

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

WPA No. 12929 of 2024

**G. R. Associates and others
Vs
Reserve Bank of India and others**

For the petitioners	:	Mr. Jaydip Kar, Mr. Krishnaraj Thakker, Mr. Siddhartha Banerjee, Mr. Anindya Chowdhury
For the respondent nos. 3 to 5	:	Mr. Ranojit Chowdhury, Mr. Sudipto Chowdhury, Ms. Aparupa Chakraborty, Mr. Purnendu Modak
For the respondent no. 6:	:	Mr. Mainak Bose, Mr. Sanwal Tibrewal Ms. Swastika Ray
For the respondent no. 7:	:	Mr. Debashis Karmakar, Mr. Soumitra Ganguly, Mr. Arya Nandi, Mr. S. Ojha, Mr. Parikshit Lakhotia
Hearing concluded on	:	13.05.2024
Judgment on	:	22.05.2024

Sabyasachi Bhattacharyya, J:-

1. The petitioners have challenged a request for bid for sale of Non Performing Assets (NPAs) to Asset Reconstruction Companies (ARCs)/NBFCs/FIs/Bank dated January 19, 2024 and consequential action.

- 2.** The facts, in brief, are that the Union Bank of India through its authorized officer transferred its NPA accounts to respondent no. 6, an Asset Reconstruction Company(ARC) within the purview of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002. The petitioners contend that they had given an offer to the Bank by way of a private treaty to purchase the secured assets at a price higher than the respondent no. 6 and, as such, in order to ensure the highest benefit of the Bank, which deals with public money, the petitioners' offer ought to have been accepted.
- 3.** On several occasions, it is argued, the petitioner sought to revise its bid higher but those were thwarted by the Bank every time without giving any rhyme or reason. The petitioner hits at the alleged lack of transparency in such refusals. Learned senior counsel appearing for the petitioners argues that the purpose of auction sale is to fetch the highest value by the property concerned. Since the petitioners offered the highest value, although by private treaty, the same had to be accepted over the lesser bid of the respondent no. 6.
- 4.** Learned senior counsel places strong reliance on Clause 8(5) of the Security Interest (Enforcement) Rules, 2002 (for short, "the 2002 Rules"). Clause 8 deals with sale of immovable secured assets in pursuance of measures taken under Section 13(4) of the SARFAESI Act. Four methods of transfer of immovable secured assets have been envisaged therein, which are as follows:

- (a) by obtaining quotations from persons dealing with similar secured assets or otherwise interested in buying such assets; or
- (b) by inviting tenders from the public; or
- (c) by holding public auction including through e-auction mode; or
- (d) by private treaty.

5. It is argued that the sequence in which the modes have been provided in the Rules is not indicative of the order of priority and as such operate on a parallel footing. Hence, neither of the clauses have precedence over the other in order of priority. The private treaty offered by the petitioners was on an equal footing with the quotations sought to be obtained from the ARCs.
6. Learned senior counsel appearing for the petitioners argues that the transfer which has been effected in favour of respondent no. 6 was under Clause (a) of Rule 8(5) which could not have any preference over Clause (d).
7. Learned senior counsel cites *Ram Kishun and others v. State of Uttar Pradesh and others*, reported at (2012) 11 SCC 511 where the Supreme Court held that Financial Institutions (FIs) are not property dealers and cannot dispose of secured assets in an unreasonable or arbitrary manner in flagrant violation of statutory provisions.
8. Learned senior counsel next cites *Karnataka State Industrial Investment & Development Corpn. Ltd. v. Cavalet India Ltd. and others*, reported at (2005) 4 SCC 456, where the concept of a sale of public property to obtain the best price was stressed. It was held that public auction is not the only mode but negotiations are also permissible in

such sales. Reasonableness, it was held by the Supreme Court, is to be tested against the dominant consideration of best price.

9. It is argued that such tests have been overlooked in the present case.
10. Learned counsel appearing for the Bank cites *Bijnor Urban Cooperative Bank Ltd., Bijnor and others v. Meenal Agarwal and others*, reported at (2023) 2 SCC 805, where it was held that the Bank is to make a conscious decision regarding settlement of dues and cannot be compelled to accept a lesser One-Time Settlement (OTS) despite the pendency of recovery proceedings. In the said case, although there were seven years of failed attempts to transfer the property, the Supreme Court held that the discretion lay with the Bank to proceed with recovery proceedings and not to accept any OTS Schemes.
11. Learned senior counsel for the respondent no. 6 refutes the contentions made by the petitioners and argues that assignment of debt in favour of the ARCs stands on a different footing than sale of secured assets. Thus, the argument of violation of Article 14 of the Constitution made by the petitioner is not acceptable, the yardsticks being different in the case of ARCs and normal purchasers of secured assets.
12. Learned counsel highlights that the assignment of debt (NPA accounts) stands on an entirely different footing than the sale of a secured asset under the SARFAESI Act.
13. Further, learned senior appearing for the respondent no. 6 hits at the locus standi of the petitioners, who chose not to participate in the auction sale process. Only after the same was concluded, the

petitioners took a chance and made a bid. It is argued that as such, the writ petition at the behest of the petitioners ought to be dismissed.

14. Thirdly, it is argued that on the date of the offer by respondent no. 6, its offer was higher than that of the petitioner. Whereas the respondent no. 6 stuck to its offer of Rs. 70.54 crore from the inception, the petitioner initially had given an offer of Rs. 70.01 crore which was a lesser amount. Approval for the assignment in favour of the petitioner was granted on February 2, 2024 and the higher offer of the petitioner came only a day thereafter.
15. It was only in continuation of the approval process, which had commenced earlier, that the concluded contract between respondent no. 6 and the Bank was reached, followed by the subsequent registration of the assignment deed on March 6, 2024.
16. Learned senior counsel for the respondent no. 6 cites *Director of Settlements, A.P. and others v. M.R. Apparao and another*, reported at (2002) 4 SCC 638, where the Supreme Court propounded that a legal right is infringed where there is an existence of a legal right and a corresponding duty of the State. In the absence of such ingredients, no writ petition is maintainable. It is argued that the petitioners in the present case do not have any legal right in the first place to have a sale in their favour by compelling the Bank to accept their offer. Thus, there arises no question of infringement of such a non-existent right.
17. The respondent no. 6 also cites *Valji Khimji and Co. v. Official Liquidator of Hindustan Nitro Product (Gujarat) Ltd. and others*,

reported at (2008) 9 SCC 299, where it was held by the Supreme Court that in case of an auction sale after adequate publicity, no objection can be entertained postconfirmation of the sale.

18. Heard learned counsel for the parties.
19. The petitioners' primary argument is based on violation of Article 14 of the Constitution of India in the respondent-Bank adopting a discriminatory approach against the petitioners and in favour of respondent no. 6.
20. In order to apply egalitarian principles, it has to be ascertained first whether the two contenders stand on an equal footing otherwise, since there cannot be any equality between unequals.
21. The concept of ARCs has been introduced in the SARFAESI Act by the August 16, 2016 Amendment to the said Act. Section 5 of the Act provides for acquisition of rights or interest in 'financial assets', *inter alia* by ARCs.
22. The definition of "financial asset" is found in Section 2(1)(l) of the SARFAESI Act which is as follows:

"2(1)(l) "financial asset" means debt or receivables and includes—

- (i) a claim to any debt or receivables or part thereof, whether secured or unsecured; or*
- (ii) any debt or receivables secured by, mortgage of, or charge on, immovable property; or*
- (iii) a mortgage, charge, hypothecation or pledge of movable property; or*
- (iv) any right or interest in the security, whether full or part underlying such debt or receivables; or*
- (v) any beneficial interest in property, whether movable or immovable, or in such debt, receivables, whether such interest is existing, future, accruing, conditional or contingent; or*
- (va) any beneficial right, title or interest in any tangible asset given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of such asset or an obligation incurred or credit*

otherwise provided to enable the borrower to acquire such tangible asset; or

(vb) any right, title or interest on any intangible asset or licence or assignment of such intangible asset, which secures the obligation to pay any unpaid portion of the purchase price of such intangible asset or an obligation incurred or credit otherwise extended to enable the borrower to acquire such intangible asset or obtain licence of the intangible asset; or

(vi) any financial assistance;”

- 23.** Thus, a financial asset predominantly means debt or receivables, although it includes, *inter alia*, any right or interest in the security, whether full or part, underlying such debt or receivables and any beneficial interest in the property and/or beneficial right, title and interest in any tangible asset pertaining thereto. Thus, ‘financial asset’ is a concept far more comprehensive than ‘secured asset’.
- 24.** The term “secured asset” as defined under Section 2(1)(zc) of the Act is simply the property on which security interest is created.
- 25.** Hence, ‘financial asset’ includes secured assets and all right, title and interest thereto but extends much further, covering the debt as a whole.
- 26.** Hence, acquisition of a financial asset and rights or interest therein by an ARC or other entities mentioned in Section 5 envisages the transfer of the entire liability of the transferor-Bank, in respect not only of the assets but also regarding recovery of the debt.
- 27.** As opposed thereto, Section 13 of the Act contemplates enforcement of security interest only. “Security interest” in terms of Section 2(1)(zf) means right, title or interest of any kind other than those specified in Section 31 upon property created in favour of any secured creditor,

including mortgage, charge, hypothecation, assignment or any right, title or interest in the tangible assets, etc. Thus, on the transfer of a secured asset, the liability of recovery is still retained by the transferor-Bank. The transferee acquires right, title or interest in the secured asset, generally on “as is where is” basis.

- 28.** Section 31 merely provides the exceptions where the Act does not apply.
- 29.** Coming back to Section 13(4) of the SARFAESI Act, the same envisages enforcement of security interest in the secured assets. Sub-section (4) of Section 13 contemplates the measures to be taken by a secured creditor to recover secured debt. All the provisions therein pertain to secured assets and interest therein.
- 30.** Rule 8 of the 2002 Rules merely provides the modalities of steps taken in furtherance of the measures taken under Section 13(4) and is, as such, circumscribed by the provisions of Section 13(4). Even the caption of Rule 8 is “Sale of immovable secured assets”. Hence, the entire provisions of Rule 8 pertain to the sale of immovable secured assets and do not have any connection with the assignment of the debt with its ancillaries, which forms the financial asset.
- 31.** Rule 8(5) contains the four methods in which the whole or any part of the immovable secured asset may be transferred.
- 32.** One of those, enumerated in Clause (d), is by private treaty.
- 33.** The endeavour of the petitioners throughout the arguments has been to impress upon the court that the impugned transfer to the respondent no. 6-ARC was under Clause (a) of Rule 8(5). The said

clause provides, as a method of transfer, obtaining quotations from “the persons dealing with similar secured assets or otherwise interested in buying such assets”. The persons spoken of therein are not necessarily restricted to ARCs, who are specifically equipped to undertake recovery proceedings *in lieu* of the Bank upon acquisition of financial assets, but the clause hints at persons who deal with assets similar to the secured assets which come up for transfer and/or who are otherwise interested in buying such encumbered/unencumbered assets.

- 34.** The ARCs may or may not fall within the purview of such persons; however, Clause (a) of Rule 8(5) cannot be equated with the assignment of financial assets but is confined to secured assets.
- 35.** It is relevant to note that Section 5 is preceded by a generic non-obstante clause, whereas the non-obstante clause in Section 13 only refers to Sections 69 and 69A of the Transfer of Property Act which operate on a different footing.
- 36.** The non-obstante clause in Section 5(1) covers anything contained in any agreement or any other law for the time being in force, thus having a plenary effect. The acquisition of rights or interest in financial assets by ARCs do not stipulate any restriction to the effect that the said acquisition has to be in pursuance of any recovery proceeding under Section 13. In fact, acquisition of the financial assets under Section 5 has a much wider connotation than measures taken under Section 13(4), the latter being restricted to secured assets only.

- 37.** From the transferor-Bank's perspective, transfer of financial assets is of paramount importance, since by such transfer, the Bank/financial institution is not only relieved from the necessary paraphernalia which follows a transfer of secured assets but is also relieved of the obligation of further recovery of debts, which blocks huge resources of the Bank.
- 38.** Even after measures are taken under Section 13(4) read with Rule 8(5) of the Act and Rules respectively, it remains for the Bank to adjust the recovered amount with the balance of the debt, thereafter either refunding it to the borrower or taking further steps if the consideration amount on such transfer falls short of the debt. Such further processes do not remain for the bank to pursue at all, in the event the entire financial asset is transferred in favour of the ARCs, lock, stock and barrel.
- 39.** Hence, not only from a statutory view-point but also from the perspective of the transferor-Bank/FIs, an acquisition under Section 5 by ARC of the financial assets stands on a different paradigm than a much lesser transfer under Section 13(4), read with Rule 8(5). Hence, the argument of discrimination or contravention of Article 14 of the Constitution cannot arise at all, since there cannot be any comparison between unequals to claim equality.
- 40.** Having held that the process of acquisition under Section 5 is independent of Section 13(4), read with Rule 8, the writ court cannot issue a direction on the transferor-Bank to adopt one of the modes over the other.

41. The second question which needs to be answered is on the issue of transparency and fetching best prices.
42. In the facts of the present case, the invitation asking for bids for transfer of the NPA accounts issued to ARCs and other similar entities was intended to assign the entire debt.
43. The said invitation was issued on January 19, 2024, whereas the intended e-auction notice was published on January 26, 2024 and the e-auction of the secured assets was to be held on February 13, 2024.
44. Respondent no. 6 gave its offer to acquire the NPA accounts which was approved by the Bank on February 22, 2024. In the meantime, despite the e-auction having been held on February 13, 2024, the petitioners chose not to participate therein.
45. Only after taking a chance, after conclusion of the said process, the petitioners first gave their offer in writing to the respondent-Bank on February 19, 2024. Whereas the first and consistent offer of the respondent no. 6, which was already approved on February 22, 2024, was Rs. 70.54 crore, the first offer of the petitioners given on February 19, 2024 was Rs. 70.01 crore which was considerably less than that of the respondent no. 6. Even in their e-mail dated February 21, 2024, the petitioners stuck to the same offer of Rs. 70.01 crore. In their e-mail dated February 22, 2024, the petitioners merely expressed willingness to revise their previous offer, but did not specifically mention any higher amount.
46. In the circumstances, even the possibility of the petitioners having insider information cannot be ruled out as the approval of the

respondent no. 6's offer otherwise would not even be available to the petitioner. In any event, even without going into such aspect of the matter, the fact remains that only after the higher offer being made by the respondent no. 6 and the same being approved on February 22, 2024, for the first time on February 23, 2024, the petitioners actually gave an offer of Rs. 71.01 crore.

- 47.** The Bank, naturally, refused to accept such offer since the previous offers of the petitioner were much less than that of the respondent no. 6 and when the increased offer came, the offer of the respondent no. 6 had obtained a seal of approval, which later culminated in a deed of assignment being registered in favour of respondent no. 6 on March 6, 2024.
- 48.** The petitioner has placed heavy reliance on *Ram Kishun (supra)* to argue that the financial institutions are not property dealers and cannot dispose of secured assets in unreasonable or arbitrary manner in flagrant violation of statutory provisions.
- 49.** For starters, there is no violation of any statutory provision involved in the present case; also, there is nothing arbitrary or unreasonable in the manner in which the assignment was conducted by the Bank. All norms of transparency and reasonableness were strictly adhered to by the Bank by making public announcements inviting bids for transfer of the NPA accounts. Thus, the ratio laid down in the above judgment is not attracted to the present context at all.
- 50.** The next issue urged by the petitioners is that of best price. The said argument is self-defeating in view of the above discussions, as the

offer of the respondent no. 6 was higher at the relevant juncture than that of the petitioners till the deal was sealed with respondent no. 6.

51. The ratio laid down in *Karnataka State Industrial Investment (supra)* was merely that reasonableness is to be tested against the dominant consideration of best price and public auction can also give way to negotiations.
52. Both the said propositions hold true in their own field but do not confer the right on the Banks or financial institutions to upset concluded contracts already finalized with an offeror. The last point of negotiations is concluded when a deal is actually struck with a particular offeror. After the deal is concluded, there cannot be any further negotiation or occasion to invite further prices. Otherwise, it would be an infinite exercise in search of the El Dorado of a best price scenario which would never fructify into a concluded transfer on pragmatic considerations.
53. In fact, such concept was precisely iterated by the Supreme Court in *Valji Khimji (supra)*, where it was held that if an auction sale is held after adequate publicity, no objection can be entertained postconfirmation of the sale.
54. The decision in *Bijnor Urban Cooperative (supra)* also makes it abundantly clear that the Bank has the right to make a conscious decision and cannot be compelled to accept a particular offer even if there was a huge delay in the process of recovery (seven years in the said case). Although in the said case the consideration was acceptance of an OTS, there is no reason why the same principle

should not also apply to an offer given for a private treaty by a third party.

55. Even on the 'best price' count, in terms of the ratio laid down in *Karnataka State Industrial Investment (supra)*, as held earlier, there cannot be any comparison between unequal offers since the offer of the ARC to acquire the entire financial asset is on a much higher footing and preferable than the transfer of the secured assets.
56. Even on the question of price, as extensively discussed in the present judgment, the petitioner made a higher offer much later in the day, after the deal was sealed with respondent no. 6. The initial offer of the petitioner till the approval of the assignment in favour of respondent no. 6 was all along Rs. 70.01 crore which was much less than the offer of Rs. 70.54 crore for acquiring the entire financial asset given by the respondent no. 6.
57. We have also to keep in mind that there were about 22 previous failed attempts by the Bank to transfer the assets. The petitioners chose not to participate in any of those, including the last auction sale and, thus, cannot claim a premium for being an opportunist, coming up conveniently with a subsequent private treaty offer after conclusion of the auction sale and the invitation for bids to acquire the NPA accounts.
58. It was entirely within the discretion of the Bank to choose one of the two offers, and in the facts, to choose the better of the two which was given by respondent no. 6.

- 59.** Thus, this court does not find any illegality, arbitrariness or unreasonableness in the action of the Bank in accepting the offer of the respondent no. 6 to acquire the financial assets over that of the petitioner to have a transfer by private treaty of only the secured assets.
- 60.** In such view of the matter, WPA No. 12929 of 2024 is dismissed on contest without, however, any order as to costs.
- 61.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)