(2016) 04 AP CK 0025

Andhra Pradesh High Court

Case No: Writ Petition No. 39735 of 2015

M. Amarender Reddy		APPELLANT
	Vs	
Canara Bank, and another		RESPONDENT

Date of Decision: April 11, 2016

Acts Referred:

- Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) - Section 13(4), 13(8)
- Transfer of Property Act, 1882 - Section 60

Citation: (2016) 6 ALLMR 29 : (2016) 4 ALT 193 : (2016) 5 AndhLD 354

Hon'ble Judges: Nooty Ramamohana Rao and B. Siva Sankara Rao, JJ.

Bench: Division Bench

Advocate: E. Madan Mohan Rao, Advocate, for the Appellant; Deepak Bhattacharjee, Advocate, for the Respondent

Final Decision: Disposed Off

Judgement

@JUDGMENTTAG-ORDER

Nooty Ramamohana Rao, J.—The petitioner herein sought for a Writ of Mandamus for declaring the E-auction notice dated 15.10.2015 issued by the Authorised Officer, Canara Bank, Secunderabad proposing to sell the immovable property covered by plot No.70 admeasuring 278 square yards situated in survey No.66/6, Ward No.3, Block No.7 in Mansoorabad Village, Saroornagar Mandal, L.B.Nagar Municipality, Ranga Reddy District, as illegal being contrary to the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (henceforth referred to, for brevity, as ''the Act'') and Rules 8 (6) and 9 of the Security Interest (Enforcement) Rules, 2002.

2. Heard Sri E.Madan Mohan Rao, learned counsel for the petitioner and Sri Deepak Bhattacharjee, learned Standing Counsel for the Canara Bank on behalf of the respondents.

3. It appears the 1st respondent Bank has provided certain financial assistance to a company named as M/S Eversure Aqua Solutions Private Limited. The petitioner herein, who claims to be an Ex-serviceman and another person by name Smt.G.Jayamma stood as guarantors for the said loan transaction. As part of this arrangement, immovable property said to be owned by the petitioner herein comprising of Plot No. 70 admeasuring 278 square yards situated in Survey No. 66/6, Ward No. 3, Block No. 7 in Mansoorabad village, Saroornagar Mandal, L.B.Nagar Municipality was mortgaged. It is also apt to notice that Mansoorabad village has since now become part of L.B. Nagar Municipal area and L.B. Nagar Municipal area has now become a part of Greater Hyderabad Municipal Corporation. This signifies the comparatively high value this immovable property enjoys.

4. There is no denying the fact that the principal borrower has committed default in making repayment of the loan and other financial assistance availed by it. In those set of circumstances, the 1st respondent bank has classified the loan account as ''non performing asset'' and hence initiated measures for securitisation of the loan under Sub-section (2) of Section 13 of the Act. The demand notice dated 25.01.2014 has not produced the desired result as the borrower and its two guarantors have not repaid the outstanding liability of approximately of Rs. 1.50 crores. In those set of circumstances, the authorised officer of the 1st respondent bank, the 2nd respondent herein, has drawn a notice under Sub-section (4) of Section 13 read with Rule 8 (6) of the Security Interest (Enforcement) Rules, 2002 on 15.10.2015 informing the principal borrower and the two guarantors, including the petitioner herein that possession of the secured asset described in the schedule to the sale notice enclosed thereto has been taken under Sub-section (4) of Section 13 of the Act and hence the authorised officer has proposed to sell the assets through e-auction mode, for which purpose a last and final opportunity to discharge the liability in full has been accorded to the principal borrower and the two guarantors, failing which the sale of the secured asset would be processed and undertaken. It is this notice, which triggered the present writ petition.

5. Sri E. Madan Mohan Rao, learned counsel for the petitioner, would principally attack the action of the respondents on two fold grounds. The first and foremost is that the statute is intended to protect the interests of the borrowers also apart from trying to protect the interests of financial institutions and hence any measures adopted by the respondents which are likely to diminish the interest of the borrower/guarantor are liable to be viewed strictly and as to whether they are in conformity with the provisions of the Act or not. In case the provisions of the Act have not been strictly complied with, then any such action has to be viewed with disfavour and it is liable to be declared as illegal. The 2nd contention that is urged is that the borrower/guarantor is required to be put on notice with regard to the intended sale of the secured asset by providing a minimum of 30 days duration for liquidating the liability. In the event of failure of the borrower/guarantor in

liquidating the liability or at least making the account to get regularised by paying such amount as the financial institution may agree to receive for such purposes. It is thereafter notice of the intended sale has to be served on the borrower and also published in accordance with Rule 8 (6) of the Security Interest (Enforcement) Rules, 2002. It is, hence urged that if The notice calling upon the borrower/guarantor to liquidate the liability within 30 days prior to undertaking the sale and the proposed sale notice are both rolled into one, then the valuable right available to the borrower/guarantor in either liquidating the liability or getting the loan account regularised becomes meaningless, which should not be the purpose or intention of the scheme of the statute or the rules made thereunder.

6. When it was realised that banks and other financial institutions are experiencing considerable difficulties in recovering loans and also enforcement of securities charged with them, a study was undertaken as to the efficacy of the existing legal regime. The study revealed that the existing legal regime is effectively blocking the significant portion of the funds of financial institutions in unproductive assets and the value of these unproductive assets was also simultaneously getting diminished with the passage of time. The committee constituted, under the Chairmanship of Sri M. Narasimhan, has come up with an apparent solution to the malady by suggesting to set up the special tribunals with special powers for adjudication of such matters and for speedy recovery of the money which is so crucial for the very sustenance of the banking system. In those state of circumstances, the parliament has enacted the Recovery of Debts Due to Banks And Financial Institutions Act, 1993 (for short, ''Act 51 of 1993''). Under Section 3 of this Act 51 of 1993, the Central Government has been empowered by notification to establish one or more tribunals to be known as Debt Recovery Tribunals to exercise the powers, jurisdiction and authority conferred on it under the said Act, which was hitherto exercised by Civil Courts.

7. Under Section 17 of the Act 51 of 1993, jurisdiction has been conferred upon the tribunal to entertain and decide applications from banks and financial institutions for recovery of debts due to them. Section 18 of this Act has made it clear that on and from the appointed day, no Court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under articles 226 and 227 of the Constitution) in relation to the matters specified in section 17 of the Act 51 of 1993. Thus, effectively the civil Courts'' jurisdiction, to entertain the claims relating to recovery of debts due to banks and financial institutions, has been taken away. As a consequence, the Debt Recovery Tribunals, which started entertaining applications by following speedier procedure and mechanism, are able to adjudicate and decide the claims brought before them. Under Section 25 of the Act 51 of 1993, a Recovery Officer has been empowered, on receipt of the copy of the certificate under sub-section (7) of section 19 to proceed to recover the amount of debt specified in the said certificate by adopting one or the other methods specified in Clause-a, b and c thereof, which include attachment and sale of movable or immovable property, arrest and

detention in prison of the defendant and appointment of a receiver for the management of such properties. With the passage of further time, the Central Government has also realised that there should be stringent measures adopted for recovering the debts due to banks and financial institutions, lest the very system of banking is likely to face un-surmountable difficulties in realising the debts due to them in real quick time. Unless banks and financial institutions recover their debts, they will not be able to recycle their funds for lending afresh. Hence, with a view to provide for securitization and reconstruction of financial assets and enforcement of security interest and for matters connected therewith, the parliament enacted the Securitization And Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, ''the SARFAESI Act'').

8. The SARFAESI Act, has been enacted essentially for the purpose of expeditious recovery of the debts due from the borrowers and for the said purpose stringent measures are provided in the Statute. Wherever stringent measures are provided, strict compliance with each and every such measure is called for. Upon a debt becoming a Non-performing Asset (NPA), the secured creditor is entitled to take measures for securitisation of such debt.

9. Chapter III of the SARFAESI Act, has provided for non-adjudicatory measures and steps to be taken for enforcement of security interest. Sub Section 1 of Section 13 of the Act, which is the first provision that is organised in this Chapter, has set out that notwithstanding anything contained in Section 69 or 69(A) of the Transfer of Property Act, 1882, any security interest, created in favour of any secured creditor, may be enforced without intervention of the Court or tribunal by such creditor in accordance with the provisions of this Act.

10. This provision contained in Sub Section 1 of Section 13 of the Act, is a very salutary provision. For the first time, power was conferred upon a secured creditor to enforce any security interest created in its favour without the intervention of the Court or tribunal. The conventional view that was held over a long period of time in this Country was that no person can dispossess the other from immovable property without securing an appropriate authorisation and acting in accordance with law. The Supreme Court in **Rame Gowda(D) by L.Rs. v. M.Varadappa Naidu (D) by L.Rs. AIR 2004 SC 4609 = 2004 (1) SCC 769**, in paragraph 5, has adverted the view held for long in England and then by revisiting the case decided by the Privy Council in **Midnapur Zemindari Co.Ltd. v. Naresh Narayan Roy AIR 1924 PC 144**, has held that persons are not permitted to take forcible possession and that they must obtain such possession as they are entitled through a Court. In view of the enormous time the aforementioned process is consuming and consequently the debts due are not getting recovered in a quick time, to enable the banks/secured creditors to recover the monies due, sub-section (1) of Section 13 of the Act, dispensed with the necessity to seek intervention of a Court or Tribunal for enforcing any such security interest created by the borrower in favour of the

secured creditor. Thus, sub Section 1 of Section 13 of the Act, has made a path-breaking legal approach by conferring powers on the secured creditor to enforce security interest without the intervention of the Court or tribunal, including the Debt Recovery Tribunal. In this context, the expression ''security interest'' has been defined u/sec. 2(1)(zf) of the Act in the following terms:

"security interest" means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in section 31;

Since the afore-mentioned definition refers to property, it would also be apt for us to visit the definition assigned to the said word ''property'' under Section 2(1)(t) of the Act. Thus, immovable property, movable property, any debt or right to receive payment of money, whether secured or unsecured, receivables in presentum or future or even intangible assets such as knowhow patent, copyright, trademark, license, franchise or commercial right of similar nature have all been brought within the sweep of the expression ''security interest''. Thus, the canvass has been spread so far and wide more with a view to protect the interests of secured creditors, banks and financial institutions. Under Sub Section 2 of Section 13 of the Act, a demand notice is liable to be raised calling upon the defaulted borrower to make repayment of the secured debt or any instalment thereof by providing 60 days time span for the said purpose. If the borrower responds to the demand notice and liquidates the liability within the time limit specified therein, there is no other way and the secured creditor cannot proceed against the borrower. Similarly, even if whole of the liability is not liquidated and if substantial amount of the outstanding liability is liquidated and a fresh proposal to get the loan account regularised emanates and the secured creditor accepts the same, no further steps can be initiated by the secured creditor thereafter, either. But, however, where the borrower makes a representation or raises any objection under sub-section (3)(a) of Section 13 of the Act and the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he is under an obligation to communicate within fifteen (15) days of receipt of such representation or objection, the reasons for non-acceptance of such representation or objection to the borrower. This is again a measure provided to the borrower to bring out any discrepancies noticed by him in the demand notice raised under subsection (2) of Section 13 of the Act, calling for the attention of the secured creditor and corrective action if any, warranted. The provision contained under sub-section (3)(a) of Section 13 of the Act can also be utilised by the borrower for resettlement/ re-schedulement of the debt, subject to the terms and conditions that are acceptable to both sides.

11. In the event, the borrower fails to discharge his liability in full, the measures to which recourse can be taken for recovering the debt have been provided for under sub-section (4) of Section 13 of the Act. Incidentally, it enables possession of the secured assets of the borrower to be taken, including the right to transfer by way of

lease, assignment or sale for realising the secured asset. The secured creditor can also take over the management of the business of the borrower, including the right to transfer lease, assignment or sale of the same. The secured creditor can also appoint any person to manage the secured assets, the possession of which has been taken over by the secured creditor.

12. Where possession of the secured asset has been taken over for the purpose of putting it to sale, the procedure prescribed under Rule 8 r/w. Rule 9 of the Security Interest (Enforcement) Rules, 2002 (for brevity "the Rules") have got to be followed.

13. In this context, it is only appropriate to notice that Sub-section (8) of Section 13 of the Act has made it very clear that if the dues of the secured creditor together with the costs, charges and expenses are tendered at any time before the date fixed for sale or transfer, in such an event, the secured asset shall not be sold or transferred by the secured creditor and no further steps shall be taken for transfer or sale of that secured asset.

"Section 13(8)

If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset."

14. This provision brings out in so many words that if dues of the secured creditor together with incidental expenses are tendered anytime before the date fixed for sale or transfer, then such sale or transfer shall take place. It is apt to notice that mere sale of an immovable asset does not create a title in favour of the purchaser. Hence, transfer of title by executing a sale certificate and then getting registered only can extinguish the title of the borrower. Hence, a notice, prior to the date fixed for sale, calling upon the borrower to liquidate the liability is clearly contemplated by this provision. Furnishing a copy of the sale notice, is therefore not the same as the one contemplated by Subsection (8) of Section 13 of the Act. They are, in our opinion, two different aspects.

15. A mortgage is a security given by a person for ensuring or facilitating the fulfilment of some obligation undertaken by him. Usually the obligation for which security is offered relates to repayment of a debt. While a simple debt of money confers on the creditor a jus in personam, a right which is enforceable against a determinate individual debtor. Such a simple debt of money is realizable by obtaining a money decree and then bringing the property of the debtor to sale in execution of such a decree. If, in the meantime, the debtor alienates his property, the creditor cannot ordinarily follow such a property as the alienee in the meantime acquires certain other rights in the same property, in which case a creditor can only proceed against the individual debtor and his interests can sometimes be

jeopardised inasmuch as, the remaining assets of the debtor could be insufficient to discharge the debt in full. For this reason, creditors require security to be furnished in the shape of a real property, the value of which the creditor can safely rely and in case of necessity, turn the same into money. Most importantly the creditor can follow the property even when it was lying in the hands of some other third parties pursuant to it''s alienation by the debtor. A mortgage is, thus a security which confers upon the creditor some right in rem. It is a right in re aliena for it exists in regard to property of which the ownership is in another person. The very definition of a mortgage, as per Section 58 of Transfer of Property Act, shows that it is nothing more than a transfer of an interest in a specified immovable property and all that the mortgagee gets is not the legal ownership of the property but merely an interest in immovable property. While a relationship of a debtor and a creditor subsists in case of mortages, but most importantly, the right to redeem remains with the debtor. The equity of redemption is singularly significant in that a mortgage shall always be redeemable and a mortgagor''s right to redeem shall neither be taken away nor can be limited by any contract between the parties.

16. In **Shaw v. Foster [(1872) 5 H.L.321 at 340** Lord Cairns has noted:

"It is a well-established rule of equity that a deposit of documents of title without anything more, without writing, without word of mouth, will create in equity a charge upon the property referred to".

17. An equitable mortgage is thus, created by the debtor by depositing his title deeds with the creditor with intent to create security thereon, for the debt obtained. In **Birch v. Ellames & Gorst [145 ER 1924]**, dealing with the effect of such an equitable mortgage, it has been noted as under:

"The deposit of title deeds as a security for a debt is now settled to be evidence of an agreement to make a mortgage and that agreement is to be carried into execution by the Court against the mortgagor or any who claim under him, with notice, either actual or constructive of such deposit having been made."

18. Lord Bramwell in **Salt v. Marquess of Northampton [(1892) A.C.1** has observed:

"An equity of redemption is a right not given by the terms of the agreement between the parties to it, but contrary to them, to have back securities given by a borrower to a lender on payment of principal and interest at a day after that appointed for payment, when by the terms of the agreement between the parties the securities were to be the absolute property of the creditor. This is now a legal right of the debtor��"

19. Thus, the mortgagor''s right to redeem the mortgage even after the specified time lapsed subsists and still the mortgagor can claim to redeem the property. Hence, this right of the mortgagor has come to be known as "Equity of Redemption". The rule against clogs on the equity of redemption is that, a mortgage

shall always be redeemable and a mortgagor''s right to redeem shall neither be taken away nor be limited by any contract between the parties. The principle behind the rule was explained in **Santley v. Wilde [(1899) 2 Ch.474]** by Lindley M.R in these words :

"The principle is this : a mortgage is a conveyance of land or an assignment of chattles as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage : and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and is therefore void. It follows from this, that "once a mortgage always a mortgage".

20. Lord Davey in **Noakes & Company v. Rice [(1902) A.C.24]** has observed "that a mortgage cannot be made irredeemable and that a provision to that effect is void."

21. Hence, the doctrine of equity of redemption came to be expressed in the maxim ''Once a mortgage, always a mortgage''. And this principle has taken now a firm footing in the form of Section 60 of the Transfer of Property Act. So long as the mortgagor had a right to redeem the mortgage, he can always pay off the debt together with interest to the mortgagee and get back possession of the mortgaged property. This position would continue so long as the property is not sold under a final decree of sale brought about in accordance with the provisions of Order 34 C.P.C or any other law providing therefore.

22. It is apt to recall in this context the principle enunciated by the Supreme Court in **Mathuralal v. Keshar Bai and another AIR 1971 Supreme Court 310**, in paragraphs 15 & 16 which is to the following effect:

"15. ������.So long as the mortgagor had a right to redeem the mortgage he can always pay off the mortgagee and get back possession. This position would continue so long as the property is not sold under a final decree for sale under the provisions of Order 34 C.P.C.

16. In our opinion the second contention put forward on behalf of the appellant has no force. The rights of a mortgagee do not merge in his rights under the preliminary decree for sale. As already mentioned, the mortgagee lost his right to recover the money by sale of the mortgaged property; otherwise his security remained intact and the mortgagor continued to have his right to redeem the property."

23. Thus what has been provided for under sub-section (8) of Section 13 of the Act is the well established principle that a mortgage once created, the right to redeem the same at any time before its title is transferred in accordance with law, subsists.

24. In our opinion, therefore, Section 13 of the Act has provided for a great balancing act between the interests of the secured creditors as well as the borrowers.

25. Now, it will be appropriate to focus our attention on Rule 8 of the Rules. These rules have been framed in accordance with law under Section 38 of the Act by the Central Government. Rule 8 of the Rules specifically dealt with the sale of immovable secured assets. Wherever the possession of a secured asset, which is an immovable property, is sought to be taken over, as per Sub-Rule (1) of Rule 8 of the Rules, the Authorised Officer of the secured creditor shall take or cause to be taken possession by delivering a possession notice in accordance with Appendix-IV of the Rules to the borrower and also by affixing on the outer door or at such other conspicuous place of the immovable property. Sub-rule (2) of Rule 8 of the Rules also requires that possession notice shall also be published as soon as possible, but in no case, not later than seven days from the date of taking possession, in two leading newspapers, one of which shall be in the vernacular language having sufficient circulation in the locality. The object behind this being that the general public will come to know, apart from the borrower as well, that the possession of the secured asset was taken over by the secured creditor. This is a kind of a caveat to pre-empt the general public from dealing with that secured asset henceforth in any other manner. Sub-rule (5) of Rule 8 of the Rules requires the Authorised Officer to obtain valuation of the property from an approved Valuer and in consultation with the secured creditor, reserve price of the property and may sell it by any of the modes specified therein, which are as under:
"(a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or

(b) by inviting tenders from the public;

(c) by holding public auction; or

(d) by private treaty."

26. Sub-rule (6) of Rule 8 of the Rules, according to us has the some significance and hence we prefer to extract it here:-

"Sub-rule (6) : The Authorised Officer shall serve to the borrower a notice of 30 days for sale of the movable secured asset under sub-rule (5)."

27. In our opinion, sub-rule (6) of Rule 8 required the secured creditor to put the borrower on a specific notice of 30 days duration before undertaking sale of the said movable asset. But, however, since Rule 8 of the Rules starts with the heading ''Sale of immovable secured asset'', we construe that the effect of sub-rule (6) thereof is also equally applicable to immovable properties apart from the movable properties mentioned therein. It cannot be justifiable for one to construe that a specific notice of 30 days duration before undertaking sale of movable asset alone is liable to be

issued to the borrower and in the event of sale of immovable assets, no such notice is required to be given. When the secured asset is a movable one, sub-rule (6) of Rule 8 of the Rules requires that a notice of 30 days duration is liable to be furnished, which is distinct from delivering possession notice. Sub-rule (1) of Rule 8 of the Rules does stand to reason and logic and hence it is to be construed that the same procedure shall also be adopted with regard to the immovable property. The answer, in this regard, can be found in the proviso to Sub-Rule 6 of the Rule 8, wherein it is provided that a public notice where sale is sought to be conducted by inviting tenders or by public auction, should also be got published. This publication of notice is essentially intended to gain the attention of the prospective participants at sale by tenders or for bidding at public auctions. Sans publicity, the prospective purchasers will not be coming to know of the intended sale of the secured asset.

28. As was already noticed supra, under sub-rule (5) of Rule 8 of the Rules, two other modes of transfer of the secured asset were also contemplated i.e., (i) by way of obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying such assets; and (ii) by private treaty. In case, quotations are invited or sale by private treaty is sought to be indulged in by the secured creditor, then perhaps, no public notice in that respect need be published, because it would in no way help or promote the cause of the secured creditor (or for that matter that of the borrower) when quotations are invited by him, other than those who have been so invited to offer the quotation, may not find any occasion to offer such quotations. Therefore, publication in newspapers in such a case is not going to serve any purpose. Similarly, when sale is sought to be undertaken by entering into a private treaty, then also the publication is not going to widen the arena of private treaty, which the secured creditor seeks to indulge in.

29. Therefore, the newspaper publication of the intended sale is liable to be indulged in only in the event the secured asset is sought to be sold by inviting tenders or by holding a public auction, but not otherwise. That could be the reason why a sale notice of 30 days duration is contemplated to be served on the borrower by sub-rule (6) of Rule 8 of the Rules, irrespective of the mode of such sale. The said sale notice to the borrower has to necessarily precede the decision of the secured creditor to sell the secured asset. It cannot be a simultaneous affair. For instance, if notice of 30 days duration of intended sale of the secured asset is responded and the borrower liquidates the liability, the secured creditor would not derive any authority to sell or proceed with the publication of sale notice of the secured asset. That would be a redundant exercise and the secured creditor need not indulge in any such wasteful expenditure liable to be incurred in the matter of publication in two newspapers of the intended sale. We are, therefore, inclined to consider that a notice of intended sale of the secured asset under sub-rule (6) of Rule 8 of the Rules must necessarily be de-linked from the actual sale notification to be published in the newspapers. The intended notice of sale is like a last warning to the borrower to liquidate the liability, if he wishes or intends, to save the secured asset from going

under a hammer. In our opinion, only if the notice of proposed sale is not responded, would there be a necessity for taking the next step of putting the secured asset for sale and then the occasion to indulge on sale would arise, but not otherwise.

30. Rule 9(1) of the Rules, in fact, lends support to our conclusion. The said sub-rule (1) of Rule 9 of the Rules reads as under:

"(i) No sale of immovable property under these rules shall take place before expiry of 30 days from the date on which the public notice of sale is published in newspapers, as referred to in the provision to sub-rule (6) or notice of sale has been served to the borrower."

31. Learned Standing Counsel for the respondent-Bank, Sri Deepak Bhattacharji, has pointedly drawn our attention to the judgment rendered by the Supreme Court in **Mathew Varghese v. M. Amritha Kumar and others (2014) 5 SCC 610**, wherein the expression ''or'' used in Rule 9(1) of the Rules was held to be read as ''and''. Para-31 of the said judgment offers appropriate guidance, in this regard, and hence it is quoted:

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

32. The Supreme Court has clearly enunciated that a reading of sub-rule (6) of Rule 8 and sub-rule (1) of Rule 9 of the Rules together, the service of individual notice to the borrower specifying a clear 30 days time gap for effecting sale of immovable secured asset is a Statutory mandate. Hence, use of the expression ''or'' found in Rule 9(1) of the Rules is only appropriate to be read as ''and'', as that alone would be in consonance with sub-section (8) of Section 13 of the Act.

33. We may also add that a notice of intended sale by providing a clear 30 days time to the borrower preceding any decision to sell away the secured asset would, in fact, be in consonance with the mandate of the provision contained in sub-section (8) of Section 13 of the Act, as it is too well known that the Rules made under a Statute are only essentially intended to secure effective implementation of the provisions contained in the Statute. In our opinion, therefore, putting the borrower on notice of 30 days duration by the secured creditor conveying the intention to put the secured asset to sale is mandatory. Such notice would be applicable even if the secured creditor later on decides to adopt any one of those four methods provided in clauses (a) to (d) of sub-rule (5) of Rule 8 of the Rules. As was already noticed supra, in cases of obtaining quotations from persons dealing with similar secured assets and also by entering into a private treaty, may not require publication of the intended sale in newspapers. Hence, without, first of all, putting the borrower on notice, threatening that the prospects of liquidation of the secured asset by any of the methods specified under sub-rule (5) of Rule 8 of the Rules would not only sub-serve the object behind sub-section (8) of Section 13 of the Act, but would, in fact, enhance the efficacy of realising/securitising the secured asset. As was already held by us, the secured asset is liable to be sold only in the event of default persisting in liquidating the liability. In other words, only when the borrower commits a default in payment of the outstanding liability, in spite of the notice threatening with intended sale of the secured asset, the actual sale notification can follow, but not otherwise.

34. In the instant case, the secured creditor has put the borrower on one single notice of sale, which was also published in two newspapers, but, he has not put the borrower on a separate individual notice prior to deciding on the mode of sale of the secured asset. For this reason, we are of the opinion that the sale undertaken pursuant to the sale notification is vitiated for want of not providing the opportunity of 30 days clear time before undertaking the actual sale.

35. Hence, we allow the writ petition, set aside the sale, but however, we preserve liberty to the secured creditor to proceed further now by undertaking sale of the secured asset, if the borrower is still in default in clearing the outstanding liability, by publishing afresh the sale notification in accordance with sub-rule (6) of Rule 8 r/w. sub-rule (1) of Rule 9 of the Rules.

36. Sri Deepak Bhattacharji, learned Standing Counsel for the respondent-Bank, while placing reliance upon a judgment rendered by the Supreme Court in **General**

Manager, Sri Siddeshwara Cooperative Bank Limited and another v. Ikbal and others (2013) 10 SCC 83, had contended that the letter addressed by the borrower on 04.11.2015 amounts to waiver of notice and, therefore, the intended sale, which was published in the newspapers need not be interdicted.

37. It is only appropriate for us to point out that the Supreme Court in **Vasu P. Shetty v. Hotel Vandana Palace and others (2014) 5 SCC 660**, after considering its earlier judgment in Ikbal''s case (supra 5), has pointed out in paras-22 and 23 as follows:

"22. In **State of Punjab v. Davinder Pal Singh Bhullar (2013) 10 SCC 83**, the Court explained the doctrine of waiver on the basis of earlier pronouncements which were taken note of and discussed the same in the following manner: (SCC pp. 793-94, paras 37-42)

"37. In **Manak Lal v. Prem Chand Singhvi AIR 1957 SC 425**, this Court held that alleged bias of a Judge/official/Tribunal does not render the proceedings invalid if it is shown that the objection in that regard and particularly against the presence of the said official in question, had not been taken by the party even though the party knew about the circumstances giving rise to the allegations about the alleged bias and was aware of its right to challenge the presence of such official. The Court further observed that: (SCC p. 431, para 8)

''8. waiver cannot always and in every case be inferred merely from the failure of the party to take the objection. Waiver can be inferred only if and after it is shown that the party knew about the relevant facts and was aware of his right to take the objection in question.''

38. Thus, in a given case if a party knows the material facts and is conscious of his legal rights in that matter, but fails to take the plea of bias at the earlier stage of the proceedings, it creates an effective bar of waiver against him. In such facts and circumstances, it would be clear that the party wanted to take a chance to secure a favourable order from the official/court and when he found that he was confronted with an unfavourable order, he adopted the device of raising the issue of bias. The issue of bias must be raised by the party at the earliest. (See **Pannalal Binjraj v. Union of India AIR 1957 SC 397** and **P.D. Dinakaran v. Judges Inquiry Committee - (2011) 8 SCC 380**.)

39. In **Power Control Appliances v. Sumeet Machines (P) Ltd.- (1994) 2 SCC 448** this Court held as under: (SCC p. 457, para 26)

''26. Acquiescence is sitting by, when another is invading the rights. It is a course of conduct inconsistent with the claim. It implies positive acts; not merely silence or inaction such as involved in laches. The acquiescence must be such as to lead to the inference of a licence sufficient to create a new right in the defendant.''

40. Inaction in every case does not lead to an inference of implied consent or acquiescence as has been held by this Court in **P. John Chandy & Co. (P) Ltd. v. John P. Thomas** **(2002) 5 SCC 90**. Thus, the Court has to examine the facts and circumstances in an individual case.

41. Waiver is an intentional relinquishment of a right. It involves conscious abandonment of an existing legal right, advantage, benefit, claim or privilege, which except for such a waiver, a party could have enjoyed. In fact, it is an agreement not to assert a right. There can be no waiver unless the person who is said to have waived, is fully informed as to his rights and with full knowledge about the same, he intentionally abandons them. (Vide **Dawson''s Bank Ltd. v. Nippon Menkwa Kabushiki Kaisha** **(1934-35) 62 IA 100 : (1935) 41 LW 764**, **Basheshar Nath v. CIT** **AIR 1959 SC 149**, **Mademsetty Satyanarayana v. G. Yelloji Rao** **AIR 1965 SC 1405**, **Associated Hotels of India Ltd. v. S.B. Sardar Ranjit Singh** **AIR 1968 SC 933**, **Jaswantsingh Mathurasingh v. Ahmedabad Municipal Corpn. 1992 Supp.(1) SCC 5**, **Sikkim Subba Associates v. State of Sikkim** **(2001) 5 SCC 629** and **Krishna Bahadur v. Purna Theatre** **(2004) 8 SCC 229 : 2004 SCC (L & S) 1086.**)

42. This Court in **Municipal Corpn. of Greater Bombay v. Hakimwadi Tenants'' Assn. - 1988 Supp. SCC 55** considered the issue of waiver/acquiescence by the non-parties to the proceedings and held: (SCC p. 65, paras 14-15)

''14. In order to constitute waiver, there must be voluntary and intentional relinquishment of a right. The essence of a waiver is an estoppel and where there is no estoppel, there is no waiver. Estoppel and waiver are questions of conduct and must necessarily be determined on the facts of each case.

15. There is no question of estoppel, waiver or abandonment. There is no specific plea of waiver, acquiescence or estoppel, much less a plea of abandonment of right. That apart, the question of waiver really does not arise in the case. Admittedly, the tenants were not parties to the earlier proceedings. There is, therefore, no question of waiver of rights by Respondents 4-7 nor would this disentitle the tenants from maintaining the writ petition.''''

23. From what is argued by the appellants, at best it can be inferred that the borrower tried to thwart the earlier attempts of the Bank in selling the property. When the first notice was issued, the borrower filed the writ petition. However, it is to be borne in mind that in the said writ petition no interim order was passed staking the auction on the stipulated date. The only stay granted was against confirmation of sale. That did not preclude anybody from participating in the auction. We are mindful of the ground realities that many times pendency of such a writ petition challenging the auction-notice and the kind of stay granted, even partial in nature, deter the intending buyers to come forward and participate in the auction. Be that as it may, we find out that even in the second attempt when the reserve price was reduced to Rs. 2.39 crores, the highest bid received was in the

sum of Rs. 2.25 crores. Further, even the bid of the appellant which was accepted was in the sum of Rs. 2.16 crores. Likewise, after the second auction when the Bank requested the borrower to accept the bid of Rs. 2.25 crores giving its reasons and the borrower instead of doing so took initiative resulting in OTS but defaulted therein, it would merely indicate that the borrower was at fault in not adhering to OTS. By no logic can it be deduced therefrom that the Bank was relieved from its obligation not to follow the mandatory procedure contained in the Rules, while taking fresh steps for the disposal of the property."

24. In this view of the matter, we are not inclined to accept the contention canvassed by the learned Standing Counsel Sri Deepak Bhattacharji.

25. The writ petition stands allowed to the extent indicated above. No order as to costs. Consequently, miscellaneous petitions, if any, pending in this Writ Petition shall stand closed.