

HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

AND

HONOURABLE SRI JUSTICE K. LAKSHMAN

WRIT PETITION No. 13936 of 2019

Between:

1. M/s.Alpine Pharmaceuticals Pvt. Ltd.
And another

.....Petitioners

And

1. Andhra Bank,, (A Government of India Undertaking), Specialized Asset Recovery Management Branch, 1st Floor, Andhra Bank Buildings, Sultan Bazar, Koti, Hyderabad.
Rep. by its Authorised offer and others.

.....Respondents

Date of Judgment pronounced on : 24-01-2020

HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

1. Whether Reporters of Local newspapers : Yes/No
May be allowed to see the judgments?
2. Whether the copies of judgment may be marked : Yes
to Law Reporters/Journals:
3. Whether His Lordships wishes to see the fair copy : Yes/No
Of the Judgment?

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< **GIST:**

> **HEAD NOTE:**

!Counsel for the Petitioners : Sri G.K.Deshpande
^Counsel for the 1st respondent : Sri A.Krishnam Raju
^Counsel for the 2nd respondent : Sri K.V.Rusheek Reddy.
^Counsel for the 3rd respondent : Sri A.Venkatesh

? Cases referred

1. (2015) 4 SCC 770
2. (2019) 2 SCC 198
3. (2018) 15 SCC 99
4. Order dt.18.04.2018 in W.P.No.12189 of 2018 (High Court at Hyderabad for the States of Telangana and AP)
5. (2008) 4 MLJ 1012 : MANU/TN/0288/2008
6. Order dt.01.09.2008 in W.A.No.926 of 2008 of the Madras High Court
7. (2009) 8 SCC 366
8. (2000) 1 SCC 633
9. (1998) 1 SCC 400
10. (2014) 5 SCC 610
- 11 (2014) 5 SCC 651

HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

AND

HONOURABLE SRI JUSTICE K. LAKSHMAN

WRIT PETITION No. 13936 of 2019

ORDER: (Per Sri Justice M.S.Ramachandra Rao)

The petitioner No.1 is a Company registered under the Companies Act, 1956 and deals in pharmaceuticals. The petitioner No.2 is its Managing Director.

2. The Andhra Bank (1st respondent) sanctioned working capital limits of Rs.35.00 lakhs and term loan of Rs.152.00 lakhs to the petitioners under SMSE Scheme in March, 2015 with moratorium period of 6 months for the purchase of the 1st petitioner Company from its existing promoters. At the time of take-over of the said Company by the 2nd petitioner, the 1st petitioner was a major supplier of medicine to M/s.Singareni Collieries Company Limited. However, due to reasons beyond the control of the petitioners, production commenced only in September, 2016 though the Company was acquired on 19-06-2015. Repayment schedule started in December, 2015 itself and M/s.Singareni Collieries Company Limited later changed its policy and disqualified the petitioner stating that it did not have minimum Rs.10.00 crores turnover. This caused financial distress to the petitioners.

3. The loan account of the petitioners with the 1st respondent Bank was declared as an NPA on 31-07-2016 and demand notice under

Section 13(2) of the SARFAESI Act, 2002 was issued on 01-08-2016. Petitioners claimed to have approached the 1st respondent several times and requested for extension of moratorium period. On 01-11-2016/06.11.2016, they wrote a letter to the 1st respondent explaining their difficulties in paying loan installments and also sought for extension of moratorium by 12 months so that the 1st petitioner can revamp its business and start repaying the loan amount installments.

4. Without considering the said request, the 1st respondent issued possession notice under Section 13(4) of the Act r/w Rule 8(1) of the Security Interest Enforcement Rules, 2002 on 03-03-2017 and took symbolic possession of the subject property, the factory of the petitioners at Jeedimetla, Qutbullapur Mandal, Medchal Malkajgiri District.

5. Physical possession of the property mortgaged i.e. factory with equipment/machinery was taken on 03-05-2017 pursuant to order of the Chief Metropolitan Magistrate, Cyberabad, R.R. District in CrI.M.P.No.343/2017. According to the petitioners, at the time of its seizure, there was a stock of raw material worth Rs.20.00 lakhs and finished stocks worth Rs.20.00 lakhs.

6. On 01-06-2017, the 1st respondent issued notice under Rule 8(6) informing the petitioners that the above property was fixed a reserve price of Rs.2,78,10,000/- and that it proposed to sell the said property by inviting tenders after 30 days from the date of the said notice.

7. Petitioners on 20-10-2017 gave a letter to the 1st respondent seeking regularization of account and withdrawal of seizure of the

factory stating that they had paid Rs.12.50 lakhs in September, 2016, that there were Rs.20.00 lakhs worth of raw material and Rs.20.00 lakhs worth of finished stocks at the time of the seizure in the factory premises, and to permit the petitioners to resume operations as the stock would cross the expiry date resulting in huge loss to petitioners. They also made an offer that they would regularize the account by making certain payments.

8. When this was not replied to, they gave another letter on 08-11-2017 also.

9. On 02-07-2018, the 1st respondent issued another notice under Rule 8(6) informing the petitioners that the property would be sold with reserve price of Rs.2.60 crores and thereafter on 20-08-2018, it gave an e-auction sale notice under Rule 9(1) proposing to conduct auction on 11-09-2018.

S.A.No.385 of 2018

10. On 01-10-2018, the 1st petitioner filed S.A.No.385 of 2018 under Section 17 of the Act to declare the said e-auction sale notice dt.20-08-2018 holding auction of the property on 11-09-2018 as illegal, void; to declare the possession notice dt.03-03-2017 without considering representation dt.01-11-2016 as illegal and contrary to Section 13(3A) of the Act and to set it aside; to declare the possession notice dt.03-03-2017 under Section 13(4) as illegal and void; to declare the taking of possession of the subject property in May,2017 as illegal and void; to declare the sale notice dt.02-07-2018 as illegal; and to declare the action

of the 1st respondent in not responding to the regularization proposal made by the petitioners despite accepting the same and directing the petitioners to get additional security, valuation, legal opinion and personal site inspection as against banking practice, prudential norms and RBI guidelines.

11. It is contended that in a meeting with the Chief General Manager of the Bank on 30-10-2017 at the Zonal Office of the Bank, the Bank had agreed to restructure the account and agreed to give chance by accepting additional collateral security and deposit of Rs.25.00 lakhs; that in meetings held on 06-11-2017 and 08-11-2017, the petitioners had furnished collateral security of Rs.50.00 lakhs which was also accepted and petitioners were advised for further legal scrutiny and valuation; that this indicated that the 1st respondent agreed to restructure the Unit; and therefore, it acted illegally in seizing the Unit and selling it.

12. It was contended that the possession notice dt.03-03-2017 was not served, published and affixed on the secured asset. It is also stated that the secured asset was a running Unit and harsh proceedings under Section 13(4) could not have been taken without application of mind and making an informed choice as to whether the Bank should exercise one of the actions mentioned in Section 13(4) (a) to (d). Reliance was placed on the decision of the Supreme Court in **Keshavlal Khemchand and Sons Vs. Union of India**¹.

¹ (2015) 4 SCC 770

13. It was also contended that the 1st respondent Bank had undervalued the property because it had fixed the reserve price at Rs.2,78,10,000/- in the sale notice dt.01-06-2017 but lowered it to Rs.2.60 crores in the sale notice dt.02-07-2018; that the value of the property is more than Rs.4.00 crores and the Bank cannot sell it at a throw-away price. It is contended that the e-auction notice dt.20-08-2018 was not served, published and affixed on the secured asset as required under Rule 9(1) proviso and the e-auction notice was not published in two leading daily news papers.

14. After coming to know that a sale certificate dt.27-09-2018 was issued to the 2nd respondent, I.A.No.5007/2018 was filed for amendment of the pleadings and also prayer in the O.A. which was allowed on 23-01-2019. Paras-5(11) and para-6(a)(i) were added.

15. It is the contention of the petitioners that the 1st respondent Bank had no right to sell both the movables/machinery as well as immovable property under Rule 9 by fixing single reserve price; that it did not follow Rules 4 to 7; that it ought to have valued movables separately; no panchanama was drawn up as per Appendix- I and II and the same was also not served on the petitioners; the letter dt.27-09-2018 of the auction purchaser referred to a panchanama dt.03-05-2017 which was not served on the petitioners; details of the machinery were not published in the e.auction notice; and separate reserve price was not fixed for it and mandatory Rules were violated; that the sale certificate did not specify the list of the machinery as stipulated in Appendix-III of the Rules; the

bid amount was not paid by the auction-purchaser within the time stipulated in Rule 9(2) to 9(4) of the Rules; the 1st respondent Bank colluded with the 2nd respondent and got the property sold by flouting the norms; and the entire auction proceedings are a farce and tailor made to benefit the auction purchaser. It was also contended that the 1st respondent ought not to have approved the auction when only one bidder participated in it.

COUNTER OF THE 1ST RESPONDENT IN THE OA

16. It is contended that that as the petitioners committed default in repayment of loan amounts, the 1st respondent Bank classified the loan accounts as NPA on 31-07-2016 as per RBI guidelines and issued demand notice dt.01-08-2016 under Section 13(2) of the Act to the borrower, guarantors/mortgagors, and as no objections were raised to the demand notice, the 1st respondent issued possession notice dt.03-03-2017 under Section 13(4) of the Act and took symbolic possession; and that the possession notice was personally served on the petitioners apart from serving the same through registered post, and it was got published in newspapers on 08-03-2017 and affixed on the secured asset and took photographs.

17. It is contended that 1st respondent Bank filed Crl.M.P.No.343/2017 under Section 14 of the Act before Chief Metropolitan Magistrate, Cyberabad, R.R. District and took physical possession of the secured asset on 03-05-2017 through Advocate-Commissioner appointed by the said Court.

18. It is contended that the notice under Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 was issued by the 1st respondent Bank on 01-06-2017 calling upon the petitioners to redeem the property and the said notice was personally acknowledged by the petitioners on 15-06-2017.

19. It is contended that the 1st respondent Bank issued another Rule 8(6) notice dt.02-07-2018 and impugned e-auction sale notice dt.20-08-2018 fixing auction on 11-09-2018 and sent the notices to the petitioners, got published in newspapers and affixed on the secured asset and in the said auction dt.11-09-2018, the 2nd respondent became the successful bidder with a purchase price of Rs.2,91,20,000/- and 1st respondent bank issued sale certificate in his favour.

20. It is contended that except e.auction sale notice dt.20-08-2018, other disputes raised by the petitioners are out of limitation period.

21. It is contended that the problems with regard to business of petitioners Company are 'impertinent' to 1st respondent Bank, that the petitioners did not raise any objections to the demand notice dt.01-08-2016 except submitting letter dt.01-11-2016 requesting time for repayment which cannot be treated as objections to demand notice dt.01-08-2016 under Section 13(3) of the Act.

22. It is contended that the Advocate-Commissioner's report indicates all the items available in the secured asset premises, and that the offer of additional collateral security and cheque payment made by

petitioners were never accepted by the 1st respondent Bank as the said offer was made with a condition of restructuring of loan.

23. It is contended that reserve price has been fixed vide sale notice dt.20-08-2018 keeping in view the earlier attempts to sell which failed.

24. It is contended that the plant and machinery are permanently embedded to the earth, therefore they are no more movable properties in terms of Section 3(26) of General Clauses Act which defines 'immovable property' whereas Transfer of Property does not define 'immovable property' except saying that standing timber, growing crops or grass are not immovable property.

25. It is contended that the machinery value has been considered by the approved valuer in his valuation report basing on which reserve price has been fixed.

26. It is contended that the additional prayer with regard to setting aside the sale certificate and redelivery of the SA schedule property to the petitioners is liable to be rejected.

COUNTER OF 2ND RESPONDENT IN THE OA

27. It is contended by the 2nd respondent in the OA that the SA is barred by limitation except for challenging e.auction sale dt.11-09-2018; that the petitioners cannot challenge the measures right from demand notice to Rule 8(6) notice; and that 2nd respondent is not a necessary party.

28. It is contended that having received all the notices issued by the 1st respondent Bank under the provisions of the Act and Rules framed thereunder, the petitioners kept quiet all these years and filed SA only to create litigation; that 1st respondent Bank separately valued the movables as per the valuation report; that being the successful bidder in the auction held on 11-09-2018, the 2nd respondent paid the entire purchase price within the stipulated time under Rule 9(2) to (4) of the Rules; and that after receiving the entire purchase price within the stipulated time, the 1st respondent Bank issued sale certificate and handed over physical possession of SA schedule property.

29. It is contended that subsequently, the 2nd respondent entered into agreement dt.04-10-2018 with M/s.Adrusya Enterprises for an amount of Rs.3.21 crores in respect of the SA schedule property and received an advance amount of Rs.51.00 lakhs through RTGS from them; and that at this stage, the petitioners filed the present SA to create litigation. Copy of the said agreement was filed in the Tribunal by the 2nd respondent.

30. It is further contended that as per the terms of agreement of sale dt.04-10-2018 with the said third parties, the 2nd respondent is bound to register the property in their favour within 90 days from the date of agreement of sale; else the 2nd respondent will be put to great financial loss.

The order of the Debt Recovery Tribunal dt.1.7.2019

31. By order dt.01.07.2019, the Debts Recovery Tribunal dismissed S.A.No.385 of 2018.

32. It held that the liability of the 1st petitioner to repay the loan is not in dispute; that the action of the 1st respondent Bank in classifying the loan account as NPA cannot be found fault with; that the petitioners had admitted receiving the notice dt.01.08.2016 under Sec.13(2) of the Act; though the petitioners contended that they sought restructuring of the loan and extension of moratorium period in their letter dt.06.11.2016, there was no reference in the said letter dt.06.11.2016 to the demand notice under Sec.13(2) of the Act; and so it cannot be treated as a representation/objection to the demand notice under Sec.13(2) of the Act. Consequently, the question of the 1st respondent complying with Sec.13(3A) did not arise.

33. The 1st respondent Bank had placed on record postal covers and copies of publication of the possession notice issued under Sec.13(4) of the Act dt.13.03.2017 which prove compliance with Rules 8(1) and 8(2) of the Rules; and taking of physical possession was done through an Advocate Commissioner appointed by the Chief Metropolitan Magistrate and photographs were taken and filed along with the reply statement by the Bank in the O.A.

34. It merely recorded the plea of the petitioner that movable property i.e., machinery ought to have been auctioned separately, but did not deal with it by stating that machinery is embedded to earth.

35. It also referred to the contention of the petitioners that the unit was a running unit and the 1st respondent Bank could not have taken

physical possession, but stated that it had stopped production for want of funds. It thus implied that 1st petitioner was no longer a running unit.

36. It held that notices under Rules 8(6) and 9(1) were served on the petitioners taking note of copies of notice of sale under Rule 8(6) and e-auction sale notice under Rule 9(1) apart from postal receipts. It gave a finding on the basis of photographs filed by the Bank that there is affixture of e-auction sale notice dt.20.08.2018.

37. It rejected the plea of the petitioners that the value of the machinery was not indicated separately in the e-auction sale notice and so it was defective stating that once the machinery is attached to the earth, it is immovable property; that the Bank had got it valued by an approved valuer before e-auction sale notice; the valuer in his report had taken note of the machinery also in arriving at the market value of Rs.2,73,80,000/-; and though the valuation report is dt.19.02.2018, since earlier auctions dt.06.10.2017, 28.03.2018 and 14.06.2018 did not materialize, and since the auction of 11.09.2018 materialized and the 2nd respondent became the highest bidder for Rs.2,91,20,000/-, the said valuation report can be the basis for the sale; and there was no necessity to obtain a fresh valuation before the sale was held on 11.09.2018.

38. It did not deal with the aspect of limitation and only stated that the Bank complied with the provisions of the Act and the Rules at every stage and no valid grounds were made out by the petitioners for quashing the measures initiated by the 1st respondent in regard to the S.A. schedule property. It thus dismissed the S.A.

39. Challenging the same, this Writ Petition is filed.

The petitioners are entitled to avail remedy under Article 226 of the Constitution

40. According to the petitioners, they were forced to invoke the jurisdiction of this Court under Article 226 of the Constitution of India since the post of the Chairperson of the Debts Recovery Appellate Tribunal at Kolkata is still vacant and the incharge Debts Recovery Appellate Tribunal at Allahabad does not offer an effective alternative remedy since an Appeal against the order of the Debts Recovery Tribunal at Hyderabad has to be first filed in the Debts Recovery Appellate Tribunal at Kolkata and the matter would then be taken up at Allahabad by the incharge Debts Recovery Appellate Tribunal.

41. We accept the said plea and hold that the petitioners cannot be compelled to avail the remedy of appeal to the Debts Recovery Appellate Tribunal constituted under Section 18 of the Act for the reasons assigned by the petitioners as the remedy of appeal is not an effective alternative remedy.

The impleadment of 3rd respondent in I.A.No.2 of 2019 in the W.P.

42. Before this Court, M/s. ARCE Polymers Private Limited was impleaded as 3rd respondent by order dt.16.08.2019 in I.A.No.2 of 2019 on the ground that the said entity purchased the subject property from the 2nd respondent on 08.07.2019 for Rs.2,92,00,000/- and had taken possession of the same, and the said party would be affected if any relief is granted to the petitioners in this Writ Petition.

The stand of the 3rd respondent

43. The 3rd respondent contended that it has purchased the subject property from the 2nd respondent under registered sale deed dt.08.07.2019 after the dismissal of S.A.No.385 of 2018 on 01.07.2019 and that it is a *bona fide* purchaser for value of the said property.

44. It is contended that the Debts Recovery Tribunal had given valid reasons for dismissal of the S.A.No.385 of 2018.

45. According to the 3rd respondent, the S.A. was time barred as per Section 17 of the Act as regards all grounds raised by the petitioners except with regard to the e-auction notice dt.20.08.2018.

46. It is stated that grave and irreparable loss will be caused to the 3rd respondent if any relief is granted to the petitioners.

47. The 3rd respondent adopted the contentions of the respondents 1 and 2 in all other respects.

The points for consideration:

48. The points which arise for consideration in this Writ Petition are:

(a) *Whether the 1st respondent Bank had an obligation to comply with Section 13(3A) of the Act and give a response to the petitioners' representation dt.01.11.2016 and whether the Debts Recovery Tribunal was correct in holding that there was no such obligation on the part of the 1st respondent Bank?*

(b) *Whether any of the reliefs claimed in the O.A. by the petitioners is barred by limitation?*

(c) *Whether it was proper for the 1st respondent Bank not to separately value the machinery in the subject property when it*

obtained the valuation before it sold the property to the 2nd respondent?

(d) Whether it was incumbent on the part of the 1st respondent to obtain a fresh valuation certificate dt.19.02.2018 in view of the long gap between the valuation report and the e-auction sale held on 11.09.2018?

(e) Whether the petitioners are entitled to any relief?

49. Before we advert to these contentions, it is necessary to note that the rights of a secured creditor may be exercised by such creditor under the Act outside the Court process **only** if the creditor acts in conformity with the Act. The Supreme Court in **Hindon Forge (P) Ltd. Vs. State of U.P.**² has held that if the secured creditor does not act in conformity with the Act, its action is liable to be interfered with by the Debts Recovery Tribunal in an Application made by the debtor/borrower. It observed that the object of the Act is to enable the borrower to approach a quasi-judicial forum in case the secured creditor, while taking any of the measures under Section 13(4), does not follow the provisions of the Act in so doing.

Point (a):

50. Section 13 of the Act deals with enforcement of security interest by a secured creditor without intervention of a Court or a Tribunal. Sub-section (2) of Section 13 states that where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as

² (2019) 2 SCC 198

non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4). Sub-section (3) of Section 13 requires that the notice referred in Sub-section (2) should give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

51. Sub-Section (3A) of Section 13 is very important and its states as under:

“(3A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within fifteen days of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or likely action of the secured creditor at the stage of communication or reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under Section 17 or the Court of District Judge under Section 17A.”

52. This provision has been interpreted by the Supreme Court in **ITC Ltd. Vs. Blue Coast Hotels Ltd. and others**³ to be mandatory. The Supreme Court declared:

³ (2018) 15 SCC 99

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

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

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

53. The petitioners had specifically contended before the Debts Recovery Tribunal that Section 13(3A) was violated since its representations dt.01.11.2016 and 06.11.2016 to the demand notice

dt.01.08.2016 under Section 13(2) of the Act was not considered by the 1st respondent Bank.

54. In the counter filed in the Debts Recovery Tribunal by the 1st respondent Bank, it stated that no objections were raised to the demand notice dt.01.08.2016 issued under Section 13(2) of the Act.

55. The Tribunal was of the opinion that the representations dt.01.11.2016/06.11.2016 of the petitioners are only representations made for restructuring of loan and extension of moratorium period and there was no reference in it to the demand notice dt.01.08.2016 and therefore, the question of complying with Section 13(3A) of the Act did not arise.

56. We do not agree with the said finding. According to us, the representations dt.01.11.2016/06.11.2016 specifically pleaded the difficulties being faced by the petitioners in repaying the loan installments and seek extension of moratorium/more time for repayment without legal action. In our opinion, these are the responses to the demand notice dt.01.08.2016 issued under Section 13(2) of the Act and merely because it was not specifically mentioned that the letter dt.01.11.2016/06.11.2016 is a response to the demand notice dt.01.08.2016, it is not open to hold that it has nothing to do with it. Merely because the representations dt.01.11.2016/06.11.2016 contained a request for extension of time and did not dispute the liability mentioned in the demand notice dt.01.08.2016, it could not have been ignored by the 1st respondent Bank.

57. In this Court, the 1st respondent Bank produced letter dt.07-11-2016 in its reference Lr.No.0212/52/Alphine/112 which showed that the Chief Manager of the 1st respondent Bank's Branch at HMT Industrial Estate Branch, Hyderabad in fact recommended deferring of action under the Act mentioning clearly that the Unit is running with production at minimum level, which is likely to extend to full extent by infusion of Rs.60.00 lakhs within three months. Why this was not acted upon is not explained by the 1st respondent.

58. For the first time in this Court, it is contended by the counsel for the 1st respondent Bank that petitioners ought to have responded within 60 days from the date of receipt of the demand notice dt.01.08.2016 from the 1st respondent Bank and that since the petitioners' representation is beyond 60 days, the Bank was entitled to ignore it.

59. There is no merit in this submission because a reading of sub-Section (3A) of Section 13 does not indicate that the objection/representation of a debtor to the demand notice issued under Sub-section (2) of Section 13 of the Act should be given before the expiry of 60 days from the date of receipt of notice under Sub-section (2) of Section 13 of the Act. In the absence of any such stipulation in the statute, such a stipulation cannot be inferred by the Court.

60. Similar view has also been taken by the Mumbai High Court in its order dt.23-03-2016 in W.P.No.222 of 2015 (**M/s.Blue Coast Hotels Ltd. Vs. IFCI Limited**). A single Judge of the Mumbai High Court held that there is no specific provision and/or mandate in Section 13(3A)

of the Act that the representation of the borrower to the demand notice under Section 13(2) of the Act should be filed within the period of sixty days from the date of the notice; that there is an obligation upon secured creditors to reply and to take decision on the borrower's representation to the demand notice under Section 13(2) of the Act and communicate it within fifteen days from the date of receipt of representation; lack of response of the secured creditor to the borrower's representation within fifteen days from its receipt goes to the root of the matter; merely because it was received one day beyond the period of sixty days, the secured creditor cannot say that they need not decide and communicate any reasoned order.

61. Admittedly, in the instant case on 03.03.2017, long after receipt of the letter dt.01.11.2016 from the petitioners, the possession notice under Section 13(4) of the Act was issued without making any reference to the representation dt.01.11.2016 of the petitioners.

62. We reject the reasons assigned by the 1st respondent for ignoring the representation dt.01.11.2016 of the petitioners and set aside the finding of the Debts Recovery Tribunal and hold that there has been a violation by the 1st respondent Bank of its mandatory statutory obligation under Sub-section (3A) of Section 13 of the Act. Point (a) is answered accordingly.

Point (b):

63. We shall now consider the question:

“Whether any of the reliefs claimed in the O.A. by the petitioners is barred by limitation?”

64. It seems to be the contention of the respondents that the O.A. was filed by the petitioners on 01.10.2018 and the period of limitation mentioned in Section 17 is 45 days from the date on which any of the measures were taken by the secured creditor, and only such of those measures which are taken within the period of 45 days from 1.10.2018 would fall within limitation, and the reliefs sought by the petitioners in the O.A. which are beyond the period of 45 days prior to the filing of the O.A., cannot be challenged.

65. It is necessary to refer to Sub-section (1) of Section 17 of the Act to consider the above question. The said provision states:

“17. Application against measures to recover secured debts.—(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorized officer under this Chapter, may make an application along with such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:.....”

66. In Sub-section (4) of Section 13, four measures which may be taken by a secured creditor, if the borrower fails to discharge his liability in full within the period specified in sub-section (2) of Section 13 are mentioned. They are:

- (a) Take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset;

- (b) Take over the management of the business of the borrower;
- (c) Appoint any person to manage the secured assets, the possession of which has been taken over by the secured creditor; and
- (d) Require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

67. A Division Bench of this Court in **M/s. Durga Bhavani Agro Tech Industry, Atmakur Village & Mandal, Warangal Dist rep. by its Manager M.Sreedhar Vs. Canara Bank, Hanamkonda Branch, Warangal rep. by its Authorized Officer and others**⁴ held that the series of steps that could be taken by an authorized officer under Section 13(4) of the Act are generally termed as “measures”; it is the right of a person against whom one or more of the measures are taken under Section 13(4) of the Act to challenge those measures under Section 17 of the Act; and *when an auction notice is challenged, it is even open to the borrower to challenge the series of steps from the date of issue of Section 13(4) of the Act, up to the date of the auction notice.*

It observed that cause of action is nothing but a bundle of facts; Court fee does not become payable on every single cause of action; and Court fee before the Debts Recovery Tribunal is not paid on

⁴ Order dt.18.04.2018 in W.P.No.12189 of 2018 (High Court at Hyderabad for the States of Telangana and AP)

the basis of valuation of everyone of the prayers made before the Tribunal; and the Tribunal cannot ask the parties to pay Court fee afresh on prayers added by way of amendment and such power is not traceable to the statute or the rules.

68. In **Indian Overseas Bank Vs. G.S.Rajshekaran**⁵, proceedings were initiated against a borrower under the provisions of the Act and possession notice under Section 13(4) was issued on 13.11.2007, and on 26.12.2007, auction sale notice was issued under Section 13(4)(a) of the Act and a Writ Petition was filed on 08.01.2008 challenging the same.

The Writ Petition was disposed of on 30.01.2008 permitting the borrower to approach the Debts Recovery Tribunal within two weeks from the date of the order.

The Bank challenged the same by way of a Writ Appeal before a Division Bench of the Madras High Court contending that the High Court, in exercise of its powers under Article 226 of the Constitution of India, has no power to extend the period of limitation. It was the contention of the Bank that possession of the secured asset was taken on 13.11.2007 and under Section 17 of the Act, the said measure has to be challenged within 45 days from the said date; the period of limitation for filing Application under Section 17 expired on 28.12.2007, and the Writ Petition filed on 08.01.2008, was beyond period of limitation.

The Division Bench held that the action of taking the possession of the secured asset, though started on 13.11.2007, the cause of action

⁵ (2008) 4 MLJ 1012 : MANU/TN/0288/2008

continued till the notice dt.26.12.2007 was issued for auction sale of the secured asset under Section 13(4) of the Act; under Section 13(4), the cause of action takes place as and when one or other such measure mentioned in Clauses (a) to (d) of Section 13(4) to recover the secured debt is taken by the secured creditor; that the first cause of action started when the possession was taken on 13.11.2007, followed by the subsequent cause of action which took place on 26.12.2007 when the auction sale notice under Section 13(4)(a) of the Act was published by the secured creditor; and there being a continuous cause of action having lastly taken on 26.12.2007, the Writ Petition filed on 08.01.2008 was well within the period of limitation.

69. In **Indian Overseas Bank Vs. Ashok Saw Mill**⁶, the account of a borrower of the appellant Bank became NPA and it initiated notice under Section 13(2) of the Act, and since the borrower failed to pay, it took action under Section 13(4) of the Act for possession of the secured asset.

The borrower moved the Madras High Court, but the said Court directed him to move the Debts Recovery Tribunal under Section 17 of the Act. He did not do so.

Thereafter, the Bank did not act upon the notice for auction sale already issued by it and issued a fresh notice for auction sale.

⁶ Order dt.01.09.2008 in W.A.No.926 of 2008 of the Madras High Court

The borrower filed a Writ Petition in the High Court which was disposed of directing the borrower to move the Debts Recovery Tribunal under Section 17 of the Act.

The Bank sought a review of the said order contending that since he did not take steps to prefer an appeal under Section 17 of the Act at the time of possession, he should not be allowed second time to move before the Debts Recovery Tribunal under Section 17 of the Act.

A learned Single Judge of the Madras High Court took the view that there was a subsequent cause of action for which the borrower could be allowed to work out his remedy under Section 17 of the Act.

The Bank challenged it before the Division Bench.

The Division Bench declared that *any person, including borrower, could file an Application under Section 17 at any stage, including the stage when management of business is taken or possession of the 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) of Section 13 is declared invalid. It observed that 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, it will not render the Tribunal powerless to restore possession in favour of the borrower, if such action taken under Sub-section (4) of Section 13 is*

found not in accordance with the Act and Rules, and is declared invalid.

It dismissed the Writ Appeal.

70. This decision was affirmed by the Supreme Court in **Authorized Officer, Indian Overseas Bank and another Vs. Ashok Saw Mill**⁷.

The Supreme Court in the said case considered the question *whether the DRT would have jurisdiction to consider and adjudicate with regard to post Section 13(4) events or whether its scope in terms of Section 17 of the Act would be confined to the stage contemplated under Section 13(4) as was contended by the Bank.*

It observed that *action* taken by secured creditor in terms of Section 13(4) is open to scrutiny; the consequences of the authority vested in the 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; and that the submission of the Bank that the DRT had no jurisdiction to deal with post Section 13(4) situation, cannot be accepted.

According to the Court, the intention of the Legislature is clear that while banks and financial institutions have been vested with stringent powers for recovery of their dues, safeguards have also been

⁷ (2009) 8 SCC 366

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. It affirmed the decision of the Division Bench of the High Court referred to in the earlier paragraph.

71. From these decisions, it follows that the series of steps from the date of issue of Section 13(4) of the Act, up to the date of the auction notice can be challenged by the borrower when he challenges the auction notice under Section 17 of the Act; though the cause of action started when possession was taken, the said cause of action is continued by the issuance of auction sale notice by the Bank; even if the borrower had not filed an Application under Section 17 of the Act at the time of his dispossession, he cannot be deprived of the opportunity to approach the DRT for post Section 13(4) events as well; and 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.

72. Therefore, in the instant case though the O.A. is filed on 01.10.2018 by the petitioners, they can not only challenge the possession notice issued on 03.03.2017 for taking of symbolic possession, but also the taking of physical possession in May, 2018, the sale notice issued on 02.07.2018 and the sale certificate issued on 27.09.2018 by the 1st respondent Bank to the 2nd respondent. This is because the same cause

of action continues till the sale notice was issued on 2.7.2018. None of the actions prior to 2.7.2018 would be barred by limitation.

73. In our opinion, not only these reliefs are not barred by limitation, even the relief sought by the petitioners about violation of Section 13(3A) of the Act by not considering petitioners' representation dt.01.11.2016/0611.2016 to the demand notice dt.01.08.2016 under Section 13(2) of the Act, is within limitation because the symbolic possession notice dt.03.03.2017 issued by the Bank ignoring the 01.11.2016 representation of the petitioners, could not have been challenged at that time because of the bar contained in proviso to Section 13(3A) and the Explanation to sub-section (1) of Section 17 of the Act.

74. The Tribunal however did not go into this contention of bar of limitation raised by the respondents in the O.A.No.385 of 2018 and rightly so.

75. Point (b) is answered accordingly in favour of the petitioners and against the respondents.

Point (c):

76. We shall next deal with the question:

“Whether it was proper for the 1st respondent Bank not to separately value the machinery in the subject property when it obtained the valuation before it sold the property to the 2nd respondent?”

77. Rule 5 of the Security Interest (Enforcement) Rules, 2002 framed under the Act deals with valuation of movable secured asset and Rule 6

deals with sale of movable secured assets. Rule 7 deals with issuing of certificate of sale of movable secured assets.

78. Likewise, Rule 8 deals with sale of immovable secured assets and sub-Rule (5) of Rule 8, deals with duty of the Authorised Officer to obtain valuation of the immovable property/ secured asset from an approved Valuer and to fix the reserve price of the property.

79. It is not in dispute that the subject property is the factory of the 1st petitioner.

80. Petitioners alleged that no panchanama was drawn up as per Appendix –I and II in the rules while taking physical possession of the movable assets and the same was also not served on the petitioners; that the letter dt.27-09-2018 of the auction purchaser referred to a panchanama dt.03-05-2017 which was not served on the petitioners; and details of the machinery were not published in the e.auction notice. These contentions are not refuted by the respondents.

81. The Engineer's valuation report dt.19-02-2018 filed as Ex.P-34 by the petitioners shows in part-G thereof several items of machinery; but it appears from the said report that the Valuer evaluated both immovable and movable property together as having value of Rs.2,73,80,000/-. Also both the movables and the immovable items were sold jointly and not separately as mandated under the rules.

82. The question is whether machinery embedded to earth can be treated as immovable property. The Debt Recovery Tribunal in its order in S.A.No.385 of 2018 held it to be immovable property.

83. Learned counsel for petitioners relied upon the decision of the Supreme Court in **Duncans Industries Ltd. VS. State of U.P. and others**⁸. In that case, a deed of conveyance had been executed by a Company named ICI India Limited in favour of Chand Chhap Fertilizer and Chemicals Limited. It was presented before the Registrar for registration under the Registration Act, 1908. He then referred it under Section 47-A(ii) of the Indian Stamp Act, 1899 to the Collector complaining of the non-compliance of Section 27 of the Act and praying for proper valuation to be made and to collect the stamp duty and penalty payable on the document. The Collector, after enquiry, levied stamp duty of Rs.37.01 crores and penalty of Rs.30.53 lakhs. The aggrieved party challenged in a Revision under Section 56 of the Stamp Act. The Revisional Authority partly allowed the challenge, set aside the penalty and modified the stamp duty determined by the Collector. The appellant challenged it before the High Court, which dismissed it. The party then approached the Supreme Court. The question was whether plant and machinery can be construed as immovable property. The Supreme Court held :

“8. ... The question whether a machinery which is embedded in the earth is moveable property or an immovable property, depends upon the facts and circumstances of each case. Primarily, the court will have to take into consideration the intention of the parties (sic

⁸ (2000) 1 SCC 633

*party) when it decided to embed the machinery, whether such embedment was intended to be temporary or permanent. A careful perusal of the agreement of sale and the conveyance deed along with the attendant circumstances and taking into consideration the nature of machineries involved clearly shows that the machineries which have been embedded in the earth to constitute a fertilizer plant in the instant case, are definitely embedded permanently with a view to utilise the same as a fertilizer plant. The description of the machines as seen in the schedule attached to the deed of conveyance also shows without any doubt that they were set up permanently in the land in question with a view to operate a fertilizer plant and the same was not embedded to dismantle and remove the same for the purpose of sale as machinery at any point of time. The facts as could be found also show that the purpose for which these machines were embedded was to use the plant as a factory for the manufacture of fertilizer at various stages of its production. Hence, the contention that these machines should be treated as moveables cannot be accepted. Nor can it be said that the plant and machinery could have been transferred by delivery of possession on any date prior to the date of conveyance of the title to the land. Mr Verma, in support of his contention that the machineries in question are not immovable properties, relied on a judgment of this Court in **Sirpur Paper Mills Ltd. v. CCE**⁹. In the said case, this Court while considering the leviability of excise duty on paper-making machines, based on the facts of that case, came to the conclusion that the machineries involved in that case did not constitute immovable property. As stated above, whether a machinery embedded in the earth can be treated as moveable or immovable property depends upon the facts and circumstances of each case. The Court considering the said question will have to take into consideration the intention of the parties which embedded the machinery and also the intention of the parties who intend alienating that machinery. In the case cited by Mr Verma, this Court in para 4 of the judgment had observed thus: (SCC p. 402)*

“In view of this finding of fact, it is not possible to hold that the machinery assembled and erected by the appellant at its factory site was immovable property as something attached to earth like a building or a tree. The Tribunal has pointed out that it was for the

⁹ (1998) 1 SCC 400

operational efficiency of the machine that it was attached to earth. If the appellant wanted to sell the paper-making machine it could always remove it from its base and sell it.”

9. From the above observations, it is clear that this Court has decided the issue in that case based on the facts and circumstances pertaining to that case hence the same will not help the appellant in supporting its contention in this case where after perusing the documents and other attending circumstances available in this case, we have come to the conclusion that the plant and machinery in this case cannot but be described as an immovable property. Hence, we agree with the High Court on this point.”(emphasis supplied)

84. Therefore it is not proper for the Debts Recovery Tribunal to treat the machinery in the subject property as immovable property only on the ground that it is embedded in the earth.

85. It was the duty of the Debts Recovery Tribunal to deal with this issue at length, by asking the parties to lead evidence, and then come to a conclusion whether a particular item of machinery can be treated as immovable property or movable property as the case may be. It however did not go into this aspect at all.

86. There are several articles listed in part-G of the Valuation report dealing with machinery which are not attached to the earth such as Air Conditioner, Fire Fighting Equipment, Electronic Balances etc and which would *prima facie* be movables. It was the duty of the 1st respondent Bank to segregate the items which are purely movable ones from those which can be termed as immovable property, and sell them separately. Why this exercise has not been done by the 1st respondent is not explained.

87. Therefore we hold that the action of the 1st respondent Bank in selling the movable items and the immovable items after obtaining the valuation report dt.19-02-2018 valuing both of them together goes contrary to Rules 5, 6 and 8 of the Rules and the said action cannot be sustained. Point (C) is answered accordingly.

Point (d)

88. Now we shall deal with the aspect :

‘Whether it was incumbent on the part of the 1st respondent to obtain a fresh valuation certificate dt.19.02.2018 in view of the long gap between the valuation report and the e-auction sale held on 11.09.2018?’

89. The immovable property/land where the factory of the 1st petitioner is located is 1241 sq. yds in Jeedimetla village, Qutbullapur Mandal, Medchal-Malkajgiri District.

90. It is no doubt true that auctions scheduled on 06-10-2017, 28-03-2018 and 14-06-2018 did not materialize and only in the fourth auction held on 11-09-2018, the property was sold to the 2nd respondent.

91. Admittedly, the said sale of the subject property was done on the basis of a valuation done on 16-02-2018 by the 1st respondent Bank through its Valuer, whose report is dt.19-02-2018. Thus there is a gap of almost seven months between the date of the valuation and the date of the auction sale conducted by the 1st respondent Bank.

92. In **Mathew Varghese Vs. M.Amrita Kumar**¹⁰, the Supreme Court held that *the secured creditor should act as a trustee of the secured asset and cannot deal with it in any manner it likes* and such an asset can only be disposed of in the manner prescribed in the Act. It held that 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. It declared that such a notice is also necessary to ensure that *the process of sale will ensure that the secured assets will be sold to provide maximum benefit to the borrowers*.

93. This was reiterated in **J.Rajiv Subramaniyan Vs. Pandiyas**¹¹. The Court reiterated that the provisions of the Act and the Rules were enacted to ensure that the secured asset is not sold for a song; it is expected that all the Banks and financial institutions which resort to the extreme measures under the Act for the sale of secured assets ensure that such sale provides maximum benefit to the borrower.

94. In our opinion, when Rule 8(5) mandates the authorized Officer to obtain valuation of the property from an approved Valuer and in consultation with the secured creditor, fix the reserve price of the property before effecting sale of immovable property, and Rule 5 contains a similar provision in respect of movable property, the intention of the legislature is to ensure that such valuation has reasonable

¹⁰ (2014) 5 SCC 610

¹¹ (2014) 5 SCC 651

proximity to the date of the sale so that there is a possibility of maximum benefit from the sale to the borrower. Failure of the 1st respondent to get such valuation prior to sale on 11.09.2018 is in violation of the above Rules.

95. This Court cannot ignore that there would have been appreciation in the value of the land between 19-02-2018 and 11-09-2018, and the Bank ought to have obtained a fresh Valuation report from the Valuer before it conducted the auction on 11-09-2018 and its failure to do so caused prejudice to the petitioners.

96. Though there would be appreciation of market value of the land in the seven months between 19-02-2018 and 11-09-2018, and Valuer had valued the same at Rs.2,73,80,000/- as on 19-02-2018, in the e.auction sale notice dt.20-08-2018 for the sale to be held on 11-09-2018, the 1st respondent fixed the reserve price at Rs.2,60,00,000/- i.e. Rs.13,80,000/- less than the Valuer's valuation.

97. The petitioners had filed as Ex.P-37, an agreement of sale entered into on 04-10-2018 by the 2nd respondent with M/s.Adrusya Enterprises proposing to sell the subject property to the said entity for Rs.3,21,00,000/- and it also indicated that Rs.51,00,000/- had been paid through RTGS to the 2nd respondent by the said entity. This agreement was admittedly filed before the Debts Recovery Tribunal by the 2nd respondent, but it was not taken note of by the said Tribunal.

98. This document indicates that the reserve price of Rs.2.60 crores fixed by the 1st respondent Bank was far less than the realizable value of

the secured asset, at least by Rs.60,00,000/- and this has seriously prejudiced the petitioners. It shows that the 1st respondent Bank was not interested in securing the best price for the secured asset to ensure maximum benefit to the borrower.

99. This conduct of the 1st respondent shows that it did not act *bona fide* and its intention was not to ensure that maximum benefit should accrue to the petitioners and that it did not act as a trustee to protect the interests of the borrower.

100. The Tribunal, in our opinion, erred in holding that the valuation report dt.19-02-2018 can be the basis for the auction sale on 11-09-2018 on the ground that there was no mention in the valuation report of its validity period. Whether or not the valuation report mentions any validity period, the Court can take judicial notice of rise in values of the immovable properties periodically and the said factor cannot be eschewed from consideration.

101. Accordingly, this point is answered against the respondents and in favour of the petitioners.

Point (e):

102. No doubt the 3rd respondent has now come on record contending that on 08-07-2019, it had purchased the subject property for Rs.2.92 crores from the 2nd respondent. It cannot claim any equities on the ground that it has been running the factory of the petitioners in the subject property since then and that it is a *bona fide* purchaser.

103. In our considered opinion, the sale in favour of the 3rd respondent by the 2nd respondent occurred during the pendency of this Writ Petition and the doctrine of *lis pendens* is attracted to it and the said sale is subject to the result of the Writ Petition.

104. If the Writ Petition is to be allowed, the sale in favour of the 3rd respondent has to be set aside and possession must be restored to the borrower.

105. For the aforesaid reasons, we direct as under:

- (a) the Writ Petition is allowed; order dt.01-07-2019 in S.A.No.385 of 2018 of the Debts Recovery Tribunal-II at Hyderabad is set aside;
- (b) the said S.A.No.385 of 2018 is allowed;
- (c) consequently, the possession notice dt.03-03-2017 is declared as illegal and contrary to law and provisions of Section 13(3A) of the Act;
- (d) the taking of physical possession of the property by the 1st respondent Bank under Section 14 of the Act on 03-05-2017 pursuant to order of the Chief Metropolitan Magistrate, Cyberabad, R.R. District in Crl.M.P.No.343/2017 is set aside;
- (e) the sale notice dt.02-07-2018 issued by the 1st respondent Bank is also set aside;

(f) the sale certificate issued by the 1st respondent Bank in favour of the 2nd respondent on 27-09-2018 as well as the registered sale deed Doc.No.15931/2019 dt.08-07-2019 executed by 2nd respondent in favour of the 3rd respondent are set aside; and

(g) the 3rd respondent is directed to restore physical possession of the subject property to the petitioners within one month from today.

(h) The 1st respondent shall pay costs of Rs.10,000/- (Rupees Ten Thousand only) to the petitioners within four (04) weeks.

(i) The 1st respondent is granted liberty to act to recover its dues from the petitioners strictly in accordance with the Act and the Rules framed thereunder.

106. Pending miscellaneous petitions, if any, shall stand closed.

M.S.RAMACHANDRA RAO, J

K.LAKSHMAN, J

Date: 24-01-2020

Note : L.R. copy to be marked.

B/o.

Vsv