in Paragraph 49 and the same reads as follows:

'49. We, therefore, hold that unless and until a clear 30 days notice is given to the borrower, the sale or transfer can be resorted to by a SECURED CREDITOR. In the event of any such sale properly notified after giving 30 days clear notice to the borrower did not take place as scheduled for reasons which cannot be solely attributable to the borrower, the SECURED CREDITOR cannot effect the sale or transfer of the SECURED ASSET on any subsequent date by relying upon the notification issued earlier. In other words, once the sale does not take place pursuant to a notice issued under Rules 8 and 9, read along with Section 13(8) for which the entire blame cannot be thrown on the borrower, it is imperative that for effecting the sale, the procedure prescribed above will have to be followed afresh, as the notice issued earlier would lapse. In that respect, the only other provision to be noted is Sub-rule (8) of Rule 8 as per which sale by any method other than public auction or public tender can be on such terms as may be settled between the parties in writing. As far as sub-rule (8) is concerned, the procedure prescribed under Rule 8 read along with 9(1) has to be necessarily followed, insomuch as that is the prescription of the law

for effecting the sale as has been explained in detail by us in the earlier paragraphs by referring to Sections 13(1), 13(8) and 37, read along with Section 29 and Rule 15. In our considered view any other construction will be doing violence to the provisions of the SARFAESI Act, in particular Section 13(1) and (8) of the said Act.'

27. Referring to Mathew Vargheese case, learned counsel for second defendant submitted that it is necessary to adhere to the SARFAESI Act, the Rules thereunder and this Court permitting re-auction necessarily means re-auction in accordance with law and therefore, there is no disobedience/breach of orders of this Court with regard to bringing down the reserve price. Besides advertng to Mathew Vargheese case, learned counsel for second defendant referred to **Gajaraj Singh and Others Vs. State of U.P & Others** reported in **(2001) 5 SCC 762** and drew the attention of this Court to Paragraph 8, which reads as follows:

*'8. It is pertinent to note that Section 68-D of the 1939 Act provided for filing of objections within 30 days of the publication of the proposed scheme and consideration of the objections by the State Government after giving an opportunity of hearing to the objectors or their representatives and the representatives of the State Transport Undertaking. A similar provision for filing of the objections and hearing thereon is included in Section 100 of the new Act. The provision for filing of objections and hearing to base the decision thereon, as contained in the new Act, being not inconsistent with the predecessor provision rather being *pari materia* therewith, continues to survive. The provisions for nationalisation of routes and excluding operation on such routes by private operators consequent thereupon are a reasonable*

restriction in public interest on the fundamental right to carry on trade or business under Article 19(1)(g) of the Constitution. It is on the hearing of the objections that the competent authority would form an opinion on the question whether the proposed nationalisation would provide a convenient, adequate, economical and properly coordinated road transport service and therefore it was necessary to do so in public interest. The scheme may then be annulled, modified or approved. The right to file objections and to secure hearing thereon is statutorily provided and is a valuable right of the private operators who would be eliminated, completely or partially, from operation on the routes covered by the scheme depending upon how and to what extent it is approved. This Court did not and could not have taken away such valuable right of hearing on the objections which were already before the competent authority. The decision of this Court in Ram Krishna Verma's case does not refer to the 38 routes and therefore this Court has not excluded the hearing insofar as such 38 routes are concerned. Such exclusion of right of hearing cannot be read in the judgement by implication. A doubt arising from reading a judgment of the Court can be resolved by assuming that the judgment was delivered consistently with the provisions of law and therefore a course or procedure in departure from or not in conformity with statutory provisions cannot be said to have been intended or laid down by the Court unless it has been so stated specifically.'

28. Gajaraj case was referred to say that on a demurrer even if there is a doubt with regard to a judgment, the same can be resolved by assuming that the judgment was delivered consistently with the provisions of law. Therefore, the course of procedure in departure from or not in

conformity with statutory provisions of law cannot be said to have been intended or laid down by the Court unless it has been so stated specifically in the order.

29. Learned counsel for second defendant also pressed into service a judgment of the Hon'ble Supreme Court in **Md.Iliyas** case being **State of Orissa and Others Vs. Md.Iliyas** reported (2006) 1 SCC 275 and referred to paragraph 12, which reads as follows:

'12. When the allegation is of cheating or deceiving, whether the alleged act is wilful or not depends upon the circumstances of the concerned case and there cannot be any strait jacket formula. The High Court unfortunately did not discuss the factual aspects and by merely placing reliance on earlier decision of the Court held that pre-requisite conditions were absent. Reliance on the decision without looking into the factual background of the case before it is clearly impermissible. A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the

various observations made in the judgment. The enunciation of the reason or principle on which a question before a Court has been decided is alone binding as a precedent. (See: [State of Orissa v. Sudhansu Sekhar Misra and Ors.](#) (AIR 1968 SC 647) and [Union of India and Ors. v. Dhanwanti Devi and Ors.](#) (1996 (6) SCC 44). A case is a precedent and binding for what it explicitly decides and no more. The words used by Judges in their judgments are not to be read as if they are words in Act of Parliament. In [Quinn v. Leatham](#) (1901) AC 495 (H.L.), [Earl of Halsbury LC](#) observed that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which are found there are not intended to be exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides.

30. Referring to paragraph 12 of [Md. Illiyas](#) case, learned counsel for second defendant submitted that it is a well settled theory of precedents that every decision contains three basic postulates, namely (1) findings of material facts, (2) statement of principles of law applicable to the legal problems that arise from the facts and (3) judgment is based on a combination of (1) and (2). On this basis, it was submitted that decision is an authority for what it actually decides.

31. With regard to the other count of disobedience raised by learned counsel for plaintiff, it was submitted that the note, which has been extracted and reproduced supra, is strictly in accordance with the orders of this Court and the objective of this is only to ensure that the plaintiff,

which has a pari passu charge qua the auction notice, is not left high and dry.

32. By way of reply to the aforesaid submission, learned counsel for plaintiff pressed into service two judgments of the Hon'ble Supreme Court. One is Hind Rubber Industries case being *Tayabbhai M. Bagasarwalla and Another Vs. Hind Rubber Industries Pvt. Ltd., and Others* reported in (1997) 3 SCC 443 and the other is *Prithawi Nath Ram Vs. State of Jharkhand and others* reported in (2004) 7 SCC 261.

33. With regard to Hind Rubber Industries case, learned counsel for plaintiff referred to Paragraphs 14 and 15, which read as follows:

'14. The first and foremost question in this appeal is whether the High Court was right in holding that since it has been found ultimately that the Civil Court had no jurisdiction to entertain the suit, the interim orders made therein are non-est and hence Defendants 1 and 2 cannot be punished for their violation even if they had flouted and disobeyed the said interim orders when they were in force. We are of the considered opinion that the High Court was not right in saying so. The landlord-plaintiff came forward with the suit alleging that by virtue of the fire resulting in the destruction of the suit house, the relationship of landlord and tenant between the parties has come to an end and, therefore, he requested the court to injunct the defendants from carrying on any construction on the suit premises without their permission and without obtaining the sanction from Municipal Corporation. The defendants questioned the jurisdiction of the Civil Court to entertain the suit. According to them, the building was not totally

destroyed and that, in any event, the relationship of landlord and tenant has not come to an end on that account. The defendants' plea was rejected by the Civil Court. It held that it did have the jurisdiction to try the said suit. On appeal, however, the High Court, disagreeing with the decision of another High court, held that relationship of landlord and tenant has not come to an end for the reason suggested by the plaintiff and that the Civil Court had no jurisdiction to entertain the suit in view of Section 28 of Bombay Rent Act. All this took about six years, i.e., from 1991 to 1996. It is not suggested nor can it be suggested that the suit was filed by the plaintiff in the City Civil Court only with a view to avoid the Rent Control Court nor can it be suggested that they approached the Civil Court knowing full well that the Civil Court had no jurisdiction to try that suit. It is evident that they approached the Civil Court bonafide, thinking that it had jurisdiction to try their suit. They were confirmed in their view by the Civil Court. It is true that ultimately the High Court found against them but even there, it must be noticed, they did so disagreeing with a decision of the Kerala High Court. It, therefore, cannot be said that the plaintiffs did not approach the Civil Court bonafide.

15. The next thing to be noticed is that certain interim orders were asked for and were granted by the Civil Court during this period. Would it be right to say that violation of and disobedience to the said orders of injunction is no punishable because it has been found later that the Civil Court had no jurisdiction to entertain the suit. Mr.Sorabjee suggests that saying so would be subversive of the Rule of Law and would seriously erode the majesty and dignity of the court. It would mean, suggests learned counsel, that it would be open to the defendants-respondents to decide for themselves whether the order was with or without jurisdiction and act upon that belief. This can never be, says the learned counsel. He further suggests that if any party

thinks that an order made by the Civil Court is without jurisdiction or is contrary to law, the appropriate course open to him is to approach that court with the plea and ask for vacating the order. But it is no open to him to flout the said order. But it is no open to him to flout the said order assuming that the order is without jurisdiction. It is this principle which has been recognised and incorporation in Section 9-A of Civil Procedure Code (inserted by Maharashtra Amendment Act No. 65 of 1977), says Mr.Sorabjee. Section 9-A reads as follows:

"9-A. Where by an application for interim relief is sought or is sought to be set aside in any suit and objection to jurisdiction is taken, such issue to be decided by the Court as preliminary issue at hearing of the application. (1) If, at the hearing of any application of granting or setting aside an order granted any interim relief, whether by way of injunction, appointment of a receiver or otherwise, made in any suit, an objection for the jurisdiction of the court to entertain such suit is taken by any of the parties to the suit, the Court shall proceed to determine at the hearing of such application the issue as to the jurisdiction as a preliminary issue before granting the interim relief. Any such application shall be heard any disposed of by the Court as expeditiously as possible and shall not in any case be adjourned to the hearing of the suit.

(2) Notwithstanding anything contained in sub-section (1), at the hearing of any such application, the court may grant such interim relief as it may consider necessary pending determination by it of the preliminary issue to the jurisdiction."

learned counsel submitted that the second defendant cannot use Rule 8(5) and adherence to the same as a garb for flouting the orders of this Court. Referring to Prithawi Nath Ram's case, learned counsel for plaintiff submitted that modification of an interim order or for that matter even vacating of an interim order cannot become an ground for defending disobedience of an interim order passed by the Court.

35. To be noted, before this Court examines the rival submissions, it is deemed appropriate to mention that a comprehensive reading of the order dated 20.12.2018 brings into sharp focus inter alia the following points:

(a) Both parties have given legal quietus to the order of this Court dated 20.12.2018.

(b) Both parties are of the view that auction should take place and moneys should be realised for the ARC and plaintiff.

(c) Both parties agree that order dated 13.12.2012 made by DRT in O.A.No.121 of 2011 is binding and is operating between the parties.

(d) Both parties agree that there is no ambivalence or ambiguity in the order dated 20.12.2018.

(e) Both parties agree that auction has to be conducted in accordance with the legal requirements which apply.

36. This Court now proceeds to examine the two grounds of

alleged disobedience/breach, which constitute the fulcrum of the instant applications. With regard to the first count, which pertains to the note in the re-auction notice, this Court deems it appropriate to extract the note in the original auction notice on 13.08.2018. The note therein reads as follows:

'Note: In addition to the abovementioned outstanding dues, a principal amount of Rs.50,00,00,000/- (Rupees Fifty Crore Only) together with interest and costs is outstanding and payable to Hanudev Investments Private Limited by the Borrower. The immovable and movable properties being sole by way of the present e-auction shall be free from such encumbrance of Hanudev Investments Private Limited.'

37. A careful comparison of the note in the original e-auction notice dated 13.08.2018 and the note now in the re-auction notice dated 06.02.2019 brings to light the obtaining position that the second defendant in the re-auction notice has made it clear that plaintiff and the second defendant will have distribution of sale proceeds amongst themselves in accordance with the orders of the Debts Recovery Tribunal dated 13.02.2019 made in O.A.No.121 of 2011.

38. A further perusal of the common order dated 20.12.2018, which has been extracted supra, will reveal that both parties had categorically

admitted that the order dated 13.02.2019 made by Debts Recovery Tribunal in O.A.No.121 of 2011 is binding on the parties and that the same is operating. This has been captured by this Court in sub-paragraph (d) of Paragraph (6) of the order dated 20.12.2018 and the relevant portion reads as follows:

'To be noted, there is no dispute or disagreement before this Commercial Division in the hearing that this order of DRT dated 13.12.2012 is operating and binding on parties to this lis. This order of DRT dated 13.12.2012 has been placed as part of suit file and it is plaint document No.5.'

39. Therefore, it cannot now be gainsaid by the plaintiff that it was not a party to the proceedings before DRT, more so in the instant application complaining of breach, much less after giving legal quietus to the order of this Court dated 20.12.2018.

40. Therefore, this Court has no hesitation in holding that there is no disobedience or violation of the order of this Court with regard to the note in the re-auction notice and therefore the first count on which the allegation of disobedience/ breach has been argued fails.

41. This takes us to the second ground on which disobedience/breach is predicated.

42. Second count of disobedience/breach pertains to aggregate reserve price. As already alluded to supra, the second count or second ground on which disobedience/breach plea is predicted is that the aggregate reserve price or what is otherwise known as upset price ought not to have been reduced from Rs.221 Crores to Rs.190 Crores. As mentioned supra, learned counsel for second defendant, adverting to Rule 8(5) of SARFAESI Rules, pressed into service Mathew Vargheese case and submitted that the order of this Court does not mean that the re-scheduling of the e-auction would mean giving a complete go by to requisite legal procedures and legal formalities. It was submitted that the whole exercise was strictly in accordance with the legal requirements and therefore, the complaint that there is breach/disobedience of order of this Court is untenable. Arguments in response made by learned counsel for the plaintiff is that Mathew Vargheese case is not an authority for the proposition that re-auction includes revaluation. It was submitted that Mathew Vargheese is an authority for the proposition that sufficient notice should be given to the borrower.

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43. Considering the nature of the complaint and in the light of the order violation of which is the complaint, this Court is of the considered view that it may not be necessary to delve further into Mathew Vargheese's

case. It is sufficient to say that pith and substance or of the broad objective of the common order of this Court dated 20.12.2018 is to the effect that the plaintiff, which has a pari passu charge qua the properties, which are subject matter of the auction notice, cannot be left high and dry.

44. To put it differently, when there is no dispute or disagreement that the plaintiff has a pari passu charge as a co-mortgagee qua properties which are subject matter of the auction notice, there cannot be any auction ignoring the rights of the plaintiff. Further, the order of this Court is to the effect that it should be made clear to intending auction purchasers that plaintiff has a pari passu charge and that the price for which the hammer goes down will include a proportionate share of the sale proceeds to the plaintiff. This is to ensure that the proposed auction purchasers are not dissuaded from participating owing to another charge to clear as that may mean going through the onerous and arduous task of negotiating with a co-mortgagee with pari passu charge after auction purchase. Equally, the order also intends to protect the rights of the plaintiff so that the auction is not conducted ignoring the plaintiff's charge or plaintiff's status as a co-mortgagee qua the properties which are subject matter of auction.

45. Therefore, there can be no complaint of breach as long as the re-auction is conducted in such a manner that it ensures following two aspects:

- a) that it discloses that plaintiff has a pari passu charge qua suit properties and that the price for which the properties

go down under the hammer will include the proportionate share of the plaintiff; and

b) that post auction the sale proceeds will be proportionately distributed amongst the second defendant, other mortgagees/lenders and the plaintiff.

46. While one limb of the order is with regard to the principal auction process, the second limb of the order is obviously with regard to post auction distribution of proceeds.

47. As already alluded to supra, it has been clearly recorded / articulated in the common order dated 20.12.2018 made by this Court that order dated 13.12.2012 in O.A.No.121 of 2011 is binding on the parties to the lis and that the same is operating. This stated position of the parties remain without being rescinded. There has been no further legal proceedings with regard to the order dated 20.12.2018 and both parties agree that they have given complete legal quietus / finality to the order.

48. Therefore, post auction, proportionate distribution shall be in accordance with order of the DRT. This Court does not find any disobedience/breach of the orders of this Court if this position is made clear in the re-auction notice itself. In other words, aforesaid

proportionate sharing of sale proceeds between plaintiff and second defendant is inter-alia between them as it is in accordance with orders of DRT which is admittedly operating.

49. With regard to Gajaraj Singh case pressed into service by learned counsel for second defendant, there is no difficulty in accepting the principle that it would apply only in a case where a doubt arises from a reading of the judgment. In the instant case, as already alluded to supra, as there is no dispute or disagreement between the plaintiff and the second defendant that there is no doubt with regard to the common order of this Court or in other words, as there is no dispute or disagreement that there is no ambiguity or ambivalence qua the order of this Court, Gajaraj Singh principle does not apply to the facts of this case.

50. With regard to Md.Illiyas case, the three postulates pertaining to the theory of precedents are undisputable. Though it was not cited before this Court, this Court deems it appropriate to remind itself of the celebrated *Padma Sundara Rao Vs. State of Tamil Nadu* reported in **(2002) 3 SCC 533** . These principles and postulates are indisputable first principles. In the light of there being no debate about interpretation in the instant case, it may not be necessary to take recourse to these principles. Suffice to say that these principles and postulates regarding theory of

precedents stand re-stated.

51. As far as the Mathew Vargheese case is concerned, it has already been mentioned supra that de hors Mathew Vargheese case also, re-auction by adhering to legal requirements is not violation/disobedience /breach of order of this Court owing to the facts and circumstances of the instant case.

52. With regard to Hind Rubber Industries case pressed into service by learned counsel for plaintiff, that was a case where it was contended that an order made by a civil Court was without jurisdiction and contrary to law. It is in this context that Hon'ble Supreme court said that an order being contrary to law or being without jurisdiction cannot be a ground to violate the order. It is in this view of the matter that the Hon'ble Supreme Court laid down that appropriate course for parties in such a situations is to approach the Court concerned with a plea for vacating the order while reiterating that it can be no excuse for violating the order. In other words, a party violating an order cannot take umbrage under the plea that the order is contrary to law or that the order is without jurisdiction. As there is no such issue in the instant case, there is no need or necessity to take recourse to Hind Rubber Industries case law.

53. Likewise, Prithawi Nath Ram case is for the principle that an

order ought to be obeyed and not breached until it is operating. To put it differently, that an order was subsequently vacated cannot be taken as a defence qua allegation of breach, violation/disobedience of the order.

54. Besides the above said two grounds, in the hearing much was said about the common Director in R.R.Info Park Private Limited (borrower) and the plaintiff. Arguments were also advanced about one Director in the borrower company and one Director in the plaintiff company being spouses. In the considered opinion of this Court, as the entire matter turns on the simple and neat question as to whether there is disobedience/breach of aforesaid common order dated 20.12.2018 made by this Court, it may not be necessary to delve into those aspects of the matter. There were also arguments touching upon an Asset Reconstruction Company (ARC) dealing with public money. Though it is not necessary to go into these aspects of the matter (owing to the scope of the instant applications), before parting with this case, this Court deems it appropriate to observe that first defendant, which is a Bank and which is admittedly dealing with public money, has ceded pari passu charge to plaintiff qua the properties which are subject matter of the auction notice on 29.04.2009, knowing fully well that there is a common Director in the borrower company and in the plaintiff company. The first defendant has also noticed that one Director in the plaintiff company and one Director in the borrower company are

spouses. After all this, the first defendant has assigned the debt/loan *inter alia* to the second defendant on 07.03.2014. In this regard, this Court notices that the plaintiff in the reply affidavit dated 12.03.2018 has averred that the second defendant is not interested in the highest recovery probably owing to the second defendant having secured the assignment from the first defendant on a throw away price. This averment is contained in Paragraph 8 of the reply and the same reads as follows:

'It is clear that the 2nd respondent is not interested in the highest recovery probably only due to it having secured the assignment from the 1st Respondent at a throw away price, and that there is no public interest involved.'

55. If this position is true and correct, it leaves this Court wondering as to how the first defendant, which is a lead Bank in a consortium of banks, could make an assignment for what is described as 'throw away price'. This is more so as this Court is informed that other banks which constitute the consortium are Indian Bank, Corporation Bank, Indian Overseas Bank and Bank of Maharashtra.

56. Be that as it may, those are decisions which the respective banks constituting the consortium, the lead bank and their management have taken. Whether it is a throw away price at all is beyond the scope of the

instant applications. This is more so as the banks have already received the entire monies which they had decided to settle for and therefore, it may be too late in the day to go into all those aspects. This Court is constrained to make this observation as arguments were advanced by predicating submission on the expansive plea of public money being involved.

57. Now that these three applications are being disposed of, reject the plaint application being A.No.1697 of 2019 shall be taken up as that would be the most appropriate course to adopt.

58. There is no dispute or disagreement that the e-auction pursuant to the re-auction notice dated 06.02.2019 did not take place on 01.03.2019 as there were no bidders. This is captured in the proceedings of this Court dated 01.03.2019, which reads as follows:

'Mr.P.S.Raman, learned senior counsel instructed by Mr.Vineet Subramani, learned counsel on behalf of the applicant, Mr.Srinath Sridevan, learned counsel on record for the second respondent and Mr.Venkatesh Babu, learned counsel on record for first respondent are before this Court.

2. Learned counsel for second respondent, on instructions, submitted that there are no bidders for the e-auction, which was scheduled to be held today (01.03.2019). This is recorded.

3. In the light of the aforesaid submissions, learned senior counsel for applicant in these applications, on instructions, submits that, as the above submission of the second respondent is being recorded, further orders are not necessary for the present and these

applications can be heard out in the ensuing listing, obviously post completion of pleadings.

4. Counsel for respondents submit that they will complete pleadings by exchanging copies amongst all concerned and filing the same in the Registry before the next listing.

5. List this matter on 08.03.2019.'

59. As no auction has taken place pursuant to the re-auction notice, this Court is of the considered opinion that O.A.No.199 of 2019 for injunction of auction and A.No. 1637 of 2019 for interim stay qua the auction are not of relevance any more. However, as prayer in A.No.1639 of 2019 is being negated, it follows as a sequitur that O.A.No.199 of 2019 and A.No.1637 of 2019 will also stand dismissed.

Owing to all that have been set out supra, all the three applications are bereft of merits and the same are dismissed. This Court deems it appropriate to leave it open to the parties to bear their respective costs.

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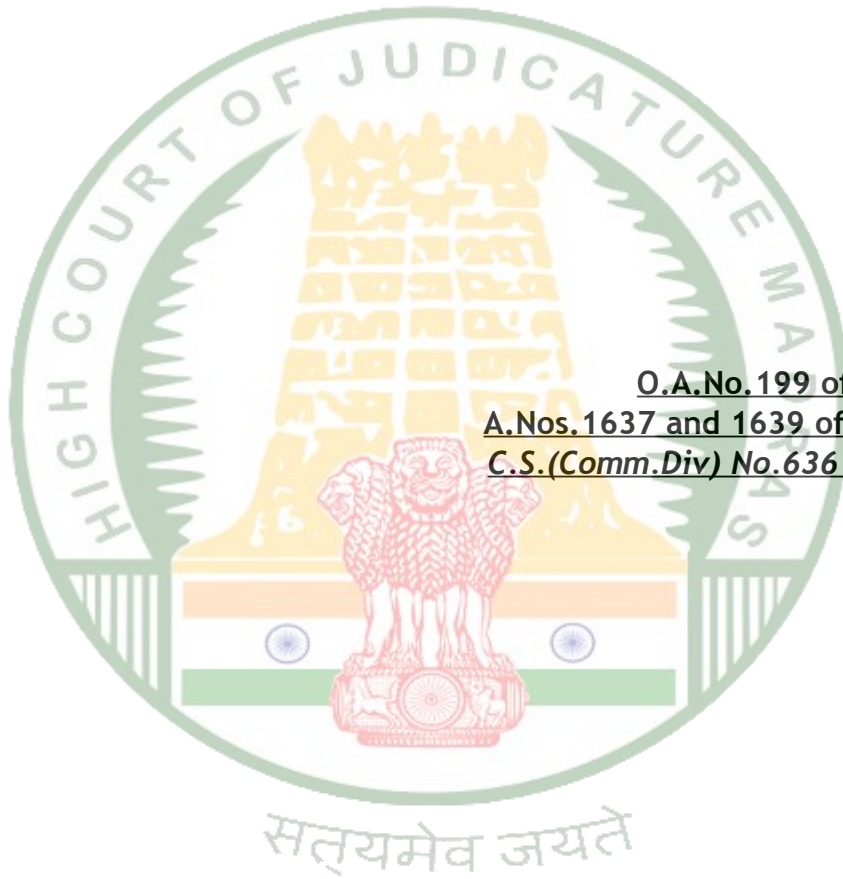
30.04.2019

Speaking Order

Index: Yes

M.SUNDAR.J.,

gpa



Order in
O.A.No.199 of 2019 &
A.Nos.1637 and 1639 of 2019 in
C.S.(Comm.Div) No.636 of 2018

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30.04.2019