

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 13.11.2019
PRONOUNCED ON: 21.11.2019

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE C.SARAVANAN

Writ Petition No.28285 of 2019

Strides Air Systems (P) Ltd.
rep. by its Director D.Anil Prabhu
40/1, Vayalur Road
Namachivayapuram
Thodukadu Village
Thiruvallur District 602 105.

.. Petitioner

Vs.

1. The Authorised Officer
The State Bank of India
Stressed Assets Recovery Branch
Red Cross Building, II Floor
No.32, Montieth Road
Egmore
Chennai 600 008.

2. J.Betzi

3. J.Johnson Thomas

[R2 & R3 impleaded vide order dated
04.11.2019 in WP No.28285 of 2019]

4. R.Dinesh Rao

.. Respondents

[R4 impleaded vide this order in WMP
No.32264 of 2019]

Petition under Article 226 of the Constitution of India
praying for a writ of Certiorarified Mandamus calling upon the
sale notice dated 19.08.2019 issued to the petitioner by the
respondent and any consequent proceedings of sale effected by
private treaty on 13.09.2019 in respect of the secured assets of
the petitioner and quash the same and consequently, direct the
respondent to consider the case of the petitioner for One Time

Settlement of the loan accounts as per the letters dated 02.07.2019, 26.08.2019 and 13.09.2019 within a time frame.

For Petitioner : Mr.AR.L.Sundaresan, S.C.
For Mr.Y.Prakash

For Respondent-1 : Mr.K.S.Sundar
For Mr.K.Chandrasekaran

For Respondents 2 & 3: Mr.G.Senthil Kumar

For Respondent-4 : Mr.S.Prabhakaran, S.C.
[Impleaded now] For Mr.P.S.Amalraj

O R D E R

Dr.Vineet Kothari,J

M/s.Strides Air Systems Private Limited, through its Director Mr.D.Anil Prabhu, 40/1, Vayalur Road, Namachivayapuram, Thodukadu Village, Thiruvallur District, has filed this writ petition against the first respondent State Bank of India, aggrieved by the impugned Sale Notice dated 19.8.2019 issued by the first respondent Bank and the consequent sale effected by private treaty, viz. one factory premises in favour of a couple purchasers, namely Mrs.J.Betzi, wife of J.Johnson Thomas and Mr.J.Johnson Thomas, Chennai and the residential house of the borrower sold to one Mr.R.Dinesh Rao.

2. The impugned Sale Notice dated 19.08.2019 for sale of both the Schedule properties, was served on the petitioner company as well as its Directors and Guarantors. The case set up by the petitioner is that the petitioner not only made continuous and strenuous efforts to settle the loan account with the first respondent State Bank of India, but it had also approached this Court by way of a writ petition in W.P.No.9768 of 2019, which was disposed of by a Co-ordinate Bench of this Court on 03.07.2019 and the said writ petition filed by the petitioner came to be dismissed by the Co-ordinate Bench, holding that the first respondent Bank cannot be compelled to agree for a One Time Settlement proposal, which was given by the petitioner on 19.03.2019.

3. In the present writ petition, this Court passed an order on 25.09.2019 while issuing notice to the respondent Bank, that

subject to the deposit of Rs.1.00 Crore by the petitioner with the respondent Bank, the status quo of the proceedings in pursuance of the impugned Sale Notice dated 19.08.2019, shall be maintained by the respondent Bank and if the sale in favour of the third party has not been concluded, then, it may not be concluded without the specific leave of the Court. The petitioner deposited the said amount of Rs.1.00 Crore in the loan account of the first respondent Bank. However, the first respondent Bank has submitted before us that the said amount of Rs.1.00 Crore was withdrawn by the petitioner through its Over Draft facility in the Cash Credit account with the same bank and deposited in the loan account.

4. When the matter was again taken up by this Court on 04.11.2019, impleading the purchasers of the two properties in question, the couple Mrs.J.Betzi and Mr.J.Johnson Thomas, this Court passed the following order:

"It is stated by the learned counsel for the petitioner that while the OTS proposal of the Petitioner was under consideration and when the petitioner brought the purchaser for better offer for the sale of property in question, the Respondent Bank has illegally sold the property to the private respondents under private negotiations without taking the present petitioner in confidence, for which the learned counsel for the Respondent/Bank submitted that the sale was not illegal.

2. Further, an order of Status-Quo was passed by this Court on 25.09.2019 subject to the condition of deposit of a sum of rupees one crore by the petitioner within a period of two weeks from that date. It is represented by the learned counsel for the petitioner that despite the deposit of the said amount the property has been sold.

3. Mr.Joseph Durairaj, the learned counsel representing the auction purchasers would submit that the auction purchasers may be impleaded and considering his request, the following Auction Purchasers are also impleaded as respondents:

1. Ms.J.Betzi

W/o. J.Johnson Thomas

No.17,Karunanidhi Nagar,

4 th Street Street,

Tondiarpet, Chennai - 600081.

2.Mr.J.Johnson Thomas

No.17, Karunanidhi Nagar,

4 th Street, Tondiarpet,

Chennai -600 081.

3. Put up on 11.11.2019.

4. We direct the original Sale Deeds executed by the Bank in favour of the private parties who has been impleaded be produced on 11.11.2019 and the Status-Quo with regard to the possession of the property shall be maintained by the parties. The petitioner and the respondent Bank are given liberty to settle the entire loan amount payable by the petitioner after adjusting the amount already paid as aforesaid and if the parties arrive at a settlement, such settlement shall be reported before us and if the settlement cannot be arrived at, the same may also be reported in writing.

5. The original Sale Deeds were not produced by the Auction Purchasers before this Court, despite aforesaid directions.

6. In pursuance of the aforesaid said order dated 04.11.2019 of this Court, it appears that the respondent Bank through its Assistant General Manager, SARB, Chennai, sent a mail on 8th November 2018, to the petitioner Borrower to pay the entire outstanding loan to the Bank.

7. The learned Senior Counsel appearing for the petitioner, Mr.AR.L.Sundaresan, contended that though the petitioner borrower has been making all out efforts for settlement of the entire dues of the respondent Bank right from the month of February 2019 and several emails and correspondence have ensued between the parties and vide the mail dated 20th March, 2019 of the first respondent Bank to the petitioner Borrower, it is indicated that the Bank had agreed to settle the loan account at Rs.2.85 Crores, subject to initial upfront payment of 25% of the compromise offer of Rs.2.85 Crores, but, the Bank could not accept the lower offer of the petitioner at Rs.2.75 Crores.

8. The learned Senior Counsel, Mr.Sundaresan, further submitted that the petitioner entered into an Agreement to Sell

on 18.03.2019 for one of the two properties, namely the Factory premises, with a third party, namely M/s. Jay Engineering Works, Chennai, who agreed to purchase the said factory property situated in 2 Acres and 45 cents of industrial land in Survey No.40/1 (Old S.No. 803A), Thodukadu Village, Thiruvallur District, for a sum of Rs.4.00 Crores and readily agreed to pay the upfront amount to the first respondent Bank provided the Bank agrees and allows the petitioner to sell one of these properties, viz. the Factory to the said person, because, in view of Section 13(13) of the Act, without the leave of the Bank, the petitioner could not undertake any such independent transaction after the receipt of notice under Section 13(2) of the Act. But, the respondent Bank deliberately did not allow the petitioner to do so and on the other hand, sold away both the properties, Factory premises to the second and third respondent couple Ms. Betzi and Mr.J.Johnson Thomas for a paltry sum of Rs.2.58 Crores as against the much higher valuation of both the properties of which the factory shed alone could fetch Rs.4.00 Crores and the Agreement of Sale dated 18.03.2019 was also produced before the first Respondent Bank, while the residential house of the petitioner, which was the only residential house available with them, for the paltry sum of Rs.96.00 Lakhs to another person Mr.R.Dinesh Rao. He also submitted that impugned Sale Notice dated 19.08.2019 fixing the date of sale on 13.09.2019 without giving clear 30 days Notice is also in violative of Rule 8 of the SARFAESI Enforcement Rules, 2002.

9. The learned Senior Counsel for the petitioner borrower also submitted that the officers of the first respondent Bank had been callous, negligent and collusive in entering into such private treaty sales with the second and third respondent couple and caused tremendous loss to the petitioner borrower and therefore, in exercise of its extraordinary jurisdiction, the said sale in question made to them in the recent past only, namely on 25.09.2019 in the teeth of this Court's proceedings and orders passed by this Court, deserve to be set aside by this Court.

10. In support of his contention, the learned Senior Counsel relied upon the judgment of the Hon'ble Supreme Court in the case of Authorised Officer, Indian Overseas Bank v. Ashok Saw Mill [(2009) 8 SCC 366] and few others.

11. Per contra, learned counsel appearing for the Bank, Mr.Ganesh as well as the learned Senior Counsel appearing for the fourth respondent / auction purchaser, Mr.S.Prabhakaran, learned counsel for the respondents 2 and 3, Mr.G.Senthil Kumar,

have vehemently opposed these submissions and urged that the Bank had to undertake the private treaty sales as the previous Sales Notices/auction notice published by the first respondent Bank could not fetch good buyers and the petitioner Borrower also failed to produce any bona fide buyer at that point of time and that after the properties in question were evaluated by the Authorised Valuers, the Reserve Price was fixed by the Bank and both the properties in question were sold for the consolidated sum of Rs.3.54 Crores. The said auction was bona fide and in accordance with law and provisions of the SARFAESI Act and therefore, the same deserves to be upheld by this Court.

12. We have heard the learned counsel at length and perused the records.

13. We find from the facts and materials placed on record in the present case that the impugned action of the first respondent Bank, State Bank of India in the present case, leaves much to be desired and it appears that the coercive process of the extreme nature by way of sale of two properties of the petitioner had been undertaken by the first respondent Bank in a rather hasty manner without allowing full and reasonable opportunity to the petitioner to seek right of redemption and settle the loan account on its own, and auctions were made in the teeth and face of this pending litigation before this Court.

14. Section 13(8) of the Act clearly envisages the right of redemption to the borrower and if the Borrower can either himself repay the loan or arrange a buyer on his own to square up the outstanding loan of the Bank, which has turned NPA, the Borrower deserves to be given that a priori right and an opportunity in a reasonable manner. The said Act, while giving the stringent and wide powers to undertake such coercive process for recovering all default loans, nonetheless provides for an equitable counter relief to the Defaulters in the form of such power of redemption at the fag end also.

15. The Hon'ble Supreme Court, in the case of Ashok Saw Mill (supra), clearly explained the position of law lucidly in paragraphs 30, 33 to 39, which are quoted below and it was held that the DRT or DRAT has power to set aside even the auctions subsequently held in pursuance of the measures under Section 13 (4) of the Act and set aside the sale of property and restore the possession of the property to the Borrower in case it finds that the measures taken under Section 13(4) of the Act are invalid and illegal. In the facts of the case before the Hon'ble

Supreme Court also, almost similar were the facts as obtaining in the present case, where the property of the borrower was sold illegally in the face of the litigation pending in the DRT and High Court. The Court held that in order to prevent the misuse of wide powers conferred on the secured creditors under the SARFAESI Act and to prevent prejudice being caused to a Borrower on account of an error on the part of the Banks or Financial Institutions, certain checks and balances have been introduced in Section 17 of the Act and on such facts, the Court set aside the sale made by the Bank.

16. Paragraphs 30 and 33 to 39 in *Authorised Officer, Indian Overseas Bank v. Ashok Saw Mill* [(2009) 8 SCC 366], are quoted below:

30. The scheme of the SARFAESI Act as it now stands after the 2004 Amendment for enforcement of security interest is that notwithstanding the provisions of Section 69 or Section 69-A of the Transfer of Property Act, any security interest created in favour of any secured creditor may be enforced, without the intervention of the Court or Tribunal, in accordance with the provisions of the Act.

...

33. It is clear that while enacting the SARFAESI Act the Legislature was concerned with measures to regulate securitisation and reconstruction of financial assets and enforcement of security interest. The Act enables the Banks and Financial Institutions to realise long-term assets, manage problems of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction.

34. The provisions of Section 13 enable the secured creditors, such as Banks and Financial Institutions, not only to take possession of the secured assets of the borrower, but also to take over the management of the business of the borrower, including the right to transfer by way of lease, assignment or sale for realizing secured assets, subject to the conditions indicated in the two provisos to Clause (b) of Sub-Section (4) of Section 13.

35. In order to prevent misuse of such wide powers and to prevent prejudice being caused to a borrower on account of an error on the part of the Banks or Financial Institutions, certain checks and balances have been introduced in Section 17 which allow any person, including the borrower, aggrieved by any of the measures referred to in Sub-Section (4) of Section 13 taken by the secured creditor, to make an application to the DRT having jurisdiction in the matter within 45 days from the date of such measures having taken for the reliefs indicated in Sub-Section (3) thereof.

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

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

38. The dichotomy in the views expressed by the Bombay High Court and the Madras high Court has, in fact, been resolved to some extent in the Mardia Chemicals Ltd.'s case (supra) itself and also by virtue of the amendments effected to Sections 13 and 17 of the principal Act. The

liberty given by the learned Single Judge to the appellants to resist S.A.No.104 of 2007 preferred by the respondents before the DRT on all aspects was duly upheld by the Division Bench of the High Court and there is no reason for this Court to interfere with the same.

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

17. At this juncture, it would be appropriate to refer to some more judgments in this regard.

18. In Mathew Varghese v. M.Amrita Kumar [(2014) 5 SCC 610], the Hon'ble Supreme Court laid down the detailed guidelines about the sale of secured assets by the secured creditor under the provisions of the SARFAESI Act, 2002 vis-a-vis Recovery of Debts Due to Banks and Financial Institutions Act, 1993. It was held inter alia, by the Supreme Court that the compliance with Rule 8(1) to (3) of SARFAESI Rules, 2002 was mandatory and therefore, giving minimum time of 30 days notice for sale was necessary. In the present case, in the impugned sale notice dated 19.08.2019, the sale of secured assets was fixed on 13.09.2019, which is obviously less than 30 days mandatory period under Rule 8(1) of the Rules. Paragraphs 34 and 35 of the said judgment of the Supreme Court are quoted below for ready reference:

"34. At this juncture, it will also be worthwhile to refer to Rules 8(1) to (3) and in particular sub-rule (3), in order to note the responsibility of the secured creditor vis-vis the secured asset taken possession of. Under sub-rule (1) of Rule 8, the prescribed manner in which the possession is to be taken by issuing the notice in the format in which such notice of possession is to be issued to the borrower is stipulated. Under sub-rule (2) of Rule 8 again, it is stated as to how the secured creditor

should publish the notice of possession as prescribed under sub-rule (1) to be made in two leading newspapers, one of which should be in the vernacular language having sufficient circulation in the locality and also such publication should have been made seven days prior to the intention of taking possession. Sub-rule (3) of Rule 8 really casts much more onerous responsibility on the secured creditor once possession is actually taken by its authorised officer. Under sub-rule (3) of Rule 8, the property taken possession of by the secured creditor should be kept in its custody or in the custody of a person authorized or appointed by it and it is stipulated that such person holding possession should take as much care of the property in its custody as a owner of ordinary prudence would under similar circumstances take care of such property. The underlining purport of such a requirement is to ensure that under no circumstances, the rights of the owner till such right is transferred in the manner known to law is infringed. Merely because the provisions of the SARFAESI Act and the Rules enable the secured creditor to take possession of such an immovable property belonging to the owner and also empowers to deal with it by way of sale or transfer for the purpose of realizing the secured debt of the borrower, it does not mean that such wide power can be exercised arbitrarily or whimsically to the utter disadvantage of the borrower.

35. Under sub-rule (4) of Rule 8, it is further stipulated that the authorized officer should take steps for preservation and protection of secured assets and insure them if necessary till they are sold or otherwise disposed of. Sub-rule (4), governs all secured assets, movable or immovable and a further responsibility is created on the authorised officer to take steps for the preservation and protection of secured assets and for that purpose can even insure such assets, until it is sold or otherwise disposed of. Therefore, a reading of Rules 8 and 9, in particular, sub-rule (1) to (4) and (6) of Rule 8 and sub-rule (1) of Rule 9 makes it clear that simply because a secured interest in a secured asset is created by the borrower in favour of the secured creditor, the said asset in the event of

the same having become a non-performing asset cannot be dealt with in a light-hearted manner by way of sale or transfer or disposed of in a casual manner or by not adhering to the prescriptions contained under the SARFAESI Act and the abovesaid Rules mentioned by us. (emphasis supplied)

19. A Division Bench of this Court, in Ramco Super Leathers Ltd. v. UCO Bank [(2007) 5 MLJ 986], has also similarly held that the powers under Section 17 of the DRT includes the power of the Tribunal to restore possession in favour of the borrower, if action taken under Section 13(4) of the Act is declared invalid and merely because a secured creditor has taken possession and Sale Certificate in favour of one or other has been issued, it will not render the Tribunal powerless to restore the possession in favour of the Borrower. Paragraph 13 of the said decision is extracted as under:

"13. From a plain reading of Sub-section (1) to Section 17, it will be evident that a person, including borrower, could make an application under Section 17 to the DRT, if aggrieved by any of the measures referred to in Sub-section (4) to Section 13 as taken by the secured creditor. That means, only if one or other measure is taken by the secured creditor, a cause of action arises for any person or the borrower to prefer appeal (application) under Section 17. Under Sub-section (2), the Tribunal is bound to consider whether any of the measures referred to under Sub-section (4) to Section 13 taken by the secured creditors are in accordance with the provisions of this Act. Under Sub-section (3) to Section 17, after examining the facts and circumstances of the case, and evidence produced by the parties, if the Tribunal comes to a conclusion that any of the measures referred to under Sub-section (4) to Section 13 taken by the secured creditor are not in accordance with the provisions of the Act and the rules and require restoration of the management of the business to the borrower, or restoration of possession of the secured assets to the borrower, it may declare such action as invalid and restore possession of secured assets to the borrower or restore the management of the business to the borrower, as the case may be.

From the aforesaid Section 17, it will be evident that any person, including borrower,

could file an appeal (application) under Section 17 at any stage, including the stage when management of business is taken or possession of secured assets of the borrower, including right to transfer is taken over by the secured creditor. In such case, the Tribunal has power to restore possession in favour of the borrower, if such action taken under Sub-section (4) to Section 13 is declared invalid. Merely because a secured creditor has taken possession of secured asset, or issued notice inviting application for sale of secured asset, or issued a sale certificate in favour of one or other auction purchaser, will not render the Tribunal powerless to restore possession in favour of the borrower, if such action taken under Sub-section (4) to Section 13 is found not in accordance with the Acts and the Rules framed thereunder, and is declared invalid." (emphasis supplied)

20. Recently, the Hon'ble Supreme Court, in the case of Shakeena v. Bank of India [2019 SCC Online 1059], held on the facts of the case that the registration of the Sale Certificate issued by the Bank was not necessary and in the facts of that case, the right of redemption of Borrower stood closed on the issuance of the Sale Certificate. We may hasten to add here that the facts of the case before the Supreme Court and the facts of the case before us are diagonally opposite and therefore, the ratio laid down by the Supreme Court in the said case would support the view which we have taken, rather than the stand taken by the respondent Bank. Paragraphs 33 to 36 of the said judgment, touching upon the relevant facts of the case before the Supreme Court and the decision rendered in the peculiar facts of the said case are quoted below for ready reference.

"33. Reverting to the stand taken by the appellants that they had attempted to exercise their right of redemption by depositing an aggregate sum of Rupees Twenty Five Lacs on 30 th December, 2005 and 4th January, 2006, in the account of the father of appellant No.2 followed by issuing cheque(s) in the aggregate sum of Rs.25,21,446/- (Rupees Twenty Five Lacs Twenty One Thousand Four Hundred Forty Six Only), on 2nd January, 2006; and once again offering the amount by demand drafts in the sum of Rs.25,06,250/- (Rupees Twenty Five Lacs Six Thousand Two Hundred Fifty Only), on 18th January, 2006. This stand though attractive at the first blush, will have to be stated to be rejected. On the other hand,

we find substance in the stand taken by the respondent bank that none of the above was a valid tender so as to extricate or discharge the appellants from their obligation - to deposit the outstanding dues payable by them before the specified date. In that, the amount was allegedly deposited by them in the account of the father of appellant No.2 and not in their loan accounts as such. Unless the amount was transferred/deposited in the loan accounts of the appellants in relation to which the mortgage operated, it would not be a valid tender for paying the outstanding dues. Similarly, on the second occasion the appellants attempted to pay in the form of cheque (s) issued on 2nd January, 2006. However, as per the terms and conditions for grant of loan payment by cheque(s) was not permissible. Thus, the respondent bank was not obliged to accept the amount in the form of cheque(s). The respondent bank, therefore, justly declined to accept the cheque(s), not being a valid tender. Even the third attempt made by the appellants was to offer demand drafts drawn in favour of or in the name of the Authorised Officer of the respondent bank and not in the name of the bank or authorising the bank to appropriate it towards the subject loan accounts. Hence, these demand drafts were rightly not accepted as a valid tender.

34. Notably, the appellants took no steps, whatsoever, to pay the outstanding dues to the respondent bank by way of a valid tender nor moved any formal application before the High Court after filing of the writ petitions on 19 January, 2006, to permit them to deposit the requisite amount either in the concerned loan accounts or in the court. That was not done even until the disposal of the writ petitions by the Single Judge or during the pendency of the writ appeals before the Division Bench and until the disposal thereof vide the impugned judgment. (Belated effort to pay by borrower). We must also notice the stand taken by the respondent bank that even the legal notice sent by the appellants to the respondent bank, in no way expresses unambiguous commitment of the appellants to exercise their right of redemption. Suffice it to observe that the appellants, for reasons best known to them, have not chosen to deposit the

amount in the loan accounts or attempted to seek permission of the Court to deposit the same in Court from 19th January, 2006 immediately after filing of writ petitions or for that matter until the registration of the sale certificate on 18th September, 2007. In this backdrop, it is not possible to countenance the stand of the appellants that they had made a valid tender to the respondent bank or that the respondent bank had mischievously or malafide rejected their offer to defeat their rights, to redeem the mortgage before registration of the sale certificate on 18th September, 2007.

35. A fortiori, it must follow that the appellants have failed to exercise their right of redemption in the manner known to law, much less until the registration of the sale certificate on 18th September, 2007. In that view of the matter no relief can be granted to the appellants, assuming that the appellants are right in contending that as per the applicable provision at the relevant time (unamended Section 13(8) of the 2002 Act), they could have exercised their right of redemption until the registration of the sale certificate - which, indisputably, has already happened on 18th September, 2007. Therefore, it is not possible to countenance the plea of the appellants to reopen the entire auction process. This is more so because, the narrative of the appellants that they had made a valid tender towards the subject loan accounts before registration of the sale certificate, has been found to be tenuous. Thus understood, their right of redemption in any case stood obliterated on 18th September, 2007. Further, the amended Section 13(8) of the 2002 Act which has come into force w.e.f. 1st September, 2016, will now stare at the face of the appellants. As per the amended provision, stringent condition has been stipulated that the tender of dues to the secured creditor together with all costs, charges and expenses incurred by him shall be at any time before the "date of publication of notice" for public auction or inviting quotations or tender from public or private deed for transfer by way of lease assessment or sale of the secured assets. That event happened before the institution of the subject writ petitions by the appellants.

36. Having said thus, in the peculiar facts of the present case, we do not deem it necessary to dilate further on the argument that registration of the sale certificate in relation to the auction conducted under the 2002 Act is essential. Similarly, it is not necessary to examine other grounds urged by the appellants, in light of our conclusion that the appellants have failed to make a valid and legal tender to the respondent bank before the issue of sale certificate on 6th January, 2006, much less registration thereof on 18th September, 2007." (emphasis supplied)

21. Here, in the facts before us, not only the petitioner borrower has been making efforts for seeking right of redemption from February 2019, but produced the Agreement of Sale dated 18th March 2019 for Rs.4.00 Crores, which could have entirely squared up the loan of the respondent Bank at Rs.3.30 Crores, even without any waiver of interest, etc. But, instead of accepting such a genuine and bona fide offer of the petitioner Borrower, the respondent Bank dragged on taking the decision of One Time Settlement offer of the petitioner and failed it deliberately, so as to issue later on the impugned Sale Notice on 19.08.2019 to sell both the properties for a total sum of Rs.3.54 Crores including the residential house of the petitioner Borrower on 13.09.2019, which notice itself is in violation of Rule 8(1) of the SARFAESI Rules, being less than 30 days notice. Further, the registration of one of the properties has taken place only on 26.09.2019, after the status quo order was passed by this Court on 25.09.2019. All these facts of the present case not only distinguishes the aforesaid Supreme Court decision in Shakeena case (supra), but turns the table on the respondent Bank as the respondent Bank has clearly denied the right of redemption to the borrower illegally in the present case.

22. Further, a Division Bench of this Court, in P.Mohan v. The Authorised Officer [W.P.No.8206 of 2018 Dt. 26.06.2018], has held as under:

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

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

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

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

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

31. Once the said legal position is ascertained, the statutory prescription contained in Rules 8 and 9 have also got to be examined as the said Rules prescribe as to the procedure to be followed by a secured creditor while resorting to a sale after the issuance of the proceedings under Sections 13(1) to (4) of the SARFAESI Act. Under Rule 9(1), it is prescribed that no sale of an immovable property under the Rules should take place before the expiry of 30 days from the date on which the public notice of sale is published in the newspapers as referred to in the proviso to sub-rule (6) of Rule 8 or notice of sale has been served to the borrower. Sub-rule (6) of Rule 8 again states that the authorised officer should serve to the borrower a notice of 30 days for the sale of the immovable secured assets. Reading sub-rule (6) of Rule 8 and sub-rule (1) of Rule 9 together, the service of individual notice to the borrower, specifying clear 30 days' time-gap for effecting any sale of immovable secured asset is a statutory mandate. It is also stipulated that no sale should be affected before the expiry of 30 days from the date on which the public notice of sale is published in the newspapers. Therefore, the requirement under Rule 8(6) and Rule 9(1) contemplates a clear 30 days' individual notice to the borrower and also a public notice by way of publication in the newspapers. In other words, while the publication in newspaper should provide for 30 days' clear notice, since Rule 9(1) also states that such notice of sale is to be in accordance with the proviso to sub-rule (6) of Rule 8, 30 days' clear notice to the borrower should also be ensured as stipulated under Rule 8(6) as well. Therefore, the use of the expression or in Rule 9(1) should be read as and as that alone would be in consonance with Section 13(8) of the SARFAESI Act."

23. We find in the present case that despite the petitioner producing a bona fide purchaser with an Agreement to Sell dated 18th March 2019, with a third party M/s. Jay Engineering Works for Rs.4.00 Crores for only one of the two properties, namely Factory shed, which if released and allowed to be sold would not only have squared up the entire loan of the Bank of Rs.3.30 Crores, but would have left a balance of Rs.70.00 Lakhs with the petitioner borrower and saved his other property, the only

residential house, but, the Bank did not give such opportunity to the petitioner for the reasons best known to it. No such reasons in defence have been pleaded by the respondent Bank except showing its power to do so.

24. At one earlier point of time, not very long ago, they had agreed to settle the entire loan account of Rs.2.85 Crores vide letter dated 25th March 2019, which fact is not disputed before us. But, merely because the upfront amount could not be deposited by the petitioner borrower, the entire One Time Settlement could not be allowed to fall through, without allowing the petitioner to bring forth the said bona fide buyer M/s. Jay Engineering Works and pay the entire amount of the first respondent Bank and get the said factory premises transferred, with the permission of the Bank, because the provisions of Section 13(13) otherwise prohibited the petitioner to take independent transaction of sale of secured assets on its own, after notice under Section 13(2) is served. We do not see apparently any good reason for the Bank not to allow such transaction to happen with their permission.

25. On the contrary, despite the directions given by this Court on the last date to allow parties to settle the dispute amicably by One Time Settlement, despite the fact that sale was already made by the first respondent Bank, albeit illegally to the second and third respondent couple on 26.09.2019, but concealing the said fact, the AGM of the respondent Bank called upon the petitioner to pay the entire outstanding amount vide its letter dated 08.11.2019. That is surprising, to say the least. If the property had already been sold and excess amount had already been realised, nothing was left to settle and call upon the petitioner borrower to pay up the entire amount with no assurance given to the petitioner to set aside the sale and refund the money received from the auction purchaser of Rs.3.54 Crores back to them, if Borrower pays the entire outstanding amount, which the petitioner undertook to pay even now immediately before us.

26. We were informed that only one of the Sale Certificate for Factory was registered on 26.09.2019, after the status quo order passed by this Court on 25.09.2019 and other Sale Certificate in respect of residential house has not so far been registered. Though this matter was pending before this Court and a status quo order was passed by this Court on 25.09.2019, in the teeth and face of the pendency of this writ petition also, the first respondent Bank, without seeking leave of this Court, has played around and without disclosing the complete facts of sale and registration of one of the properties in favour of the blue eyed couple, second and third respondent, sold both the

properties for an unreasonably lesser amount of Rs.3.54 Crores and has still called upon the petitioner to pay the entire amount of loan. This arbitrary action on the part of the first respondent Bank is clearly and completely violative of Article 14 of the Constitution of India and cannot be sustained.

27. We are constrained to observe that in view of the stringent and wide powers given to the Banks and Financial Institutions under the SARFAESI law, unless the coercive action of these institutions are put to strict judicial scrutiny, the said powers are open to be misused or used in a biased manner giving rise to chances of corruption in such deals of sale by private treaties or auction, under the garb of public Auction Notices, without complying with Rules 8 and 9 of SARFAESI Enforcement Rules in their letter and spirit. We have also come across cases where the Banks and Financial Institutions have pushed the illegalities in sales made by them of immovable properties under the garb of sales made by them on "As is where is", "Caveat Emptor" or "As is what is" basis, under carpet of these protective principles loosely invoked by them. The litigation galore arises on account of public Banks dealing with public money not undertaking their "Due Diligence" exercise before hand at the time of sanction of loans and even while taking such coercive actions of sales under SARFAESI law, like huge difference of valuations of property, sales by private negotiations and public auction notices issued Ad Seriatum inviting series of SARFAESI applications in DRT or even writ petitions under Articles 226 / 227 of the Constitution of India, etc. wasting huge public time of Courts, delaying the process of recovery itself and lot of man-hours and public money lost. Should we not put them on guard and hold them accountable ??

28. In these circumstances and for the aforesaid reasons, we are inclined to allow this writ petition and set aside both the impugned sales made by the respondent State Bank of India in favour of the second and third respondents, namely the couple Ms.Betzi and Mr.J.Johnson Thomas and in favour of Mr.D.Dinesh Rao and we direct that the refund of the entire amount paid by the auction purchasers to be made by the first respondent Bank itself forthwith. We further direct the first respondent Bank to allow the petitioner to undertake the sale of one of the properties of factory premises in favour of M/s. Jay Engineering Works for the sum of Rs.4.00 Crores and we direct the petitioner to pay off the entire outstanding of Rs.3.30 Crores to the first respondent State Bank of India and thus, square up the loan account within a period of one month from today. The first respondent Bank shall issue necessary orders for releasing both the properties immediately from their charge and allow the

petitioner to undertake such transaction in respect of the factory premises and Bank shall release the original documents of title and papers relating to the residential house and the factory premises in favour of the petitioner, immediately upon payment of Rs.3.30 Crores by the petitioner to the respondent Bank.

This writ petition is accordingly allowed. No costs. Consequently, WMP No.27961 of 2019 is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

kpl

To

The Authorised Officer,
The State Bank of India,
Stressed Assets Recovery Branch,
Red Cross Building, II Floor,
No.32, Montieth Road
Egmore, Chennai 600 008.

+1cc to Mr.P.S.Amalraj, Advocate, S.R.No.97726
+1cc to Mr.G.Senthil Kumar, Advocate, S.R.No.97010
+2cc to Mr.K.Chandrasekaran, Advocate, S.R.No.97009
+1cc to Mr.Y.Prakash, Advocate, S.R.No.96931

WP No.28285 of 2019

RJI(CO)
CS/03/12/2019