

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 5126 OF 2010

- 1) Akola Janata Commercial Co-operative Bank Ltd., Akola, a Multi State Scheduled Bank, Main Branch, Post Box No.90, Old Cotton Market, Akola, Tq. and District Akola.
- 2) Branch Manager/Authorised Officer, The Akola Janata Commercial Co-operative Bank Ltd., Akola, Multi State Scheduled Bank, Main Branch, Post Box No.90, Old Cotton Market, Akola, Tq. and District Akola. **PETITIONERS**

VERSUS

- 1) M/s. Sharad Automobiles, through its Partners.
- A) Shri Sharad Abhaykumar Chaware, Aged – Adult, Occupation – Business,
- B) Shri Abhaykumar Motilal Chaware (Dead), Aged – Adult, Occupation – Business,

LRs. of respondent No.1(B)

- 1(B)(i) Shri Ranjat s/o Sharad Chawre, - (Amended as per Aged – Major, Occ. - Business, Court's Order dt. R/o Sharad Automobiles, 29-6-2022) Murtizapur Road, Akola, Tq. & District Akola.

C) Sau. Tarabai Abhaykumar Chaware
(Dead), Aged – Adult,
Occupation – Business,

2) Sau. Savita Sharad Chaware,
Aged – Adult, Occupation – Business,

All Resident of c/o. Sharad Automobiles,
Murtizapur Road, Akola, Tq. and
District Akola.

.... **RESPONDENTS**

Mr. R.L. Khapre, Senior Counsel assisted by Mr. D.R. Goenka,
Counsel for the petitioners,
Mr. A.S. Jaiswal, Senior Counsel assisted by Mr. N.S. Deshpande
and Mr. P.M. Pande, Counsel for the respondents.

CORAM : ROHIT B. DEO & MR. M.W. CHANDWANI, JJ.
DATED : 22nd JUNE, 2023

ORAL JUDGMENT : (PER : R.B. DEO, J.)

Petitioners are assailing the judgment dated 25-7-2008 in S.A. 13/2008 rendered by the Debt Recovery Tribunal, Nagpur (DRT) whereby the auction sale conducted on 31-12-2007 is quashed and set aside and liberty is reserved with the petitioners to initiate further action in accordance with the statutory provisions, after deciding the objections raised by the borrower and obtaining fresh valuation report of the secured asset. Liberty is also reserved with the petitioner-bank to participate in the fresh

auction after conveying such intention to the borrower.

2. The petitioners are further assailing the judgment dated 30-6-2010 in Appeal 174/2008 rendered by the Debts Recovery Appellate Tribunal, Mumbai (DRAT) whereby the appeal preferred against the judgment of the DRT is dismissed.

3. Shorn of unnecessary details, the broad facts are as set out infra :-

a) Petitioner 1 is a Multi State Co-operative Scheduled Bank duly registered under the Multi State Co-operative Societies Act, 1984 and petitioner 2 is the Branch Manager who is also the designated Authorised Officer (AO). In 2001, petitioner-bank sanctioned in favour of respondent 1-M/s. Sharad Automobiles, which is a partnership firm, secured cash credit loan limit of Rs.50,00,000/- (Rupees Fifty Lac), (hereinafter referred to as the “borrower”).

b) Another partnership firm M/s. Satish Motors executed registered deed of mortgage dated 22-3-2001 in favour of the

bank as security for the secured cash credit loan limit sanctioned in favour of the borrower. The property mortgaged admeasures 24275.5 square feet in area and is assigned plot number 8/10, situated within the territorial limits of the Akola Municipal Corporation (secured asset).

c) In addition to the secured cash credit loan limit of Rs.50,00,000/- (Rupees Fifty Lac) supra the bank sanctioned to the borrower and its sister concerns four other separate and distinct loan limits.

d) The borrower committed default in repayment of the loan and the loan account was classified as non performing asset. As on April 2007, an amount of Rs.58,93,983/- (Rupees Fifty Eight Lac Ninety Three Thousand Nine Hundred Eighty Three) was outstanding against the financial assistance extended.

e) The AO issued demand notice dated 24-4-2007 to the borrower, the guarantors and mortgagors under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act), which

was duly served on 26-4-2007.

f) The notice under Section 13(2) of the SARFAESI Act went unheeded and the bank took recourse to the measures provided under Section 13(4) of the SARFAESI Act. The AO took symbolic possession of the secured asset on 27-6-2007.

g) The bank contends that after four months of the symbolic possession, the borrower submitted representation dated 22-10-2007, which the bank was not obligated to consider since the representation or objection is required to be submitted within the statutorily prescribed period of sixty days from the receipt of notice under Section 13(2) of the SARFAESI Act. However, the bank did consider the said representation and the decision was conveyed to the borrower vide communication dated 05-11-2007.

h) The AO obtained the valuation of the secured asset from approved valuer Mr. Shailesh Agrawal who issued valuation certificate dated 27-10-2007 and the reserve price of the secured asset was fixed at Rs.1,25,45,000/- (Rupees One Crore Twenty Five Lac Forty Five Thousand).

i) The AO published proclamation dated 28-11-2007 in two prominent daily newspapers informing the public at large that open and public auction of the secured asset is scheduled in the premises of the bank between 12-00 noon to 3-00 p.m. on 31-12-2007.

j) On or about 28-11-2007 the borrower preferred an application under Section 17 of the SARFAESI Act before the DRT which was accompanied by an application for condonation of delay and an application for grant of interim relief. The bank was served with the notice issued by the DRT on 22-12-2007 and appeared in the proceedings. The DRT rejected the stay application and permitted the bank to proceed further with the auction sale. Accordingly, the bank took the process of auction sale further.

k) The auction was held on 31-12-2007 in which four bidders including the bank participated. The bank submitted the highest bid of Rs.1,77,50,000/- (Rupees One Crore Seventy Seven Lac Fifty Thousand). Significantly, the averment in paragraph 13 of the petition is that the bank participated in the auction through

the AO.

l) The bid of the bank was more than the reserve price and was accepted by the AO who conducted the auction on 31-12-2007 and on 03-3-2008 the sale certificate was executed and registered by the AO in favour of the bank.

m) The DRT condoned the delay in preferring the application under Section 17 of the SARFAESI Act. The application was registered as S.A. 13/2008 and fresh notice was issued to the bank. The bank and the AO appeared before the DRT on 05-3-2008. The DRT permitted the borrower to amend the application and to incorporate additional grounds challenging the auction sale.

n) The bank produced valuation certificate dated 27-10-2007 which was issued by the approved valuer Mr. Shailesh Agrawal. The borrower pressed in service valuation certificate dated 11-11-2000 issued by the same valuer and valuation certificate dated 12-3-2003 issued by Mr. Pradeep Ingole. By judgment dated 25-7-2008 the DRT allowed the application in

terms noted supra.

o) The bank preferred Appeal 174/2008 and on 04-9-2008 the DRAT directed that status quo be maintained.

p) The bank preferred Miscellaneous Application 346/2009 for issuance of directions to the borrower. In sum and substance, the direction sought was that the borrower be asked to locate and produce interested purchaser who is willing to purchase the property for higher price.

q) By judgment dated 30-6-2010, the DRAT dismissed the appeal.

4. **JUDGMENT OF THE DRT -**

a) The DRT noted the provisions of Section 35 of the SARFAESI Act which give an overriding effect on the provisions of any other law for the time being in force, or any instrument having effect by virtue of any such law.

b) The DRT then considered the provisions of the Civil Procedure Code, 1908 (CPC) and the Transfer of Property Act,

1882 (TP Act) and held that Order XXI Rules 72 and 72-A of the CPC and Section 69 of the TP Act preclude the mortgagee from purchasing the mortgaged property, without obtaining the permission from the Court.

c) The DRT held that while under the SARFAESI Act the secured creditor is not required to seek permission from the Court since the auction sale is non adjudicatory process, nonetheless natural justice demands that if a secured creditor intends to participate in the auction conducted by the secured creditor, some extra ordinary situation must exist. The DRT referred to the provisions of the Maharashtra Co-operative Societies Act, 1960. The DRT observes that one exceptional situation could be if no buyer comes forward to purchase the mortgaged property and the secured creditor is compelled to participate in the auction and purchase the mortgaged property. The DRT held that since three bidders did participate in the auction, the circumstances in which the bank participated in the auction are blurred.

d) The DRT then considered the provisions of Rule 8(5) of the Security Interest (Enforcement) Rules, 2002 (Security

Interest Rules) and found that the AO is duty bound to obtain valuation of the property from approved valuer, and thereafter fix the reserve price. The DRT noted the submission of the borrower that the valuation of the secured asset was more than Rs.2,00,00,000/- (Rupees Two Crore), at the relevant time and that the reserve price of Rs.1,25,45,000/- (Rupees One Crore Twenty Five Lac Forty Five Thousand) is disproportionately lesser than the valuation. The DRT considered the three valuation reports on record. The DRT noted that Mr. Shailesh Agrawal valued the secured asset at Rs.1,14,07,000/- (Rupees One Crore Fourteen Lac Seven Thousand) on 11-11-2000 and on 27-10-2007 he valued the secured asset at Rs.1,25,45,000/- (Rupees One Crore Twenty Five Lac Forty Five Thousand). The valuation report of Mr. Ingole obtained by the borrower in March 2003 values the property at Rs.2,35,00,000/- (Rupees Two Crore Thirty Five Lac).

e) The DRT found that the valuation of Mr. Shailesh Agrawal is seriously flawed.

5. **JUDGMENT OF THE DRAT -**

a) The DRAT noted a significant aspect which was missed by the DRT. The DRAT noted that on 11-11-2000 the valuation report issued by Mr. Shailesh Agrawal who valued the property at Rs.1,14,07,000/- (One Crore Fourteen Lac Seven Thousand) was only in respect of half the secured asset and on 27-10-2007 Mr. Shailesh Agrawal valued the entire secured asset at Rs.1,25,45,000/- (Rupees One Crore Twenty Five Lac Forty Five Thousand).

b) The DRAT considered the submission of the bank that since the AO was an officer of the bank, no purpose would have been served by seeking the prior permission of the AO before participating in the bid. The DRAT held that while discharging duty under the SARFAESI Act, the AO performs quasi judicial functions.

c) The DRAT then referred to the provisions of Rule 72-A of Order XXI of the CPC and held that participation of the bank without seeking the prior permission of the AO was unauthorised.

6) **SUBMISSIONS CANVASSED ON BEHALF OF THE BANK -**

a) The learned Senior Counsel Mr. R.L. Khapre would submit, inviting our attention to the provisions of Section 13(1) of the SARFAESI Act, that the provisions of Sections 69 and 69-A of the TP Act are specifically made inapplicable to the enforcement of security interest under Section 13 of the SARFAESI Act.

Section 13(1) of the SARFAESI Act reads thus -

“13. Enforcement of security interest -(1)
Notwithstanding anything contained in section 69 or section 69-A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the Court or tribunal, by such creditor in accordance with the provisions of this Act.”

b) Mr. R.L. Khapre further submits that the reliance placed by the DRAT on the provisions of Order XXI Rule 72 of the CPC is clearly misplaced, inasmuch as the statutory scheme of the SARFAESI Act necessarily excludes the applicability of the CPC. Mr. R.L. Khapre would invite our attention to the provisions of Section 17(2) and (4) of the SARFAESI Act and submit that the DRT is vested with the power to consider only whether any of the

measures referred to in sub-section (4) of Section 13 of the SARFAESI Act taken by the secured creditor are in accordance with the provisions of the SARFAESI Act and the Rules made thereunder. Mr. R.L. Khapre would submit that unless it is established that the recourse taken by the secured creditor under sub-section (4) of Section 13 of the SARFAESI Act is contrary to the provisions of the SARFAESI Act and the Rules made thereunder, the DRT is not clothed with the jurisdiction to interdict. Mr. R.L. Khapre's endeavour is to persuade us to hold that the consideration by the DRT and DRAT must be restricted to ascertaining whether the provisions of the SARFAESI Act and the Rules framed thereunder are followed and that the auction sale could not have been set aside by invoking the provisions of either the CPC or the TP Act.

c) Mr. R.L. Khapre would submit that there is no fetter on the right of the secured creditor of participating in the auction sale.

d) Referring to the provisions of Section 29 of the Recovery of Debts and Bankruptcy Act, 1993 (RDB Act), Mr. R.L.

Khapre submits that the provisions of the Second and the Third Schedules to the Income-tax Act, 1961 (IT Act) and the Income-tax (Certificate Proceedings) Rules, 1962 (IT Rules), as in force from time to time, shall as far as possible, apply with necessary modifications as if the said provisions and the rules refer to the amount of debt due under this Act instead of to the income-tax and any reference to “assessee” shall be construed as a reference to the borrower. Mr. R.L. Khapre would submit that the purport of the provisions of Section 13(1) of the SARFAESI Act is that while the provisions of Sections 69 and 69-A of the TP Act stand excluded, the enforcement of the security interest must be in conformity with the provisions of the SARFAESI Act. Mr. R.L. Khapre would submit that while the provisions of Second and Third Schedules of the IT Act and IT Rules, to the extent the same are not inconsistent with the provisions of the SARFAESI Act are required to be followed, the decision of the Supreme Court in *ICICI Bank Ltd. v. M/s. Aburubam And Company And Ors.*, **LAWS(SC) 2016 8 102** has held, interpreting Rule 17 of Schedule II of the IT Rules, that the secured creditor is not precluded from participating in the auction.

e) Mr. R.L. Khapre would submit that the observations and the findings recorded by the Tribunals on the aspect of the valuation of the secured asset are clearly flawed.

f) Mr. R.L. Khapre did attempt to explain the apparent incongruity in the valuation of the secured asset by Mr. Shailesh Agrawal who valued half the secured asset at Rs.1,14,07,000/- (Rupees One Crore Fourteen Lac Seven Thousand) on 11-11-2000 and the entire secured asset at Rs.1,25,45,000/- (One Crore Twenty Five Lac Forty Five Thousand) on 27-10-2007. Mr. R.L. Khapre submits that it is in view of the Building Rules and Regulations and the requirement of leaving access and approach to the rear side that the valuation in the year 2007 appears incongruous. Mr. R.L. Khapre would urge us to accept the submission that despite the passage of six years, the fact that valuation in the year 2000 was of only half the secured asset, the fact that valuation in the year 2007 was of the entire secured asset, and the additional area which was valued in 2007 was more than 12000 square feet, the valuation done by the same valuer is unimpeachable.

g) Mr. R.L. Khapre would submit that reserve price cannot be equated with market value. Reserve price or upset price is the minimum threshold below which the secured asset shall not be sold. Mr. R.L. Khapre submits that while the reserve price may not be the market price, the settled position of law is that the highest bid must be presumed as the prevailing market price.

h) Mr. R.L. Khapre would invite our attention to certain decisions to buttress the submission that judicial interference in auction sale must be minimum and unless there is patent illegality which has occasioned prejudice or the auction sale tainted with fraud, the Court must be loath to interfere.

i) Mr. R.L. Khapre submits that the participation of the bank in the auction sale has not prejudiced the borrower. *Au contraire*, the participation of the bank has ensured better price. Mr. R.L. Khapre would submit that the entire endeavour of the bank was to ensure that the secured asset fetched the best possible price and the bank acted *bona fide* at every stage of the proceedings. Mr. R.L. Khapre endeavours to demonstrate from

the record of proceedings that the borrower did not reciprocate the *bona fide* conduct of the bank. Illustratively, the borrower did not respond to and rather resisted the suggestion of the bank that the borrower may locate and produce a purchaser who would purchase the secured asset at price higher than the bid accepted in the auction.

j) Mr. R.L. Khapre would finally submit that the Tribunals committed serious error relegating the bank to the stage of deciding the objections, which already stood decided.

7) The learned Senior Counsel Mr. A.S. Jaiswal submits that the bank was precluded from participating and bidding at the auction and the participation of the bank in the auction through the AO renders the proceedings null and void. Mr. A.S. Jaiswal submits that the normal rule is that the secured creditor is not authorised to participate in the auction. Rule 59 of Schedule II incorporates an exception. The secured creditor is authorised to bid only if the auction has been postponed for want of a bid of an amount not less than the reserve price. Inviting our attention to Rule 17, Mr. A.S. Jaiswal submits that the said Rule engrafts a

prohibition against the officer or person having any duty to perform in connection with any auction sale, either directly or indirectly, against bidding. Mr. A.S. Jaiswal would submit that the decision in *ICICI Bank Ltd. v. M/s. Aburubam And Company And Ors.* on which heavy reliance is placed by the bank, is clearly distinguishable inasmuch as the factual matrix was that no bidder came forward to purchase the secured asset in the auction conducted. Mr. A.S. Jaiswal would submit that Section 13 (5-A) of the SARFAESI Act which is introduced on the statute book by Act 1 of 2013, clarifies and restates the position of law crystallized by Rules 17 and 59 of Schedule II of the IT Rules.

a) Mr. A.S. Jaiswal would submit that Rule 8(5) of the Security Interest Rules is manifestly breached. The AO did not obtain the valuation of the property from an approved valuer. It is the bank which has obtained the valuation. The AO did not fix the reserve price of the property in consultation with the secured creditor. Mr. A.S. Jaiswal submits that while the reserve price may not necessarily be the market value, the statutory scheme is that the market valuation must be obtained from the approved valuer and then allowances can be made and a lower reserve price can

be fixed by the AO in consultation with the secured creditor. Mr. A.S. Jaiswal would emphasize that the market valuation is not obtained by the AO, the valuation obtained by the bank is not the market valuation and the reserve price is not fixed in consultation with the secured creditor.

b) Responding to the submission that no prejudice is caused, Mr. A.S. Jaiswal would submit that as a fact, prejudice is caused inasmuch as the perception of the bidders participating, of the worth of the property, is influenced to a large extent by the reserve price and the normal tendency is not to submit a bid which is disproportionately higher than the reserve price. Mr. A.S. Jaiswal would submit that apart from the fact that the valuation and the fixation of the reserve price is contrary to the statutory scheme, the participation of the bank contrary to the statutory embargo renders the auction sale illegal and null and void. Mr. A.S. Jaiswal would argue that manifest breach of mandatory provisions of law must necessarily lead to inference of prejudice in law.

c) Mr. A.S. Jaiswal would invite our attention to the

decision of the Supreme Court in *Mathew Varghese v. M. Amritha Kumar and others*, (2014) 5 SCC 610 which considers, *inter alia*, breach of Rule 15 of Schedule II of Part I of the IT Act, to buttress the submission that the provisions of Schedule II of Part I of the IT Act must be strictly followed, unless the provisions are inconsistent or in conflict with the provisions of the SARFAESI Act or the Security Interest Rules.

8. **CONSIDERATION** -

In the light of the submissions canvassed, the seminal issues which fall for determination are -

- (i) Is the participation of the bank-secured creditor in the auction sale through the AO contrary to the statutory mandate and if the answer is in the affirmative, whether the auction sale is vitiated.
- (ii) Whether the valuation reports of the approved valuer are manifestly irrational.
- (iii) Whether the fixation of the reserve price is done in breach of the provisions of Rule 8(5) of the Security Interest Rules.

a) The answer to issue (i) necessitates analysis of the relevant statutory provisions.

Section 37 of the SARFAESI Act reads thus -

“37. Application of other laws not barred. - The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation), Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force.”

b) Section 29 of the RDB Act reads thus -

“29. Application of certain provisions of Income-tax Act- The provisions of the Second and Third Schedules to the Income-tax Act, 1961 (43 of 1961) and the Income-tax (Certificate Proceedings) Rules, 1962, as in force from time to time shall, as far as possible, apply with necessary modifications as if the said provisions and the rules referred to the amount of debt due under this Act instead of to the income-tax :

Provided that any reference under the said provisions and the rules to the ‘assessee’ shall be construed as a reference to the defendant under this Act.”

c) Section 35 of the SARFAESI Act is also relevant and is produced verbatim -

“35. The provisions of this Act to override other laws –
The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”

d) From conjoint reading of Sections 35 and 37 of the SARFAESI Act, it is clear that to the extent the provisions of the RDB Act are not inconsistent with the provisions of the SARFAESI Act, the statutory scheme of both the enactments, compliment each other.

e) It is held in *Mathew Varghese (supra)* that the application of the SARFAESI Act are in addition to the provisions of Section 29 of the RDB Act, and as a necessary consequence, the mandate of Section 29 of the applicability of certain provisions of the IT Act and in particular Schedule II of Part I, for effecting sale or transfer would apply automatically. The mode and method by which a recovery of income can be resorted to under the Second and Third Schedules to the IT Act and the IT Rules have to be

followed in proceedings under the SARFAESI Act.

f) We have examined the provisions of Rule 17 and Rule 59 of Schedule II supra to ascertain whether there is any conflict or inconsistency with the provisions of the SARFAESI Act. In our considered view, there is no inconsistency whatsoever between Rule 17 and Rule 59 supra and the provisions of the SARFAESI Act.

g) The provisions of Rule 17 and Rule 59 of Schedule II read thus :

“17. No officer or other person having any duty to perform in connection with any sale under this Schedule shall, either directly or indirectly, bid for, acquire or attempt to acquire any interest in the property sold.”

“59. (1) where the sale of a property, for which a reserve price has been specified under clause (cc) of rule 53, has been postponed for want of a bid of an amount not less than such reserve price, it shall be lawful for an (Assessing) Officer, if so authorised by the (Principal Chief Commissioner or) Chief Commissioner or (Principal Commissioner or) Commissioner) in this behalf, to bid for the property on behalf of the Central Government at any subsequent sale.)

2) All persons bidding at the sale shall be required to

declare, if they are bidding on their own behalf or on behalf of their principals. In the latter case, they shall be required to deposit their authority, and in default their bids shall be rejected.

3) Where the (Assessing) Officer referred to in sub-rule (1) is declared to be the purchaser of the property at any subsequent sale, nothing contained in rule 57 shall apply to the case and the amount of the purchase price shall be adjusted towards the amount specified in the certificate.)

h) The language of Rule 59 admits of no other understanding or interpretation than that the normal rule is that the secured creditor is prohibited from participating in the auction and an exception is made if the auction does not materialise for want of bid higher than the reserve price. While Rule 59 engrafts an embargo on the authority of the secured creditor, Rule 17 is a special provision which precludes an officer who is entrusted with the duty, directly or indirectly, of conducting the auction, from participating in the auction.

i) The legislative amendment by Act 1 of 2013 which introduces Section 13(5-A) in the SARFAESI Act is clarificatory

and restates the position crystallized by Rule 17 and Rule 59 of Schedule II of the IT Rules. Sub-section (5-A) of Section 13 which is inserted by Act of 1 of 2013 reads thus :

“5-A Where the sale of an immovable property, for which a reserve price has been specified, has been postponed for want of a bid of an amount not less than such reserve price, it shall be lawful for any officer of the secured creditor, if so authorised by the secured creditor in this behalf, to bid for the immovable property on behalf of the secured creditor at any subsequent sale.”

Mr. R.L. Khapre did argue that prior to the introduction of sub-section (5-A) of Section 13, there was no embargo against the secured creditor participating in the auction, and the unfettered right or authority is curtailed by the amendment introduced. Mr. R.L. Khapre would submit that since the amended Section 13 was not on the statute book at the relevant time, the secured creditor did have the unfettered authority to participate in the auction. We are not persuaded to accept the said submission, for reasons already articulated supra.

j) In the teeth of the admission of the bank in paragraph 13 of the petition that the bank participated in the auction

through the AO, we have no hesitation in recording that the auction sale is conducted in manifest breach and violation of the statutory provisions, which in our considered view, are mandatory.

k) We are not impressed by the submission canvassed by Mr. R.L. Khapre that the test of prejudice must be applied. While right to hold property is no longer a fundamental right, the right remains a constitutional right. Depriving a person of his property except in accordance with the provisions of a statute is a violation of the constitutional right guaranteed under Article 300-A of the Constitution of India. [See : *Ram Kishan v. State of U.P. (2012) 11 SCC 511*; *Lachhman Dass v. Jagat Ram, (2007) 10 SCC 448*; *and State of M.P. v. Narmada Bachao Andolan, (2011) 7 SCC 639* which decisions are referred to in *Mathew Varghese (supra)*].

l) Statutory provisions intended to ensure fairness and transparency in the auction and the strict observance of which can only lend legitimacy to the deprivation of property must be scrupulously followed and breach thereof cannot be brushed under the carpet on the premise that there is no prejudice caused.

(i) While we are not required to, and do not intend to make any conclusive observation on the submission canvassed by Mr. R.L. Khapre that the provisions of the CPC could not have been invoked by the Tribunals below, it would nonetheless be apposite to consider the statutory scheme. Rule 72 of Order XXI of the CPC reads thus -

“72. Decree-holder not to bid for or buy property without permission-(1) No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property.

(2) Where decree-holder purchases, amount of decree may be taken as payment-Where a decree-holder purchases with such permission, the purchase-money and the amount due on the decree may, subject to the provisions of section 73, be set-off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

(3) Where a decree-holder purchases, by himself or through another person, without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any other person whose interests are affected by the sale, by order set aside the sale; and the costs of such application and order, and any deficiency of

price which may happen on the re-sale and all expenses attending it, shall be paid by the decree-holder.”

(ii) Corresponding Section 294 of the Civil Procedure Code, 1882 is considered by the Privy Council in ***Rao Radha Krishna and others v. Bisheshar Sahay and others, AIR 1922 PC 336***. The Privy Council enunciated thus :

“Upon the construction of this section it is evident that a purchaser by a decree-holder who has not obtained permission is not void nor a nullity, but is only to be avoided on the application of the judgment-debtor or some other person interested. It would be injurious to those interested in the sale of a decree-holder who had been forced up in the bidding to give a large sum of money could escape from fulfilling his contract by getting the sale declared a nullity, and it would make all titles under such sales insecure if at later periods they were liable to be treated as nullities. A sale is to be set aside upon application and upon cause shown.”

(iii) The Privy Council held that while the sale is not void or nullity, if the sale is conducted in breach of Section 294 of the Civil Procedure Code, 1882, the sale is voidable at the option of the judgment-debtor or some other person interested.

(iv) Construing the express “the Court may, if it thinks fit, set aside the same” several High Courts have held that the purchase by a decree-holder without permission is not *ipso facto* void and the purchase is valid until it is set aside.

(v) While Rule 72 of Order XXI of the CPC engrafts an embargo against the holder of a decree, Rule 72A is a special provision which applies to mortgagee. (emphasis supplied)

Rule 72A of the CPC reads thus :

“72-A. Mortgagee not to bid at sale without the leave of the Court - (1) Notwithstanding anything contained in rule 72, a mortgagee of immovable property shall not bid for or purchase property sold in execution of a decree on the mortgage unless the Court grants him leave to bid for or purchase the property.

(2) If leave to bid is granted to such mortgagee, then the Court shall fix a reserve price as regards the mortgagee, and unless the Court otherwise directs, the reserve price shall be-

(a) not less than the amount then due for principal, interest and costs in respect of the mortgage if the property is sold in one lot; and

(b) in the case of any property sold lots, not less than such sum as shall appear to the Court to be properly attributable to each lot in relation to the amount then due for principal, interest and costs on the mortgage.

(3) In other respects, the provisions of sub-rules (2) and (3) of rule 72 shall apply in relation to purchase by the decree-holder under that rule.”

(vi) Rule 72-A is a special rule in contradistinction with Rule 72 which is a general rule applying to all kinds of decree-holders/purchasers and overrides Rule 72.

(vii) Rule 73 of Order XXI of the CPC is *pari materia* with Rule 17 of Schedule II of the IT Rules, and reads thus :

“73. Restriction on bidding or purchase by officers-No officer or other person having any duty to perform in connection with any sale shall, either directly or indirectly, bid for, acquire or attempt to acquire any interest in the property sold.”

(viii) Rule 72 of Order XXI of the CPC is held to be mandatory by the Supreme Court in ***Lal Chand v. VIIth Addl. District Judge and Others, (1997) 4 SCC 356.***

(ix) In ***Manilal Mohanlal Shah and others v. Sardar Sayed Ahmed Sayed Mahmad and another, AIR 1954 SC 349***, the Supreme Court, however, observed that as a matter of pure construction Rule 72 of Order XXI of the CPC is directory and not mandatory. The principal question which fell for consideration was whether the failure of the auction purchaser to make the deposit under Order XXI Rules 84 and 85 of the CPC is only a material irregularity in the sale which can only be set aside under

Rule 90 or whether it is wholly void. The contention was that the Court having once allowed the set-off and condoned the failure to deposit, the mistake of the Court should not be allowed to prejudice the purchasers. It is while considering and rejecting the said contention that the Supreme Court observed that while Rule 72 of Order XXI of the CPC is directory, if the purchaser is any person other than the decree-holder, he is bound to deposit 25% of the purchase money, and Rule 85 is mandatory.

(x) The provisions of Rules 72, 72-A and 73 of Order XXI of the CPC envisage sale of the property via an adjudicatory process. The overwhelming judicial opinion appears to be that the use of the expression “the Court may, if it thinks fit, set aside the same” reserves some discretion with the executing Court and the test of prejudice may perhaps be relevant. In contradistinction, the provisions of Rules 17 and 59 of Schedule-II of the IT Rules and Section 13(5-A) of the SARFAESI Act govern sale of the secured asset without recourse to the adjudicatory mechanism and the sale is not subject to confirmation.

(xi) We cannot be unmindful of the distinction between the sale of the property or mortgaged property which is governed by the provisions of Order XXI Rules 72 and 72-A of the CPC and the sale of the secured asset by the secured creditor in exercise of power traceable to Section 13 of the SARFAESI Act. In the former case, the sale is via an adjudicatory process and is subject to confirmation. In the latter, it is the secured creditor who puts the secured asset to auction without intervention of the Court or the Tribunal, and the sale is not subject to confirmation.

In our considered view, the fact that the auction sale conducted under the SARFAESI Act need not pass the muster of confirmation by Court or Tribunal, renders it all the more imperative that the provisions of the SARFAESI Act and the Security Interest Rules must be strictly observed.

m) We, therefore, hold that the participation of the secured creditor in the auction renders the auction sale, if not null and void, voidable at the option of the borrower.

n) Issue (ii) presents no conundrum. Irrationality is writ large on the face of the valuation reports which are submitted by

the same valuer Mr. Shailesh Agrawal, who valued half the secured asset at Rs.1,14,07,000/- (Rupees One Crore Fourteen Lac Seven Thousand) on 11-11-2000 and the entire secured asset at Rs.1,25,45,0000/- (Rupees One Crore Twenty Five Lac Forty Five Thousand) on 27-10-2007. The fact that Mr. Shailesh Agrawal valued half the secured asset admeasuring approximately 12000 square feet at Rs.1,14,07,000/- (Rupees One Crore Fourteen Lac Seven Thousand) on 11-11-2000 and after passage of more than six years valued the entire secured asset admeasuring 24000 square feet at Rs.1,25,45,0000/- (Rupees One Crore Twenty Five Lac Forty Five Thousand) is inexplicable. The submission of Mr. R.L. Khapre that the valuation which was done by Mr. Shailesh Agrawal in the year 2007 was to ascertain the “distress value” is an attempt to defend the indefensible.

o) The statutory scheme is that the AO shall obtain the valuation of the secured asset from an approved valuer and thereafter fix the reserve price in consultation with the secured creditor. The valuation of the secured creditor must be the market valuation. The reserve price may, however, be lesser than the market valuation. In the auction sale, the secured asset may

not necessarily fetch the market price. The perception and the judgment of the prospective purchaser may be influenced by several factors, which cannot be placed in straight jacket. The perceived disadvantages or factors which may impel the prospective purchaser not to purchase the property at the market valuation will have to be considered at the stage of fixing the reserve price and allowances may be made and lesser price may be fixed. We are, however, not persuaded to accept the submission of Mr. R.L. Khapre that the approved valuer who was asked to value the secured property could have proceeded on the assumption that the distress price will have to be determined and not the market price. *De hors* the said aspect, we have not come across any material nor any reason or logic discernible from the valuation report of 2007 from which the rationale underlying the valuation can be ascertained. We, therefore, answer issue (ii) in the affirmative.

p) Issue (iii) must also be answered in the affirmative. The valuation report of the approver is not obtained by the AO. It is the secured creditor which has obtained the valuation report.

Moreover, the reserve price is not fixed by the AO in consultation with the secured creditor. Provisions of Rule 8(5) of the Security Interest Rules are clearly breached.

q) Provisions of sub-rule (5) of Rule 8 of the Security Interest Rules are held mandatory by the SC in ***Vasu P. Shetty v. M/s. Hotel Vandana Palace and others, AIR 2014 SC 1947***. The factual position considered was that before holding the fresh auction the secured creditor did not obtain the fresh valuation of the secured asset from the approved valuer.

r) In *Vasu P. Shetty (supra)* the Supreme Court extracted its observations in ***J. Rajiv Subramaniam & Anr. v. M/s. Pandiyas & Ors., 2014 AIR SCW 1850***, which extract reads thus :

“12. This Court in the case of Mathew Varghese v. M. Amritha Kumar & Ors. examined the procedure required to be followed by the Banks or other financial institutions when the secured assets of the borrowers are sought to be sold for settlement of the dues of the Banks/financial institutions. The Court examined in detail the provisions of the SARFAESI Act, 2002. The Court also examined the detailed procedure to be followed by the Bank/financial institutions under the Rules, 2002. This Court took

notice of Rule 8, which relates to sale of immovable secured assets and Rule 9 which relates to time of sale, issue of sale certificate and delivery of possession etc. With regard to Section 13(1), this Court observed that Section 13(1) of SARFAESI Act, 2002 gives a free hand to the secured creditor, for the purpose of enforcing the secured interest without the intervention of Court or Tribunal. But such enforcement should be strictly in conformity with the provisions of the SARFAESI Act, 2002. Thereafter, it is observed as follows :-

“A reading of Section 13(1), therefore, is clear to the effect that while on the one hand any SECURED CREDITOR may be entitled to enforce the SECURED ASSET created in its favour on its own without resorting to any court proceedings or approaching the Tribunal, such enforcement should be in conformity with the other provisions of the SARFAESI Act.”

9. Before we part with the judgment, we note that while as many as eighteen decisions placed on record as Compilation 1 and six decisions are cited in Compilation 2, Mr. R.L. Khapre has pressed in service only few, which we may consider and analyze.

a) ***K. Suresh Babu v. K. Balasubramaniam and another, AIR 1981 Madras 1; Lal Chand v. VIIIth Addl. District Judge and***

others, AIR 1997 SC 2106; Egmore Benefit Society, 3rd Branch Ltd., by Secretary and Treasurer, T.G. Damodara Mudaliar v. K. Aburupammal, AIR 1943 Madras 301; and Sree Yellamma Cotton, Woolen and Silk Mills Co., Ltd. Bank of Maharashtra Ltd., Poona v. Official Liquidator, High Court Building, AIR 1969 Mysore 280 are decisions which hold that the auction sale in which the decree-holder participated is illegal. Mr. R.L. Khapre has referred to the said decisions only to emphasize that the said decisions are not relevant inasmuch as the decisions are rendered on the touchstone of the provisions of Order XXI Rule 72 of the CPC or Section 69 of TP Act, which provisions are not applicable to the proceedings under the SARFAESI Act.

b) *ICICI Bank Ltd. V. M/s. Aburubam And Company And Ors.* which considers Rule 17 of Schedule II of IT Rules and holds that the bank was not precluded from participating in the auction is clearly distinguishable on facts. The public auction did not materialize since no bidder came forward to purchase the secured asset and it was only thereafter that the secured creditor submitted its bid.

c) Mr. R.L. Khapre would heavily rely on the decision of *Arce Polymers Private Limited v. M/s. Alphine Pharmaceuticals Private Limited and others, AIR 2022 SC 545*. The contention of the borrower was that the auction notice did not state that the auction is taking place for the recovery of the secured debt which is violative of the provisions of Rule 8(6)(b). The other contention of the borrower was that the amount of debt is not specified. The Supreme Court found that the defect was only technical and no prejudice is caused to the mortgager inasmuch as in the possession notice which was published in close proximity with the auction notice the amount due was already specified and was known to the mortgager. The Supreme Court held that no injury has been caused to the mortgager and the conditions specified in Rule 8(6)(b) are for the benefit of the auction purchaser.

In our considered view, the statutory provisions which are breached in the case at hand are clearly mandatory and the decision *supra* does not take the case of the secured creditor any further.

d) The next decision pressed in service is *P. Ambujakshi and others v. E.E. Sainudeen, (1997) 11 SCC 455*. The Supreme Court found that the High Court was in error in setting aside the sale merely because the decree-holders are the purchasers, even though the High Court found that there was no material irregularity in the sale. It is not discernible from the facts culled out in the said decision, which appears to have been rendered on the touchstone of the provisions of the CPC and the TP Act, whether the property was purchased by the creditor with the permission of the Court.

e) Mr. R.L. Khapre further relies on *K. Kumara Gupta v. Sri Markendaya and Sri Omkareswara Swamy Temple and others, AIR 2022 SC 1220*. The broad facts which were considered are that the auction was conducted in the year 1998 and the highest bid was of Rs.13,01,000/- (Rupees Thirteen Lac One Thousand) per acre as against the expected price of Rs.4,00,000/- (Rupees Four Lac) per acre. A spate of litigations followed and ultimately the Division Bench of the High Court directed re-auction observing that more than twenty years had lapsed and that the

upset price higher than what had been fixed earlier be fixed. The submission canvassed, and which was accepted by the Supreme Court was that the High Court ought to have appreciated that the petitioner did not participate in the public auction and merely because subsequent to the completion of the public auction and execution of the sale-deed in favour of the highest bidder, a person expresses willingness to pay a higher amount, the auction and the sale-deed could not have been nullified. While we are respectfully bound by the articulation in the said decision, on facts the said decision has no relevance.

f) *Anil Kumar Srivastava v. State of U.P. and another, AIR 2004 SC 4299* is cited in support of the submission that the concept of reserve price is not synonymous with the valuation of the property.

g) *R. Sai Bharathi v. J. Jayalalitha and others, AIR 2004 SC 692*, which decision is rendered in the context of the provisions of the Prevention of Corruption Act, is cited in support of the submission that unless the tender process is vitiated, the price quoted by the highest bidder is to be taken as the market

value.

h) *Samir K. Shah and another v. Union of India and another, (2005) 10 SCC 134* holds that the debtor is not entitled to any opportunity of being heard before the valuation is made and the reserve price is fixed.

i) *Valji Khimji and Company v. Official Liquidator of Hindustan Nitro Product (Gujarat) Limited and others, (2008) 9 SCC 299* is pressed in service to buttress the submission that once the auction sale is confirmed, certain rights accrue in favour of the auction purchaser and these rights cannot be extinguished except in exceptionable cases such as fraud.

We may notice the broad facts in the said decision. Hindustan Nitro Product (Gujarat) Ltd. was put under liquidation. The Court asked the Official Liquidator to obtain a valuation report. The Official Liquidator valued the assets at Rs.2,55,00,000/- (Rupees Two Crore Fifty Five Lac). The property was put in auction. Several bids were received and opened in the Court and the appellant was the highest bidder.

The Court confirmed the sale. It was only after the confirmation of the sale that M/s Castwell Alloys Ltd. made a higher offer one year after the confirmation. The Company Judge recalled the order of confirmation of sale and the Division Bench of the High Court dismissed the appeal. It is in these glaring facts that the Supreme Court observes thus :

“28. If it is held that every confirmed sale can be set aside the result would be that no auction-sale will ever be complete because always somebody can come after the auction or its confirmation offering a higher amount. It could have been a different matter if the auction had been held without adequate publicity in well-known newspapers having wide circulation, but where the auction-sale was done after wide publicity, then setting aside the sale after its confirmation will create huge problems. When an auction sale is advertised in well-known newspapers having wide circulation, all eligible persons can come and bid for the same, and they are themselves to be blamed if they do not come forward to bid at the time of the auction. They cannot ordinarily later on be allowed after the bidding (or confirmation) is over to offer a higher price. Of course, the situation may be different if an auction-sale is finalized say for Rs.1 crore, and subsequently somebody turns up offering Rs.

10 crores. In this situation it is possible to infer that there was some fraud because if somebody subsequently offers 10 crores, then an inference can be drawn that an attempt had been made to acquire that property/asset at a grossly inadequate price. This situation itself may indicate fraud or some collusion. However, if the price offered after the auction is over which is only a little over the auction price, that cannot by itself suggest that any fraud has been done.”

The Supreme Court, however, emphasized that auctions are of two types, (1) where the auction is not subject to subsequent confirmation, and (2) where the auction is subject to subsequent confirmation by some authority after the auction is held. It is in the context of the latter cases that the Supreme Court observes thus :

“29. In the present case we are satisfied that there is no fraud in the auction sale. It may be mentioned that auctions are of two types - (1) where the auction is not subject to subsequent confirmation and (2) where the auction is subject to subsequent confirmation by some authority after the auction is held.

30. In the first case mentioned above, i.e. where the auction is not subject to confirmation by any authority,

the auction is complete on the fall of the hammer, and certain rights accrue in favour of the auction-purchaser. However, where the auction is subject to subsequent confirmation by some authority (under a statute or terms of the auction) the auction is not complete and no rights accrue until the sale is confirmed by the said authority. Once, however, the sale is confirmed by that authority, certain rights accrue in favour of the auction-purchaser, and these rights cannot be extinguished except in exceptional cases such as fraud.

31. In the present case, the auction having been confirmed on 30.7.2003 by the Court it cannot be set aside unless some fraud or collusion has been proved. We are satisfied that no fraud or collusion has been established by any one in this case.”

j) Mr. R.L. Khapre then relies on the decision in ***Pegasus Assets Reconstruction P. Ltd. v. M/s. Haryana Concast Limited and Anr., AIR 2016 SC 494.*** The issue which fell for consideration is formulated by the Supreme Court thus -

“A common issue of law: Whether a Company Court, directly or through an Official Liquidator, can wield any control in respect of sale of a secured asset by a secured creditor in exercise of powers available to such creditor under the Securitization and Reconstruction of Financial

Assets and Enforcement of Security Interest Act, 2002 (for brevity ‘the SARFAESI Act’), arises in all these matters which have been heard together and shall be governed by this common judgment.”

The secured asset of Haryana Concast Limited was subject to auction by Pegasus Assets Reconstruction Private Limited (Pegasus) in association and collaboration with the Official Liquidator as per the order of the Company Judge. The Company Judge confirmed the sale in favour of M/s. Venus Realcon Pvt. Ltd. A Company Appeal and a Public Interest Litigation were filed which were dismissed by the Division Bench. It was argued in the Supreme Court that the property was worth Rs.100,00,00,000/- (Rupees Hundred Crore) and the sale was confirmed in favour of M/s. Venus Realcon Pvt. Ltd. for Rs.32,00,00,000/- (Rupees Thirty Two Crore). It was in the context of these broad facts that the Supreme Court observes thus:

“30. Since the larger issue arising out of the conflicting judgments of Punjab and Haryana High Court and Delhi High Court has already been addressed by us, the case of Mr. Rajaliwala requires adjudication, mostly on facts as to whether the sale confirmed by the Company Judge and approved by the Division Bench in favour of M/s.

Venus Realcon requires any interference. It is not at all necessary to go into the facts which preceded the sale in favour of M/s Venus Realcon for Rs.32 crores which till date stands confirmed. It is against confirmation of sale that Mr. Rajaliwala has preferred appeal as well as a PIL on the ground that the consideration money does not reflect the correct value of the secured assets, i.e., the land sold to M/s. Venus Realcon. In order to substantiate this claim, Mr. Rajaliwala was granted an opportunity by the Division Bench to find out a higher bid. One M/s. ACHASTES Promoters Private Limited through an application in Company Appeal No. 10/2010 claimed to offer a bid of Rs.33 crores but later withdrew the same. Thereafter, another buyer made an offer of Rs.37 crores but tendered a meagre amount of Rs.1 crore only before the Division Bench. On these facts the Division Bench dismissed company appeal on 23.9.2010. As a consequence, the PIL was also dismissed on the same date. In this Court, the petitioner claimed that the property was worth hundred of crores but ultimately petitioner persuaded another entity M/s. Himalayan Infra Projects Private Limited to offer a higher bid. This company was allowed to intervene and be impleaded, and it deposited 10 crores in January, 2011 and Rs. 40 crores in April, 2011. That money is lying in deposit in this Court.

31. The argument on behalf of Mr. Rajaliwala and the intervener Himalayan Infra Projects Private Limited is that this Court should take a practical view and allow the offer of Rs.50 crores in comparison to Rs.32 crores deposited by the auction purchaser. In reply, on behalf of Venus Realcon-respondent No. 3, it was pointed out that Mr. Rajaliwala is himself a property dealer and a PIL at his instance, in this matter, does not deserve any consideration for lack of good faith, in view of Judgment in the case of [Arun Kumar Agrawal vs. Union of India](#), 2014 (2) SCC 609. It was pointed out from materials on record that the valuation of property has been changing from 2002 when it was estimated to be Rs.10.13 crores. In January 2010 its market value was around Rs.24-25 crores and the distress value was Rs.18-20 crores approximately as per two different valuation reports. The valuation of Rs.75 crores approximately in 2008 was unrealistic, solely on the basis of oral communication from the Collector said to be based upon valuation for commercial plot and not for an industrial plot. It is pointed out that one bid in 2005 by M/s. Radha Raman Builders and Developers Private Limited for Rs.29 crores approximately for a larger plot than the actual land, could not materialize. The first offer by M/s. Venus Realcon on 9.4.2010 was Rs.26 crores which on negotiation was raised to Rs.26.50 crores. Subsequently on allegations made by Mr. Rajaliwala the Company

Judge on 13.5.2010 held an open bid in Court, wherein M/s. Venus Realcon raised its bid to Rs.32 crores. The Court then ordered for fresh advertisement pursuant to which no bidder, including Mr. Rajaliwala offered more than Rs.32 crores. Hence the Company Court confirmed the sale in favour of M/s. Venus Realcon for Rs.32 crores but it was made subject to Special Leave Petitions filed by Pegasus and HSIIDC.

32. On considering the submissions of parties, we find that the sale confirmed in favour of M/s. Venus Realcon for Rs.32 crores does not require any interference particularly at the instance of Petitioner-Vinod Rajaliwala. There was no illegality or irregularity established against the conduct of auction and once it is found that the offer of Rs.32 crores was a fair offer in a competitive bid conducted fairly and the offer has been accepted and the sale confirmed, it would not be proper for this court to undermine the value of such auction sale conducted not only by the secured creditor but also by the Official Liquidator who was permitted to be associated with the whole process of finding out of valuation as well as the conduct of sale. M/s. Venus Realcon has rightly placed reliance upon the judgments of this court in the case of Valji Khimji & Co. vs. Official Liquidator of Hindustan Nitro Product (Gujarat) Ltd. 2008(9) SCC 299 : (AIR 2009 SC (Supp) 776 : 2008 (9)

SCW 5828) and Vedica Procon Private Limited vs. Balleshwar Greens P. Ltd., 2015(8) SCALE 713 : (AIR 2015 SC 3103 : 2015 AIR SCW 4786). In Valji Khimji, the law was enunciated in Paragraph 28 (Paras 31-33 of AIR (Supp) in the following words:

“If it is held that every confirmed sale can be set aside the result would be that no auction-sale will ever be complete because always somebody can come after the auction or its confirmation offering a higher amount. It could have been a different matter if the auction had been held without adequate publicity in well-known newspapers having wide circulation, but where the auction-sale was done after wide publicity, then setting aside the sale after its confirmation will create huge problems. When an auction- sale is advertised in well-known newspapers having wide circulation, all eligible persons can come and bid for the same, and they are themselves to be blamed if they do not come forward to bid at the time of the auction. They cannot ordinarily later on be allowed after the bidding (or confirmation) is over to offer a higher price. Of course, the situation may be different if an auction-sale is finalized, say for Rs.1 crore, and subsequently somebody turns up offering Rs.10 crores. In this situation it is possible to infer that there was some fraud because if somebody subsequently offers Rs.10 crores, then an inference can be drawn that

an attempt had been made to acquire that property/asset at a grossly inadequate price. This situation itself may indicate fraud or some collusion. However, if the price offered after the auction is over which is only a little over the auction price, that cannot by itself suggest that any fraud has been done.”

k) We have no hesitation in accepting Mr. R.L. Khapre's submission that an auction sale, particularly which is subject to confirmation and is confirmed, cannot be set aside merely because there is a higher offer at a subsequent stage. However, in the present case, the auction sale is not challenged on the ground that at a later stage there was a higher offer. The auction sale is assailed on the ground that there is breach of mandatory provisions of law.

l) Mr. R.L. Khapre would then invite our attention to the order dated 27-4-2017 in ***Securities and Exchange Board of India v. Sahara India Real Estate Corporation Limited and Others, (2017) 15 SCC 523***, in an endeavour to demonstrate that the distress value is indeed a relevant factor. Rather than supporting the submission of Mr. R.L. Khapre, the summary which is reproduced in paragraph 4 of the said order records that the

property is valued at ready reckoner rate. The next column is the fair market value after taking discounting factor for land within Aamby Valley, the third column is realizable value at 90% of the fair market value and the last column is the distress value which is at 80% of the fair market value. The chart is self speaking and we need not dilate on the said aspect any further.

10. In view of the discussion supra, the judgments and orders dated 25-7-2008 passed in S.A. 13/2008 by the Debt Recovery Tribunal, Nagpur and dated 30-6-2010 passed in Appeal 174/2008 by the Debt Recovery Appellate Tribunal, Mumbai are upheld to the extent the petitioner-Bank is directed to obtain proper valuation report of the secured assets and to conduct fresh auction.

11. The direction that the objection of the borrower be decided, is quashed. It is clarified that the secured creditor shall be entitled to participate in the auction only if the condition stipulated in Section 13(5-A) of the SARFAESI Act stands satisfied.

12. Rule is made absolute in the aforestated terms with no order as to costs.

(Mr. M.W. Chandwani, J.)

(Rohit B. Deo, J.)

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