

Setting aside of auction sale under SARFAESI Act: DRAT KOLKATA

Hindusthan Agencies

...Appellant

Tarak Nath Das

...Respondent

Case No: Appeal No. 26 of 2020

Date of Judgement: 5th October, 2023

Judges:

Anil Kumar Srivastava, J- Chairperson

For Appellant: Mr. Rahul Poddar, Mr. Pranit Bag, Advocates.

For Respondent: Mr. Souritra Ganguly, Ms. Aparna Das, Mr. Pankaj Kumar Mukherjee, Mr. A.K. Dhandhanian, Mr. Soumo Mukherjee, Advocates.

Facts:

Respondent No. 1, Taraknath Das availed a cash credit facility of Rs. 6 crores from Appellant Bank which was enhanced to Rs. 8 crores. The amount was not repaid and loan account was classified as NPA. Bank initiated SARFAESI action and issued notices under Sections 13(2) and 13(4). These were challenged by Taraknath Das before the DRT Cuttack by filing an application. Bank issued sale notice dated 5th May 2018 for the secured assets consisting of land and building (Cinema Hall – Tanmay Talkies) belonging to the guarantor Dinesh Chandra Das. Appellant, Hindusthan Agencies purchased the property for Rs. 3.35 crores in the auction held on 23rd May 2018. DRT passed interim orders directing the Bank not to confirm the sale subject to Taraknath Das depositing Rs. 1.5 crores. He failed to comply. Sale certificate was issued on 31st July 2018 in favour of Hindusthan Agencies. Sale deed

was executed on 6th August 2018. Ashok Kumar Agarwala, Respondent No. 5 offered to purchase the property for Rs. 5.25 crores from Taraknath Das. He reduced the offer to Rs. 4 crores later. DRT allowed the amendment application regarding undervaluation of property. DRT finally disposed of the SARFAESI Application directing the Bank and Hindusthan Agencies to register the property in favour of Ashok Kumar Agarwala if Taraknath Das deposits Rs. 2 crores within 1 month.

Arguments:

For Hindusthan Agencies:

They are bonafide purchasers for value. Deposited bid amount as per rules. Sale deed executed in their favour which conferred ownership rights. Plea of undervaluation was not taken initially but added later by way of amendment. DRT has not held property to be undervalued. Sale certificate issued and sale deed executed. Neither fraud nor misrepresentation alleged or proved which could vitiate the sale. Notice u/s 13(2) not challenged in pleadings. DRT exceeded jurisdiction in holding it illegal.

For Bank:

SARFAESI action as per law. Auction conducted as per rules. Property not undervalued. Reserve price fixed properly on valuers report. No fraud or collusion proved. Impugned order suffers from material illegalities.

For Borrower and Ashok Kumar Agarwala:

Steps under SARFAESI Act were pending consideration of the DRT. Lis Pendens under S. 52 T.P. Act applicable. Amendment regarding undervaluation allowed and attained finality. Cannot be challenged now. DRT order directing Ashok Kumar's offer to be considered not challenged. Binding on parties.

Sections and Laws referred:

*Sec 13(2), 13(3A), 13(4), 13(8), 17 and 35 of SARFAESI Act
Sec 52 and 60 of Transfer of Property Act
Sec 17A of RDBFI Act*

Court's Observations and Conclusions:

Sale notice published in newspaper as per rules. Value properly assessed in Bank's valuation report based on relevant factors. Report filed by borrower vague without specifying basis for property rate. Hence no undervaluation of property. Sec 52 T.P Act not applicable when action taken under SARFAESI Act which has overriding effect under Sec 35. Reliance on Lis Pendens misplaced. Right to challenge notice u/s 13(2) not available to borrower in view of SC decision in Standard Chartered Bank v. V. Noble Kumar. Rejection of representation does not allow filing application u/s 17. Sec 13(3A) introduced after SC decision in Mardia Chemicals requiring communication of reasons for rejecting objections of borrower. This does not permit borrower to challenge reasons and does not amount to right to hearing. In terms of amended Sec 13(8) right of redemption extinguished once borrower fails to pay entire dues before publication of sale notice. CELIR LLP judgment applied. Settling the matter by accepting offer of Ashok Kumar Agarwala, an unsuccessful auction bidder, would frustrate the auction especially when there is no plea of fraud or collusion. Sanctity of auction needs to be protected. Judgments in K. Kumara Gupta and Eva Agro Feeds Invoked. Mere expectation of better price cannot justify setting aside an otherwise valid auction. Discretion of liquidator not absolute. DRT swayed by equity which cannot override law.

Orders:

Appeals allowed. Impugned order set aside.

SARFAESI Application dismissed.

Refund of Rs. 2 crores directed to Ashok Kumar Agarwala.

I.A of Dinesh Chandra Das for impleadment dismissed.

Case Laws Referred:

No case laws were referred in the order.

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Court

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Full Text of Judgment:

1.Both these appeals have arisen against one common judgment and order

passed by Learned DRT, Cuttack in SARFAESI Application No. 37 of 2018 (Taraknath Das -vs- Bank of Baroda & Others) on 29th February, 2020 hence both the appeals are being disposed of by a common judgment.

2. A SARFAESI Application, under Section 17 of the SARFAESI Act, 2002 (hereinafter referred to as 'the Act'), was filed by the Respondent No.1 herein, Taraknath Das, challenging the Notices under Sections 13 (2) and 13 (4) of the Act.

3. As per the pleadings of the parties, Respondent No. 1, Taraknath Das, availed Cash Credit Facility of Rs.6.00 crore, which was subsequently enhanced to Rs.8.00 crore, from Bank of Baroda, Respondents No. 2, 3 and 4 herein, but the amount was not repaid. Loan account was classified as N.P.A. SARFAESI action was initiated by the Bank. Notices under Section 13 (2) and 13 (4) of the Act were issued which were challenged by the Borrower before the Learned DRT, Cuttack by filing SARFAESI Application No. 37 of 2018.

4. E-Auction sale notice of the secured assets consisting of land and building (Cinema Hall – Tanmay Talkies) in the name of Shri Dinesh Chandra Das, situated in Mouza – Pichhili Ghati, Khata No. 153/37, Plot No. 254, Rairangpur, District – Mayurbhanj, Odisha having an area of 66 decimals was issued by the Bank on 5th May, 2018.

5. Appellant herein, i.e. Hindusthan Agencies, participated in the auction and was declared successful bidder who paid the entire consideration and became rightful owner of the property.

6. Successful Auction Purchaser, i.e., Hindusthan Agencies, moved a Misc. Application, being M.A. 977 of 2028 in the SARFAESI Application which was allowed by the Learned DRT and was impleaded as a Respondent in the SARFAESI proceedings.

7. Vide order dated 22nd May, 2018 passed by Learned DRT, Bank was permitted to conduct the auction but not to confirm without the leave of the Tribunal. Further, SARFAESI Applicant was directed to deposit Rs.1.5 crore on or before 21st June, 2018.

8. On 6th July, 2018 M.A. 782 of 2018 was allowed and the SARFAESI

Applicant was permitted to deposit Rs.1.5 crore in two instalments, i.e. first instalment of Rs.75.00 lac on or before 12th July, 2018 and second instalment of Rs.75.00 lac on or before 19th July, 2018. Vide order dated 19th July, 2018 time was extended to deposit Rs.1.00 crore by 26th July, 2018 which was further extended till 30th July, 2018. Interim order vacated on 30th July, 2018 for non compliance. Sale Certificate in favour of the Purchaser, Hindusthan Agencies, and the order was issued on 31st July, 2018 and Sale Certificate was issued and on 6th August, 2018 Sale Deed was executed. Auction Purchaser was also impleaded as a party in the SARFAESI proceedings on 8th August, 2018. In the meantime, interim order was issued against the Auction Purchaser not to raise any new construction over the property or not to alienate or create third party interest and to maintain status quo.

9. On 29th December, 2018 an amendment application was moved by the Borrower on the ground that the property had been sold at a gross undervalue which was allowed by the Learned DRT vide order dated 29th December, 2018.

10. Respondent No. 5 in Appeal No. 26 of 2020, i.e. Ashok Kumar Agarwala, was also interested in purchasing the property in question who is having a hall in the name of Shanti Palace in the adjoining plot of land. Initially Ashok Kumar Agarwala wanted to purchase the property upto Rs.5.25 crore. He also participated in the auction and offered upto Rs.3.33 lac but could not increase the bid due to technical fault. Property was sold at Rs.3.35,31,000.00 to M/s. Hindusthan Agencies. Initially Respondent No. 5, Ashok Kumar Agarwala, gave an offer to the Borrower for purchasing the property at Rs.5.25 crore but since the building was demolished and some teak trees were cut down by the Auction Purchaser, he reduced the offer to Rs.4.00 crore.

11. Vide order 29th January, 2019, Respondent No. 5, Ashok Kumar Agarwala, was directed to file a detailed affidavit to this effect along with a Demand Draft of Rs.1.00 crore. However, vide order dated 7th February, 2019, Demand Draft of Rs.50.00 lac was deposited.

12. SARFAESI Application was finally disposed of by the Learned DRT

vide judgment and order dated 29th February, 2020 wherein it was held that in order to grant liberty to the Applicant to discharge the loan liability, one month more time was granted to the SARFAESI Applicant, i.e. Taraknath Das, to deposit the balance amount of Rs.2.00 crore with the Respondent Bank and on depositing the amount, Respondent Bank as well as the Auction Purchaser were directed to register the property in favour of Ashok Kumar Agarwala or in favour of the SARFAESI Applicant; in default in payment of Rs.2.00 crore by the SARFAESI Applicant, Auction Purchaser will be at liberty to deal with the property. If the amount of Rs.2.00 crore is deposited by the SARFAESI Applicant, as per the direction of the Learned DRT, Bank will refund the amount of Rs.3,35,31,000.00 with Fixed Deposit Rate of Interest to the Auction Purchaser. All the cost of sale as well as further cost would be deducted from the account of SARFAESI Applicant.

13. It is further ordered that if Rs.2.00 crore is deposited, the SARFAESI action, initiated by the Bank, shall stand set aside on the ground that the property was sold for lesser value and notice under Section 13 (2) of the Act is not a valid notice. Feeling aggrieved with the finding, Auction Purchaser preferred the instant appeal, being Appeal No. 26 of 2020 as well as the Bank preferred Appeal No. 73 of 2022 challenging the judgment and order passed by the Learned DRT. I have heard the Learned Counsel for the parties and perused the record.

14. SARFAESI Application was filed by the Borrower, Taraknath Das. Secured assets (land and building, Cinema Hall, Tanmay Talkies) were in the name of Dinesh Chandra Das, who is the father of Taraknath Das. Initially SARFAESI Application was moved on the ground that notice under Section 13 (4) of the Act is not in accordance with law. Further it was stated in paragraph (vii) of the grounds that SARFAESI Application does not challenge the jurisdiction of the Bank for issuing the impugned notice but non-consideration of application for repayment with interest was unwarranted. Subsequent thereto an amendment was sought for, after the auction sale was conducted, to amend the SARFAESI Application to add a ground for challenge to the effect that the property is sold for lesser value and the auction sale

is bad in law. This amendment was not carried out in the Original SARFAESI Application. Hence, it could not be considered. However, since Learned DRT has recorded a finding on this issue, this issue would also be dealt with in the later part of this judgment. So now, there are two issues which are raised by the SARFAESI Applicant in the SARFAESI Application. If we go through the impugned order, we find that the Learned DRT had also travelled beyond the pleadings of the parties. Learned DRT recorded a finding that the notice, issued under Section 13 (2) of the SARFAESI Act, is bad in law.

15. In the meantime, certain developments took place in the proceedings. One Ashok Kumar Agarwala was introduced as a prospective purchaser initially for an amount of Rs.5.25 lac but subsequently he reduced the amount to Rs.4.00 crore on the pretext that the building has been demolished and some teak trees standing thereat were cut down; accordingly, value of the property had decreased. We have to look into the proceedings undertaken by the Learned DRT on this account.

16. Auction notice was dated 10th February, 2018; published in the newspaper on 10th February, 2018. The Appellant, Hindusthan Agencies, participated in the auction process and was declared as the highest bidder for an amount of Rs.3,35,31,000.00 on 23rd May, 2018. On 22nd May, 2018 on the application of the SARFAESI Applicant Learned DRT issued direction not to confirm the sale subject to deposit of Rs.1.5 crore on or before 21st June, 2018. 25% of the bid amount was deposited by the successful bidder. For further payment of 75% extension of time was sought for which was granted by the Bank till 3rd of August, 2018. On 6th July, 2018 M.A. 782 of 2018 was filed by the Borrower, Taraknath Das, for modification of the order dated 22nd May, 2018, passed in M.A. 594 of 2018, with a prayer for depositing Rs.1.00 crore instead of Rs.1.5 crore in three instalments. Learned DRT directed the Borrower to deposit a sum of Rs.1.5 core in two instalments of Rs.75.00 lac each on 12th July, 2018 and 19th July, 2018. On 19th July, 2018 on the application, M.A. 945 of 2018, time was extended till 26th July, 2018. Rs.10.00 lac was deposited by the Borrower. Again Rs.10.00 lac was deposited on 27th July, 2018. On 30th

July, 2018, M.A. 976 of 2018 was filed by the Borrower challenging the value of the property and for extension of time; wherein Learned DRT rejected the prayer for time and interim order was vacated. Bank was given liberty to proceed in accordance with law. Accordingly, Auction Purchaser, i.e. the Appellant, Hindusthan Agencies, deposited an amount of Rs.1,85,17,000.00 on 30th July, 2018. On 31st July, 2018, Sale Certificate was issued and on 6th August, 2018 Sale Deed was executed.

17. M.A. 977 of 2018 was moved by the Appellant, Hindusthan Agencies, for impleadment which was allowed and Appellant, Hindusthan Agencies, was added as Opposite Party in the SARFAESI proceedings. M.A. 997 of 2018 was filed by the Borrower for acceptance of payment of Rs.1.4 crore which was deposited with the Bank to be invested in a 'No Lien' Account.

18. Application for amendment, being M.A. 1400 of 2018, was filed by the Borrower which was allowed on 19th December, 2018 raising the plea of undervaluation of the property.

19. In the meantime, Ashok Kumar Agarwala, added Respondent in the appeal, was impleaded in the SARFAESI Application who was also interested to purchase the property. He has also participated in the auction proceedings but was an unsuccessful bidder. Auction was finally completed in favour of Hindusthan Agencies for an amount of Rs.3,35,31,000.00. Ashok Kumar Agarwala made a bid for an amount of Rs.3.33 lac, but the same could not be raised by him. Thereafter he offered an amount of Rs.5.25 lac to the Borrower, Taraknath Das. But in the meantime, purchaser demolished the entire Cinema hall building and cut down fifty teak trees, so he reduced the offer to Rs.4.00 crore. It finds place in the order dated 28th February, 2019 of the Learned DRT. In the order dated 29th January, 2019 it is recorded by the Learned DRT that Ashok Kumar Agarwala is ready to take the property for Rs.4.00 crore. Ultimately, SARFAESI Application was disposed of by the Learned DRT by the impugned order.

20. In the appeal, an application being, I.A. Diary No. 121 of 2023, is also moved by one Dinesh Chandra Das, who is father of Taraknath

Das, the SARFAESI Applicant, with a prayer for impleadment as Respondent for affording him an opportunity of hearing on the ground that the secured assets belongs to him which was sold to the Appellant, Hindusthan Agencies, in the auction sale. Applicant, Dinesh Chandra Das, was Guarantor for the advance granted in favour of the Applicant, Taraknath Das. Without issuing any notice under the SARFAESI Act to him, proceedings are drawn by the Bank illegally. He was neither impleaded nor given an opportunity of hearing in the SARFAESI Application hence he may be impleaded as a party.

21. Objections were filed by the Bank alleging that the application is moved with a purpose to delay the proceedings. Sale has been completed. Sale certificate has been issued. Applicant was never a party in the SARFAESI Application. He was well aware of the proceedings but did not make any attempt to appear before the Learned DRT. Application is misconceived and is liable to be dismissed.

22. An attempt is by Sri Dinesh Chandra Das who is father of SARFAESI Applicant, Tarak Nath Das, to scuttle the SARFAESI action initiated by the Bank. He appeared in the appeal for the first time while he was having knowledge of all the proceedings. No challenge to SARFAESI Actions were made by him within the limitation period. Sale has been confirmed. Sale Certificate is also issued. Now his application is devoid of merits and is liable to be dismissed.

23. Learned Counsel for Appellant, Auction Purchaser, would submit that he is a bona fide purchaser for value in the auction conducted by the Bank. He deposited the bid amount in accordance with law. Sale Deed was executed in his favour on 6th August, 2018. Physical possession was also handed over on 24th August, 2018.

24. Learned Counsel for Appellant would further submit that the issue of undervaluation was not initially raised in the SARFAESI Application but was added after amending the SARFAESI Application. Property was not undervalued; rather, value was assessed on the basis of a report of the Valuer. Learned DRT has also not recorded any finding to the effect that the property was undervalued.

25. Learned Counsel for Appellant would further submit that the Sale Certificate has been issued and Sale Deed was also executed. No case of fraud is either pleaded or proved by the SARFAESI Application which can be a ground for setting aside the auction sale. It is further submitted that in the SARFAESI Applicant no plea of illegality of the Notice, under Section 13 (2) of the Act, was taken by the SARFAESI Applicant. Learned DRT travelled beyond the pleadings and exceeded its jurisdiction in arriving at a finding that the Notice under Section 13 (2) of the Act is not valid.

26. Learned Counsel for Respondent Bank would submit that the SARFAESI actions initiated by the Bank were in accordance with law. Auction was conducted in accordance with law. Secured assets were not undervalued. Reserve Price was fixed in accordance with law. No case of fraud has either been pleaded or proved by the SARFAESI Applicant. Learned DRT has recorded a finding against the law.

27. Learned Counsel for Respondent, Ashok Kumar Agarwala, would submit that Notices under Section 13 (2) and 13 (4) of the Act were served upon the Guarantor. All the steps were taken pending SARFAESI Application. Auction sale was conducted. Sale Certificate was issued and Sale Deed was executed pending SARFAESI Application wherein Doctrine of Lis pendens would be applicable. All the actions would be subject to the decision of the SARFAESI Application in accordance with Section 52 of the Transfer of Property Act.

28. Learned Counsel for Respondent Borrower as well as the proposed Auction Purchaser, Ashok Kumar Agarwala, would further submit that the amendment regarding undervaluation of the secured assets was allowed by the Learned DRT which order was not challenged, hence attained finality. Therefore, now the Appellants cannot challenge the order amending the SARFAESI Application and challenge the SARFAESI Appellant regarding undervaluation. It is further submitted that the order dated 20th February, 2019, passed by Learned DRT, was also not challenged wherein the amount deposited by the proposed buyer, Ashok Kumar Agarwala, was accepted by the Learned DRT and was directed to be kept in a Fixed Deposit Account till the disposal of the SARFAESI Application. Permission for purchase of the schedule property was

permitted to be considered at the time of final disposal of the SARFAESI Application. Learned Counsel would submit that this order was also not challenged by the Auction Purchaser or the Bank.

29. Learned Counsel has placed reliance upon the doctrine of Lis pendens and also placed reliance upon a judgment of the Hon'ble Apex Court reported in (2006) 2 SCC 608 (Sanjay Verma -vs- Manik Roy & Others) and (2008) 7 SCC 144 (Usha Sinha -vs- Dina Ram & Others).

30. Admittedly, the proposed buyer, Ashok Kumar Agarwala, participated in the auction proceedings but could not succeed. His last bid was for Rs.3.30 lac. The Auction Purchaser Appellant, M/s. Hindusthan Agencies, is the successful bidder who paid a sum of Rs.3,35,31,000.00. Auction sale was conducted on 23rd May, 2018 while SARFAESI Application was filed on 10th April, 2018. No plea for impleadment of Ashok Kumar Agarwala was made in the SARFAESI Application; even no assertion was made that Ashok Kumar Agarwala is still ready and willing to purchase the property. Auction sale was affirmed on 31st July, 2018 and Sale Deed was executed on 6th August, 2018. No plea is raised regarding any fraud having been played in the auction. Learned Counsel for Appellant as well as the Borrower have placed reliance upon a judgment of the Hon'ble Apex Court in Ram Kishun & Others -vs- State of Uttar Pradesh & Others [(2012) 11 SCC 511]. It was held in paragraph 28 of the judgment that recovery of the public dues must be strictly in accordance with law with the procedure prescribed by law. The liability of a surety is co-extensive with that of the principal debtor. In case there are more than one surety, the liability is to be divided equally among the sureties for unpaid amount of loan. Once the sale has been confirmed it cannot be set aside unless a fundamental procedural error has occurred or sale certificate had been obtained by misrepresentation or fraud.

31. In the present case, admittedly sale certificate was issued and sale deed was executed and registered. There is no plea by the Borrower or the Guarantor, i.e. Dinesh Chandra Das, who moved an application for impleadment in the appeal that any fraud was played or any misrepresentation was made in the auction.

32. Hon'ble Apex Court in Valji Khimji & Company -vs- Official Liquidator of Hindustan Nitro Product (Gujarat) Limited & Others [(2008) 9 SCC 299] held that if it is held that every confirmed sale can be set aside the result would be no auction sale would 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 would create huge problems.

33. No such plea is taken that wide publicity was not made for auction or Auction Notices were not published in two leading newspapers. No plea of fraud was taken. Hence, on these grounds, auction sale cannot be bad or illegal.

34. At this stage, it would be apposite to refer to the judgment of the Hon'ble Apex Court in the matter of Authorised Officer, Indian Overseas Bank -vs- Ashok Saw Mill [(2009) 8 SCC 366] wherein it was held in paragraphs 36 and 37 that:

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

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

be looked into as to whether property was undervalued or the Reserve Price was fixed on a lower side.

35. Reserve price was fixed at Rs.1,52,08,000.00 and the final bid was accepted for an amount of Rs.3,35,31,000.00.

36. In Ram Kishun (supra) the Hon'ble Apex Court has held in paragraph 20 that fixation of the reserve price does not preclude the claimant from adducing proof that the land has been sold for a low price. It was further held in paragraphs 21 and 22 that :

"21. In Desh Bandhu Gupta -vs- N.L. Anand (1994 1 SCC 131) this Court held that in an auction-sale and in execution of the civil court's decree, the Court has to apply its mind to the need for furnishing the relevant material particulars in the sale proclamation and the records must indicate that there has been application of mind and principle of natural justice had been complied with. (See also Gajadhar Prasad -vs- Babu Bhakta

Ratan (1973 2 SCC 629, S.S. Dayananda -vs- K.S. Nagesh Rao, (1997) 4 SCC 451, D.S. Chohan -vs- State Bank of Patiala (1997) 10 SCC 65 and Gajraj Jain -vs- State of Bihar (2004) 7 SCC 151).

22. In view of the above, it is evident that there must be an application of mind by the authority concerned while approving/accepting the report of the approved valuer and fixing the reserve price, as the failure to do so may cause substantial injury to the borrower/guarantor and that would amount to material irregularity and ultimately vitiate the subsequent proceedings." Now it is to be looked into as to whether the competent authority had applied its mind at the time of accepting the report of the approved Valuer and fixing the Reserve Price or not.

37. Reserve Price was fixed on the basis of the report of the Valuer. A valuation report was obtained by the Bank from Chartered Engineer and Valuer, Consultant and Designer, which is signed by one Mr. M.H. Khan, approved valuer, wherein the details of the property are portion of plot No. 254, Khata No. 153/137, Mouza Rairangpur, District – Mayurbhanj which is known as Tanmay Talkies located at

Plot No. 254 Maouza Rairangpur, District – Mayurbhanj. Location of

the property is also mentioned. Characteristic of the site are properties of middle class and situated in commercial area. Value of the land assessed at Rs.2.05 crore while estimated market value was Rs.1,35,30,000.00. Building cost was assessed at Rs.96,05,058.00. Total market value of Rs.2,31,35,580.00. Realisable value Rs.2,34,64,000.00, while Distress Value Rs.1,96,65,000.00. Contrary to it, a valuation report is also filed by the SARFAESI Applicant dated 25th July, 2018 by V.V. Consulting Agencies of the same property wherein it is stated that it is located in commercial area and the market value of the property was assessed at Rs.1,04,88,280.00 per acre (as in the website). Land rate per unit taken in market value was adopted at the rate of Rs.1600 per sq.ft. Land area was 0.66 decimal and the market value was assessed at Rs.4,59,99,360.00, Realisable value was assessed at Rs.4,37,000.00. Value of construction was assessed at Rs.58,86,562.00. Accordingly, total valuer was assessed at Rs.5,25,36,000.00 and the realisable value was assessed at Rs.5.00 lac.

38. There are two valuation reports available on record. Learned DRT has not taken care of discussing the valuation reports. Even no specific finding is recorded as to why the valuation report submitted by the Bank could not be accepted. Affidavit is filed by the Auction Purchaser, Hindusthan Agencies, before Learned DRT on 13th December, 2018 wherein it is stated that the schedule property is a closed cinema hall. Auction Purchaser purchased the land on 18th August, 2007 from one Lakshman Kumar Paria for Rs.94,20,550.00. Report of Sri M.H. Khan contains the details of land along with reasons for assessing the value of land. Value of construction thereon is also assessed on the basis of nature of construction along with the age of construction; while the Valuer, V.V. Consulting Agencies, has not given the reasons or grounds for assessing the value of land as well as constructions. Land value is assessed on the basis of rates available in web site. What are the basis for fixing the rates in web site are not mentioned. Further even the name of web site is not there. It is a vague report based upon surmises and conjectures. Such report cannot be made basis for assessing the value of the property. Accordingly, as far as valuation of the property is concerned, it could not be accepted that

the property was sold for lesser value. Valuation report filed by the Bank could not be controverted by the SARFAESI Applicant. Accordingly, it is to be held that Valuation Report of Sri M.H. Khan is to be relied upon. Reserve price is fixed on the basis of this report which is fixed after due application of mind.

39. As has been referred to earlier that the Learned DRT has recorded finding regarding illegality of the notice under Section 13 (2) of the Act. Apparently, this issue was not raised in the pleadings. No such plea is made in the SARFAESI Application. It is held by the Hon'ble Apex Court in Mrs. Akella Lalitha -vs- Sri Konda Hanumantha Rao & Another (2022 LiveLaw (SC) 638) that a plea not taken in the pleadings cannot be looked into. Hon'ble Apex Court has placed reliance upon Trojan & Company Limited -vs- N.N. Nagappa Chettiar (AIR 1953 SC 235) wherein it was held that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Hence since there is no plea challenging the notice under Section 13 (2) of the Act, it could not be looked into by the Tribunal.

40. However, as far as plea of validity of Section 13 (2) of the Act is concerned, it was held by the Hon'ble Apex Court in Standard Chartered Bank -vs- V. Noble Kumar & Others [(2013) 9 SCC 620] wherein reliance was also placed upon a judgment of the Hon'ble Apex Court in Mardia Chemicals Limited & Others -vs- Union of India & Others [(2004) 4 SCC 311] wherein it was held in paragraph 77 that: "It is also true that till the stage of making of the demand and notice under Section 13(2) of the Act, no hearing can be claimed for by the borrower. But looking to the stringent nature of measures to be taken without intervention of court with a bar to approach the court or any other forum at that stage, it becomes only reasonable that the secured creditor must bear in mind the say of the borrower before such a process of recovery is initiated so as to demonstrate that the reply of the borrower to the notice under Section 13(2) of the Act has been considered applying mind to it. The reasons, howsoever brief they may be, for not accepting the objections, if raised in the reply, must be communicated to the borrower. True, presumption is in favour of

validity of an enactment and a legislation may not be declared unconstitutional lightly more so, in the matters relating to fiscal and economic policies resorted to in the public interest, but while resorting to such legislation it would be necessary to see that the persons aggrieved get a fair deal at the hands of those who have been vested with the powers to enforce drastic steps to make recovery.”

41. It was further held in Noble Kumar (supra) in paragraph 19 that: “Sub-section (3-A) further provides that if the secured creditor reaches a conclusion that the objections raised by the borrower are not acceptable or tenable, the creditor shall communicate the reasons for non acceptance of the objections within a period of 15 days. The proviso to the said sub-section declares that the rejection of the objections does not confer any right on the borrower to resort to the proceedings, contemplated either under Section 17 or 17-A. We may indicate here both Sections 17 and 17-A afford an opportunity to the borrower to approach the Debts Recovery Tribunal or (in the cases of Jammu & Kashmir) the District Court concerned against any measure taken under Section 13(4).” Hence the purpose of notice under Section 13 (2) was taken care of by the Hon’ble Apex Court in the case of Noble Kumar as well as Mardia Chemicals (supra).

42. Section 13 (3-A) was introduced in SARFAESI Act after the judgment of the Hon’ble Apex Court in Mardia Chemicals. But mere rejection of a representation does not entitle a borrower to file an application under Section 17 of the Act. In Noble Kumar (supra) it was further held in paragraphs 28 and 29 that:

28. It can be noticed from the language of the proviso to Section 13(3-A) and the language of Section 17 that an “appeal” under Section 17 is available to the borrower only after losing possession of the secured asset. The employment of the words “aggrieved by taken by the secured creditor” (emphasis supplied) in Section 17(1) clearly indicates the appeal under Section 17 is available to the borrower only after losing possession of the property. To set at naught any doubt regarding the interpretation of Section 17, the proviso to sub-section (3-A) of Section 13 makes it explicitly clear that either the

reasons indicated for rejection of the objections of the borrower or the likely action of the secured creditor shall not confer any right under Section 17.

29. The same principle is re-emphasised with the newly added Explanation in Section 17(1) which came to be inserted by Act 30 of 2004:

“Explanation – For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including the borrower) to make an application to the Debts Recovery Tribunal under this sub-section.”

43. It is thus clear that the issue of the validity of Section 13 (2) of the Act does not entitle a borrower to move an application under Section 17 of the Act; rather, appeal under Section 17 of the Act is available to the Borrower against any measure taken under Section 13 (4) of the Act.

44. It was held in paragraph 45 of the *Mardia Chemicals* (supra) that: “In the background we have indicated above, we may consider as to what forums or remedies are available to the borrower to ventilate his grievance. The purpose of serving a notice upon the borrower under sub-section (2) of Section 13 of the Act is, that a reply may be submitted by the borrower explaining the reasons as to why measures may or may not be taken under sub-section (4) of Section 13 in case of noncompliance with notice within 60 days. The creditor must apply its mind to the objections raised in reply to such notice and an internal mechanism must be particularly evolved some meaningful consideration of the objections raised rather than to ritually reject them and proceed to take drastic measures under sub-section (4) of Section 13 of the Act. Once such a duty is envisaged on the part of the creditor it would only be conducive to the principles of fairness on the part of the banks and financial institutions in dealing with their borrowers to apprise them of the reason for not accepting the objections or points raised in reply to the notice served upon them

before proceeding to take measures under sub-section (4) of Section 13. Such reasons, overruling the objections of the borrower, must also be communicated to the borrower by the secured creditor. It will only be in fulfilment of a requirement of reasonableness and fairness in the dealings of institutional financing which is so important from the point of view of the economy of the country and would serve the purpose in the growth of a healthy economy. It would certainly provide guidance to the secured debtors in general in conducting the affairs in a manner that they may not be found defaulting and being made liable for the unsavoury steps contained under sub-section (4) of Section 13. At the same time, more importantly, we must make it clear unequivocally that communication of the reasons for not accepting the objections taken by the secured borrower may not be taken to give occasion to resort to such proceedings which are not permissible under the provisions of the Act. But communication of reasons not to accept the objections of the borrower, would certainly be for the purpose of his knowledge which would be a step forward towards his right to know as to why his objections have not been accepted by the secured creditor who intends to resort to harsh steps of taking over the management/business of viz. secured assets without intervention of the court. Such a person in respect of whom steps under Section 13(4) of the Act are likely to be taken cannot be denied the right to know the reason of non-acceptance and of his objections. It is true, as per the provisions under the Act, he may not be entitled to challenge the reasons communicated or the likely action of the secured creditor at that point of time unless his right to approach the Debts Recovery Tribunal as provided under Section 17 of the Act matures on any measure having been taken under sub-section (4) of Section 13 of the Act."

Hence in the present case neither a plea of validity of notice under Section 13 (2) of the Act was taken in the pleadings nor does any right accrue in favour of the SARFAESI Applicant to challenge the same under Section 17 of the Act. Hence finding recorded by the Learned DRT regarding validity of Section 13 (2) of the Act could not sustain.

45. Learned Counsel for SARFAESI Applicant submits that sale was conducted pending SARFAESI proceedings. It is submitted that Section

52 of the Transfer of Property Act could be applicable as far as all the actions taken by the Appellant pending SARFAESI Application are concerned. Reliance is placed upon a judgment of the Hon'ble Apex Court in Sanjay Verma -vs- ManikR oy & Others [(2006) 13 SCC 608] in paragraphs 10 and 12 wherein it was held that a transferee Lis pendens is bound by the decree just as much as he was a party to the suit. The principles of Lis pendens embodied in Section 52 of the Transfer of Property Act, being a principle of public policy, no question of good faith or bona fide arises.

46. Reliance is placed upon a judgment of the Hon'ble Apex Court in Usha Sinha -vs- Dina Ram & Others [(2008) 7 SCC 144] wherein it was held that a transferee from a judgment debtor is presumed to be aware of the proceedings before a Court of law. He should be careful before he purchases a property which is the subject matter of litigation. It recognized the doctrine of Lis pendens recognized by Section 52 of the Transfer of property Act.

47. With due regard to the law laid down by the Hon'ble Apex Court it was held in the case of Bajarang Shyamsunder Agarwal -vs- Central Bank of India (2019) 9 SCC 94 that provisions of SARFAESI Act precede the provisions of the Transfer of Property Act. Accordingly, when the action was taken by the Bank under the SARFAESI Act, 2002, Borrower or the Guarantor cannot take advantage of Section of Section 52 of the Transfer of property Act. Accordingly, the case law referred to by the Learned Counsel could not help the SARFAESI Applicant.

48. In a recent judgment of Hon'ble Supreme Court in CELIR LLP -vs- Bafna Motors (Mumbai) Private Limited & Others [Civil Appeal Nos. 5542-5543 of 2023] decided on 21.09.2023 the same principle was reiterated wherein it was held that:

“(iv) In Mathew Varghese (supra) this Court held that the original Section 13(8) retained the borrowers right to redeem. Thus, it is important to note that till the amendment took place under Section 13(8), there was nothing inconsistent between 13(8) of the SARFAESI Act and the Act 1882. It is only after the amendment of Section 13(8) the inconsistency arose between the two Acts on the said subject, which is clearly covered by Section 35 of the SARFAESI Act whereby now

the amended Section 13(8) achieves supremacy over Section 60 of the Act 1882. Thus, leading to upholding of the SARFAESI Act as the special law against the Act 1882 which is a general law. [See Para 53 of S. Karthik (supra) also quoted above.]”

49. In paragraph 84 of CELIR LLP (supra), the Hon’ble Apex Court has relied upon K. Kumara Gupta -vs- Sri Markendaya and Sri Omkareswara Swamy Temple & Others [(2002) 5 SCC 710] wherein it was held that:

“84. In another decision by this Court in K. Kumara Gupta v. Sri Markendaya and Sri Omkareswara Swamy Temple & Ors. reported in (2022) 5 SCC 710, it was held that repeated interferences with public auction would frustrate the sanctity and purpose of holding auctions. The relevant observations made in it are given below:-

14. Once the appellant was found to be the highest bidder in a public auction in which 45 persons had participated and thereafter when the sale was confirmed in his favour and even the sale deed was executed, unless and until it was found that there was any material irregularity and/or illegality in holding the public auction and/or auction-sale was vitiated by any fraud or collusion, it is not open to set aside the auction or sale in favour of a highest bidder on the basis of some representations made by third parties, who did not even participate in the auction proceedings and did not make any offer.

16. It is also required to be noted that the sale was confirmed in favour of the appellant by the Commissioner, Endowments Department after obtaining the report of the Assistant Commissioner. Therefore, we are of the opinion that in the aforesaid facts and circumstances of the case, the High Court ought not to have ordered re-auction of the land in question after a period of 23 years of confirmation of the sale and execution of the sale deed in favour of the auction-purchaser by observing that the value of the property might have been much more, otherwise, the object and purpose of holding the public auction and the sanctity of the public auction will be frustrated. Unless there is concrete material and it is established that there was any fraud and/or collusion or the land in question was sold at a throwaway price, the sale pursuant to the public auction cannot be set aside at the instance of strangers to the auction proceeding.

17. The sale pursuant to the public auction can be set aside in an eventuality where it is found on the basis of material on record that the property had been sold away at a throwaway price and/or on a wholly inadequate consideration because of the fraud and/or collusion and/or after any material irregularity and/or illegality is found in conducting/holding the public auction. After the public auction is held and the highest bid is received and the property is sold in a public auction in favour of a highest bidder, such a sale cannot be set aside on the basis of some offer made by third parties subsequently and that too when they did not participate in the auction proceedings and made any offer and/or the offer is made only for the sake of making it and without any serious intent. In the present case, as observed hereinabove, though Shri Jagat Kumar immediately after finalising the auction stated that he is ready and willing to pay a higher price, however, subsequently, he backed out.(Emphasis supplied) If the auction-sale pursuant to the public auction is set aside on the basis of such frivolous and irresponsible representations made by such persons then the sanctity of a public auction would be frustrated and the rights of a genuine bidder would be adversely affected.” (Emphasis supplied)”

50. Further in paragraph 85 of CELIR LLP (supra), reliance was placed upon a judgment of Hon’ble Apex Court in *Eva Agro Feeds Private Limited -vs- Punjab National Bank & Another* [2023 SCC OnLine SC 1138] wherein it was held that:

“84. ... mere expectation of the Liquidator that a still higher price may be obtained can be no good ground to cancel an otherwise valid auction and go for another round of auction. Such a cause of action would not only lead to incurring of avoidable expenses but also erode credibility of the auction process itself. That apart, post auction it is not open to the Liquidator to act on third party communication and cancel an auction, unless it is found that fraud or collusion had vitiated the auction. The necessary corollary that follows therefrom is that there can be no absolute or unfettered discretion on the part of the Liquidator to cancel an auction which is otherwise valid. As it is in an administrative framework governed by the rule of law there can be no absolute or unfettered discretion of the Liquidator.

Further, upon a thorough analysis of all the provisions concerning the Liquidator it is evident that the Liquidator is vested with a host of duties, functions and powers to oversee the liquidation process in which he is not to act in any adversarial manner while ensuring that the auction process is carried out in accordance with law and to the benefit of all the stakeholders. Merely because the Liquidator has the discretion of carrying out multiple auction it does not necessarily imply that he would abandon or cancel a valid auction fetching a reasonable price and opt for another round of auction process with the expectation of a better price. Tribunal had rightly held that there were no objective materials before the Liquidator to cancel the auction process and to opt for another round of auction.”

Thus, it was held that it is the duty of the Courts to zealously protect the sanctity of any auction conducted. The Courts ought to be loath in interfering with auctions otherwise it would frustrate the very object and purpose behind auctions and deter public confidence and participation in the same. In paragraph 88 it was held that as per the amended Section 13(8) of the SARFAESI Act, once the borrower fails to tender the entire amount of dues with all cost & charges to the secured creditor before the publication of auction notice, his right of redemption of mortgage shall stand extinguished/waived on the date of publication of the auction notice in the newspaper in accordance with Rule 8 of the Rules of 2002.

51. In *K. Kumara Gupta -vs- Sri Markendaya and Sri OmkareswaraSwamy Temple & Others* [(2022 5 SCC 710)] the Hon'ble Apex Court in paragraph 17 held that :

“17. The sale pursuant to the public auction can be set aside in an eventuality where it is found on the basis of material on record that the property had been sold away at a throwaway price and/or on a wholly inadequate consideration because of the fraud and/or collusion and/or after any material irregularity and/or illegality is found in conducting/holding the public auction. After the public auction is held and the highest bid is received and the property is sold in a public auction in favour of a highest bidder, such a sale cannot be set aside on the basis of some offer made by third parties subsequently and that

too when they did not participate in the auction proceedings and made any offer and/or the offer is made only for the sake of making it and without any serious intent. In the present case, as observed hereinabove, though Shri Jagat Kumar immediately after finalising the auction stated that he is ready and willing to pay a higher price, however, subsequently, he backed out. If the auction-sale pursuant to the public auction is set aside on the basis of such frivolous and irresponsible representations made by such persons then the sanctity of a public auction would be frustrated and the rights of a genuine bidder would be adversely affected." (Emphasis supplied)"

52. Judgment of K. Kumara Gupta (supra) squarely applies on the facts of the present case. In the present case also public auction was held. Appellant, Hindusthan Agencies, was declared as the highest bidder. There is no plea that the sale was conducted with fraud or collusion or there is any material irregularity and/or illegality in conducting the sale. Property was auctioned for adequate consideration. Such sale cannot be set aside merely on the basis that Ashok Kumar Agarwala made a subsequent offer although he was an unsuccessful bidder in the auction proceedings. If such a sale is set aside on the basis of such frivolous and irresponsible representations made by the said Ashok Kumar Agarwala then sanctity of the auction, held in favour of Hindusthan Agencies, would be frustrated and his right would also be adversely affected.

53. Hence on the basis of the case laws laid down by the Hon'ble Apex Court, I am of the considered view that neither the Respondent No. 1 nor Respondent No. 5 can take advantage from any deposits made by them; rather, the Learned DRT grossly erred in affording opportunity to them to settle the matter as a whole by merely making a deposit.

54. It appears that the Learned DRT was persuaded merely by equity and not by law. The Hon'ble Apex Court in paragraphs 80 and 81 of CELIR LLP (supra) held that:

"80. To read it otherwise in a strict manner as to only stipulating a restriction upon the secured creditor and not on the borrower's right of redemption would lead to a very chilling effect, where no auction conducted under the SARFAESI Act would have any form of sanctity, and

in such a situation no person would be willing to come forward and participate in any auction due to the fear and apprehension that despite being declared a successful bidder, the borrower could still at any time come and redeem the mortgage and thereby thwart the very auction process.

81. Such a scenario is all the more worrisome, because the general public who participate in such auctions are often neither aware nor informed by the secured creditors conducting the auctions, that as long as the sale certificate is not issued, they will not have a right in the said asset and that the borrower whose asset is being auctioned could sweep-in and redeem the mortgage any time, and thereby thwart their rights and the very auction process.”

55. It was held by the Hon’ble Apex Court in National Spot Exchange Limited -vs- Anil Kohli, Resolution Professional for Dunar Foods Limited [(2022) 11 SCC 761] that where the law is clear the consequence thereof must follow. The High Court has no option but to implement the law. In P.M. Latha -vs- State of Kerala [(2003) 3 SCC 541 in paragraph 13 it is held that :

“13. Equity and law are twin brothers and law should be applied and interpreted equitably but equity cannot override written or settled law.”

56. Further in Laxminarayan R. Bhattad -vs- State of Maharashtra [(2003) 5 SCC 413] in paragraph 13 it is held that :

“73. It is now well settled that when there is a conflict between law and equity the former shall prevail.” 57. In the case of Sadashiv Prasad Singh -vs- Harendar Singh & Others [(2015) 5 SCC 574] it was held in paragraph 104 that equity cannot supplant the law. Equity has to follow the law if the law is clear and unambiguous.

58. Learned DRT should not have exceeded its jurisdiction by issuing direction to the secured creditor to accept amount from a person, i.e. Ashok Kumar Agarwala, who was an unsuccessful Auction Bidder and to set aside the auction. I.A. Diary No. 121 of 2023 of Dinesh Chandra Das is also liable to be dismissed.

59. On the basis of the discussion made above, I am of the considered opinion that the impugned order suffers from material illegalities which is liable to be set aside.

Both the appeals, being Appeal No. 26 of 2020 and Appeal No. 73 of 2022 are allowed. Judgment and order dated 29th February, 2020 passed by Learned DRT, Cuttack is set aside. SARFAESI Application No. 37 of 2018 is dismissed. However, Respondent No. 5, Ashok Kumar Agarwala, is entitled for refund of the amount of Rs. 2.00 crore, with accrued interest thereon, from the Bank on the deposits made by Sri Ashok Kumar Agarwala. I.A. Diary No. 121 of 2023 is also dismissed. All pending I.A.s and interim orders, if any, also stand dismissed.

No order as to costs.

File be consigned to Record room.

Copy of the order be supplied to Appellant and the Respondents and a copy be also forwarded to the concerned DRT.

Copy of the order be retained in the records of Appeal No. 73 of 2022.

Copy of the Judgment/Final Order be uploaded in the Tribunal's Website.

Order signed and pronounced by me in the open Court on this the 5th day of October, 2023.