(2014) 08 CAL CK 0113

Calcutta High Court

Case No: W.P. 38111(W) of 2013

Mahendra Mahato — APPELLANT

Vs

The Central Bank of India — RESPONDENT

Date of Decision: Aug. 29, 2014

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 40 Rule 1
- Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) - Section 13, 13(2), 13(4), 13(4)(6)(8), 13(4)(a)
- Transfer of Property Act, 1882 - Section 55

Citation: (2015) 2 BC 105 : (2014) 4 CALLT 526

Hon'ble Judges: D. Datta, J

Bench: Single Bench

Advocate: Amales Roy and Mousumi Bhowal, Advocate for the Appellant; Bishwambher Jha, Advocate for the Respondent

Final Decision: Dismissed

Judgement

Dipankar Datta, J.

By filing this writ petition, the petitioners seek orders on the Central Bank of India (the first respondent) and four of its officers, who are the other respondents, to discharge their obligation in terms of the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereafter the SARFAESI Act) of handing over possession of a secured asset to the petitioners which had been put up for sale by auction and has since been purchased by them.

2. The basic facts giving rise to the writ petition are not in dispute. The third respondent, being the authorized officer of the first respondent, had published an auction notice dated April 12, 2012 in exercise of power conferred by Rules 8(6) and 9(1) of the Security Interest (Enforcement) Rules 2002 (hereafter the 2002 Rules)

putting up various properties (secured assets) for sale. Such properties, inter alia, included a 3-storied residential cum commercial building known as Medilife, located in Ward No. 6 of Siliguri Municipal Corporation, P.O. and P.S. Siliguri, District Darjeeling together with such area of vacant land as delineated in the notice. The petitioners were the successful bidders and in due course of time the requisite amount having been made over to the third respondent, sale certificate in the statutory form (Appendix V) read with Rule 9(6) of the 2002 Rules was issued. The material portion of the sale certificate reads as follows:

"Whereas

The undersigned being the authorized Officer of the Central Bank of India, Asset Recovery Branch, Kolkata under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest'' 2002 and in the exercise of the powers conferred u/s 13 read with rule 12 of the Security Interest (Enforcement) Rules, 2002 sold on behalf of the Central Bank of India, Siliguri Branch in favour of Sri Mahendra Mahato & Ms. Sarita Agarwal the immovable property shown in the schedule below secured in favour of the Central Bank of India, Siliguri Branch in Account Medilife towards the Cent Trade facility offered by Central Bank of India, Siliguri Branch to Mr. Sujit Kumar Singhania. The undersigned acknowledge the receipt of the sale price of Rs. 26.75 lacs (Rupees Twenty Six Lacs Seventy Five Thousand) only in full & handed over the delivery and possession of the schedule property. This property has been sold AS IS WHERE IS BASIS & AS IS WHAT IS BASIS as mentioned in "Times of India [English]" & "Aajkal [Bengali]" on 12.04.2012 The sale of the scheduled property was made free from all encumbrances known to the secured creditor listed below on deposit of the money demanded by the undersigned."

3. Upon being furnished the sale certificate, the petitioners vide letter dated December 17, 2012 requested the respondents to provide peaceful and vacant possession of the secured asset. Since no positive result yielded, a lawyer''s notice dated April 27, 2013 was sent containing similar prayer. This request too proved abortive. Finding no other option, this writ petition dated December 23, 2013 was presented before the Court seeking, inter alia, order on the respondents to immediately and forthwith deliver peaceful and vacant physical possession of the secured asset in favour of the petitioners.

4. The writ petition has been contested by the respondents by filing an affidavit-in-opposition. It seems to be their version that the petitioners submitted their bid upon inspection of the secured asset on May 10, 2012; that the secured asset was put up for sale on "AS IS WHERE IS BASIS" and "AS IS WHAT IS BASIS" & "WHATEVER THERE IS BASIS" (hereafter as-is-where-is basis) and therefore, if they are obstructed in taking possession of the secured asset, it is their responsibility to have the occupants of the secured asset removed; and that the respondents have no liability to put the petitioners in possession, since they are neither the mortgagee of the secured asset nor owner thereof. It has further been pleaded that the

petitioners having taken delivery of the sale certificate, they are now owners of the secured asset and they ought to take appropriate steps by approaching the Debts Recovery Tribunal having jurisdiction.

5. Mr. Roy, learned advocate for the petitioners contended that the respondents cannot be allowed to wash their hands off on the specious ground that the secured asset was sold on as-is-where-is basis and that the sale certificate had been issued in their favour. Referring to the statutory form in which the sale certificate was issued, being Appendix V, it was contended by him that the secured creditor while issuing the same declared that the secured asset was free from all encumbrances known to them and so long possession is not made over to the petitioners, the liability of the respondents does not cease. Relying on several decisions of the Apex Court and the various High Courts of the country, Mr. Roy contended that it is the duty of the respondents to initiate steps for taking physical possession of the secured asset and to put the petitioners in peaceful and vacant possession thereof. The following decisions were cited by Mr. Roy in support of his submissions:

(i) Transcore Vs. Union of India (UOI) and Another,

(ii) Business India Builders and Developers Ltd. Vs. Union Bank of India and Others,

(iii) The Kottakkal Co-op. Urban Bank Ltd. Vs. T. Balakrishnan,

(iv) Bharatbhai Ramniklal v. Collector and District Magistrate, an unreported decision of the Gujarat High Court dated October 29, 2009;

(v) Kathikkal Tea Plantations Vs. State Bank of India and P. Srinivasa Varma,

(vi) Kalyani Sales Company and Another Vs. Union of India (UOI) and Another, and

(vii) Smt. Popi Chakraborty and Others Vs. Punjab National Bank and Others,

He, accordingly, prayed for relief as claimed in the writ petition.

6. Mr. Jha, learned advocate for the respondents, placed the affidavit-in-opposition, the contents whereof have been referred to above. According to him, the petitioners having purchased the secured asset with their eyes open and conscious of the stipulation that the secured asset would be sold on as-is-where-is basis cannot have any reason to complain now. He prayed for dismissal of the writ petition.

7. In reply, Mr. Roy referred to a supplementary affidavit dated June 2, 2014 of the petitioners and contended that the respondents themselves had approached the District Magistrate, Darjeeling u/s 14 of the SARFAESI Act whereupon an order was passed on the police authorities to provide assistance for taking possession of the secured asset by the respondents. According to him, it is the duty of the respondents to seek assistance of the local police authorities for taking physical possession of the secured asset, but not having so done they are amenable to the writ jurisdiction of this Court. He prayed for a direction in this behalf.

8. The questions that arise for a decision on this writ petition are (i) whether the respondents owe a duty to hand over vacant and peaceful physical possession of the secured asset in favour of the petitioners after receipt of bid money and issuance of the sale certificate, and (ii) whether the respondents ought to be directed to deliver vacant and peaceful physical possession of the secured asset in favour of the petitioners.

9. Before I proceed to adjudicate the contentious issues that have arisen, it would be necessary to notice whether the law laid down in the decisions cited by Mr. Roy, referred to supra, assists in adjudication of the issues that I am seized of. I shall consider the decisions in chronological order of reporting and finally the unreported decision.

10. The Hon''ble Division Bench of the Punjab & Haryana High Court in Ms. Kalyani Sales (supra) was considering a bunch of writ petitions where the legality and validity of the action taken by various banks and financial institutions under the SARFAESI Act were challenged. The questions which came up for consideration were formulated in paragraph 4. Only question 5 and the answer thereto have some relevance for the present purpose.

Question 5 is quoted below:

"5. Whether recourse to take possession of the secured assets of the borrower in terms of Section 13(4) of the Act is the power to take actual physical possession of immovable property?"

Such question was answered in the following words:

"43. in Section 14 of the Act or after the sale is confirmed in terms of Rule 9 Therefore, we have notice u/s 13(4) of the Act so as to defeat the adjudication of his no hesitation in holding that the borrower or any other person in possession of the immovable property cannot be physically dispossessed at the time of issuing representation or objection by the Debts Recovery Tribunal. The physical possession can be taken by the bank or the financial institution by following the procedure laid down particularly sub-rule (9) of Rule 9 of Security Interest (Enforcement) Rules, 2002."

11. The Apex Court decision in M/s. Transcore (supra) answered 3 (three) questions that arose for decision. The second question was whether recourse to take possession of the secured assets of the borrower in terms of Section 13(4) of the SARFAESI Act comprehends the power to take actual possession of the immovable property. The answer is found in the passage quoted below:

"55. The word possession is a relative concept. It is not an absolute concept. The dichotomy between symbolic and physical possession does not find place in the Act. As stated above, there is a conceptual distinction between securities by which the creditor obtains ownership of or interest in the property concerned (mortgages) and

securities where the creditor obtains neither an interest in nor possession of the property but the property is appropriated to the satisfaction of the debt (charges). Basically, the NPA Act deals with the former type of securities under which the secured creditor, namely, the bank/FI obtains interest in the property concerned. It is for this reason that the NPA Act ousts the intervention of the courts/Tribunals.

56. Keeping the above conceptual aspect in mind, we find that Section 13(4) of the NPA Act proceeds on the basis that the borrower, who is under a liability, has failed to discharge his liability within the period prescribed u/s 13(2), which enables the secured creditor to take recourse to one of the measures, namely, taking possession of the secured assets including the right to transfer by way of lease, assignment or sale for realizing the secured assets. Section 13(4-A) refers to the word ''possession'' simpliciter. There is no dichotomy in sub-section (4-A) as pleaded on behalf of the borrowers. Under Rule 8 of the 2002 Rules, the authorised officer is empowered to take possession by delivering the possession notice prepared as nearly as possible in Appendix IV to the 2002 Rules. That notice is required to be affixed on the property. Rule 8 deals with sale of immovable secured assets. Appendix IV prescribes the form of possession notice. It inter alia states that notice is given to the borrower who has failed to repay the amount informing him and the public that the bank/FI has taken possession of the property u/s 13(4) read with Rule 9 of the 2002 Rules. Rule 9 relates to time of sale, issue of sale certificate and delivery of possession. Rule 9(6) states that on confirmation of sale, if the terms of payment are complied with, the authorised officer shall issue a sale certificate in favour of the purchaser in the form given in Appendix V to the 2002 Rules. Rule 9(9) states that the authorised officer shall deliver the property to the buyer free from all encumbrances known to the secured creditor or not known to the secured creditor. (Emphasis supplied). Section 14 of the NPA Act states that where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred, the secured creditor may, for the purpose of taking possession, request in writing to the District Magistrate to take possession thereof. Section 17(1) of NPA Act refers to right of appeal. Section 17(3) states that if the DRT as an appellate authority after examining the facts and circumstances of the case comes to the conclusion that any of the measures u/s 13(4) taken by the secured creditor are not in accordance with the provisions of the Act, it may by order declare that the recourse taken to any one or more measures is invalid, and consequently, restore possession to the borrower and can also restore management of the business of the borrower. Therefore, the scheme of Section 13(4) read with Section 17(3) shows that if the borrower is dispossessed, not in accordance with the provisions of the Act, then the DRT is entitled to put the clock back by restoring the status quo ante. Therefore, it cannot be said that if possession is taken before confirmation of sale, the rights of the borrower to get the dispute adjudicated upon is defeated by the authorised officer taking possession. As stated above, the NPA Act provides for recovery of possession by non-adjudicatory process,

therefore, to say that the rights of the borrower would be defeated without adjudication would be erroneous. Rule 8, undoubtedly, refers to sale of immovable secured asset. However, Rule 8(4) indicates that where possession is taken by the authorised officer before issuance of sale certificate under Rule 9, the authorised officer shall take steps for preservation and protection of secured assets till they are sold or otherwise disposed of. u/s 13(8), if the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the creditor before the date fixed for sale or transfer, the asset shall not be sold or transferred. The costs, charges and expenses referred to in Section 13(8) will include costs, charges and expenses which the authorised officer incurs for preserving and protecting the secured assets till they are sold or disposed of in terms of Rule 8(4).Thus, Rule 8 deals with the stage anterior to the issuance of sale certificate and delivery of possession under Rule 9. Till the time of issuance of sale certificate, the authorised officer is like a court receiver under Order XL, Rule 1, CPC. The court receiver can take symbolic possession and in appropriate cases where the court receiver finds that a third party interest is likely to be created overnight, he can take actual possession even prior to the decree. The authorized officer under Rule 8 has greater powers than even a court receiver as security interest in the property is already created in favour of the banks/FIs. That interest needs to be protected. Therefore, Rule 8 provides that till issuance of the sale certificate under Rule 9, the authorized officer shall take such steps as he deems fit to preserve the secured asset. It is well settled that third party interests are created overnight and in very many cases those third parties take up the defence of being a bona fide purchaser for value without notice. It is these types of disputes which are sought to be avoided by Rule 8 read with Rule 9 of the 2002 Rules. In the circumstances, the drawing of dichotomy between symbolic and actual possession does not find place in the scheme of the NPA Act read with the 2002 Rules."

12. The Hon''ble Division Bench of the Kerala High Court in Business India Builders & Developers Ltd. (supra) was considering an intra-court writ appeal. The writ petition had been preferred by the appellant seeking a declaration that the word "encumbrances" enumerated in Rule 9(9) of the 2002 Rules does not include tenancy arrangements with respect to the secured assets sold as per Rule 8 and also for a declaration that the provisions of the 2002 Rules do not authorise the eviction of tenants in occupation of secured assets and also for other consequential reliefs. Also under challenge was a notice dated October 31, 2006, received from the bank, directing the petitioner to hand over vacant possession of the premises to the bank failing which the petitioner was informed that coercive steps would be taken to evict him from the premises. The learned single judge found no infirmity in the notice issued by the bank and dismissed the writ petition. While dismissing the appeal, it was held in paragraph 6 as follows:

"6. We are not impressed by the arguments of the counsel for the petitioner that the encumbrance enumerated in Rule 9(9) would not take in the occupation of the

tenant. The word encumbrance cannot be given a restricted meaning. ''Encumbrance'' means a liability which burdens the property, for example, lease, mortgage, easement, restriction, covenant, rent, charge etc. Encumbrance which can be carved out of ownership, generally are securities, leases, servitudes, trusts etc. It is generally a burden or charge upon the property. Lease is therefore an encumbrance over the property. In any view the borrower is bound by the terms and conditions stipulated in Annexure R2 dated 20-1-95, by which he had undertaken that he would not lease out the property. Contrary to the said stipulation the tenant was put in possession and therefore by virtue of Securitisation Act there is no necessity of the Bank resorting to the provisions of the Rent Control Act for evicting the tenant. The authorized officer is to deliver the property to the purchaser free from encumbrances in terms of Rule 9(9). Occupants are not to be physically dispossessed at the time of issuing notice u/s 13. The physical possession can be taken by the Bank by following the procedure laid down in Section 14 or after the sale is confirmed. In this connection we may refer to the Bench decision of the Punjab and Haryana High Court in Kalyani Sales Company and Another Vs. Union of India (UOI) and Another, ***"

13. It is, however, noted that the aforesaid decision has been held not to lay down good law by a Full Bench of the Kerala High Court in the decision reported in Pushpangadan Vs. Federal Bank Ltd.,

14. In Kottakkal Co-operative Urban Bank (supra), the secured creditor was the writ petitioner before the learned single judge of the Kerala High Court. It had challenged an order passed by the Chief Judicial Magistrate u/s 14(1) of the SARFAESI Act wherein a view had been taken that Section 14 could not be invoked by the secured creditor after the secured creditor had taken possession of the secured asset, effected sale thereof and issued the sale certificate. Upon hearing the parties, the learned judge held as follows:

"7. While there is a vesting of right, exclusively with the transferee under a sale in terms of Section 13(6), such vesting of sale gives the transferee the right to demand the secured creditor for actual physical possession. Such vesting, by operation of Section 13(6), is in relation to the secured asset as if the transfer had been made by the owner of such secured asset. Such deemed vesting, by operation of law, gives the entitlement to the transferee to insist that the secured creditor puts the transferee in de facto possession by dispossessing the secured debtor who continues in de facto possession only by the choice of the secured creditor to take only de jure possession, leaving the secured debtor with actual possession. Therefore, the secured creditor, who has taken over de jure possession continues to be a secured creditor, duty bound to give the transferee de facto possession and such liability of the secured creditor gives sufficient standing to sustain the application for dispossession of the secured debtor, of de facto possession over the security interest, by recourse to Section 14 of the Act. On this count also, a secured

creditor who has not taken de facto possession but has proceeded and completed transferors (sic transfers) on the basis of de jure possession is entitled to apply for assistance of the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, for taking over actual physical possession from the secured debtor. The result of that proceedings would be that the secured debtor would be dispossessed of actual possession and de facto possession would be taken by the secured creditor, who would then, duty bound, as he is, transfer such de facto possession to the transferee of rights u/s 13(6) of the Act.

8. For the aforesaid reasons, the impugned order does not stand. The same is accordingly set aside and it is declared that the application of the writ petitioner (Ext. P1) is maintainable. The learned Chief Judicial Magistrate would accordingly take back Ext. P1 application and proceed with the same in accordance with law and in the light of what is stated herein."

15. In Kathikkal Tea Plantations (supra), the Division Bench of the Madras High Court was considering writ petitions involving common issues i.e. whether the respondent banks could take possession of the secured assets after issuing sale certificates in favour of the auction purchasers. Upon detailed examination of the provisions of the SARFAESI Act and the Rules it was held in paragraphs 16 and 20 as follows:

"16. From the above, the submission made by the learned counsel for the respondents that section 14 of the Act cannot be read in isolation and has to be viewed in the context of all other provisions of the Act, such as Sections 13(4)(6)(8), 15, 17, 18 Rule 8(9) of SARFAESI Rules and section 55 of the Transfer of Property Act is acceptable. These provisions are in conjunction with Section 14 of the Act for the purpose of interpretation, to be adopted, to achieve and sub-serve the object of the SARFAESI Act. Any other approach or interpretation will defeat the object of the Act. The object of the Act is only to enable the secured creditor, financial institutions to realise the long term assets, manage problems of liquidity, asset liability mismatch and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction. Therefore, it could be understood that the Act was brought for recovering the amount in speedy manner in taking possession of the properties and in realising the money. The third party, who comes forward to purchase the secured asset, must have a confidence that he would get the title to the property at the earliest. If the transferring of the property by way of title is going to be delayed endlessly, then the object of the Act which is meant for speedy recovery, would be defeated in whole. Therefore, as contended by the learned counsel for the banks, that if interpretation is given by taking the words in isolation from section 14, it would defeat the whole object. Only on a combined reading of section 14 along with the other sections, it would give a clear picture of the object.***
20. A reading of the dictum laid down in the above judgments would give a clear picture that the mechanical way of interpreting the provisions made in the statute

will lead to defeat the object of the Act. Here, when the object is to speedy recovery of debt, by way of taking possession on transferring the property in favour of third party and issued a sale certificate, it cannot be contended that once the sale certificate is issued, physical possession cannot be taken by the secured creditors. Further, in this regard, a useful reference could be placed on the judgment reported in The Kottakkal Co-op. Urban Bank Ltd. Vs. T. Balakrishnan,

16. The Gauhati High Court in Popi Chakraborty (supra) was considering a challenge to the action taken by the respondent bank upon invocation of the provisions of the SARFAESI Act. The writ petition was dismissed. I have failed to notice any law laid down therein that would aid a decision for resolving the present controversy.

17. The Gujarat High Court in the unreported decision declined to entertain the petitions before it in view of availability of alternative remedy u/s 17 of the Act. No law has been laid down in such decision too, which assists me to answer the questions that this writ petition raises.

18. Turning attention to the facts of the present case, paragraph 3(c) of the writ petition and its several sub-paragraphs reveal what according to the petitioners were the 7 (seven) "vital facts" that they found on perusal of the auction notice. Although it is clear from such notice that the secured asset was put up for sale on as-is-where-is basis, such stipulation clearly seems to have escaped the notice of the petitioners or else that ought to have found place as an additional vital fact in paragraph 3(c). Be that as it may.

19. It is alleged in paragraph 3(f) of the writ petition that while the secured asset was being inspected on May 10, 2012 the third respondent "assured the petitioner No. 1 that the property in question would be delivered to the purchasers free from encumbrances, known to them, at the time of issuance of a certificate of sale of the said immovable property in favour of the purchasers", the respondents in their affidavit-in-opposition have emphatically denied the same. The sale certificate issued in Appendix V, to which my attention has been drawn by Mr. Roy, records that the secured asset has been sold on as-is-where-is basis and the sale of the scheduled property was made free from all encumbrances known to the secured creditor. A decision on this writ petition would necessarily require consideration of the effect of the sale made on as-is-where-is basis and the assertion of the secured creditor that the sale is free from all encumbrances known to it.

20. In my considered opinion, the stipulation in the auction notice that the secured asset is being put up for sale on as-is-where-is basis, which the petitioners missed, is indeed decisive and is the distinctive feature that dissuades me to apply the ratio of a couple of decisions cited by Mr. Roy.

21. The Supreme Court in numerous decisions has had the occasion to consider issues arising out of sales made on as-is-where-is basis. I shall now take a look at a few of them.

22. In the decision reported in AI Champdany Industries Limited Vs. The Official Liquidator and Another, the purchaser of a property put for sale on as-is-where-is basis was called upon by a local authority to pay unpaid taxes by the erstwhile owner. While reversing the decisions of this Court and allowing the appeal of the purchaser, meaning of the word ''encumbrance'' was traced and ultimately it was held as follows:

"12. The terms and conditions of the sale must be read as a whole. It must be given a purposive meaning. The word ''encumbrance'' in relation to the word ''immovable property'' carries a distinct meaning. It ordinarily cannot be assigned a general and/or dictionary meaning.

13. We may, however, notice some dictionary meanings of the said word as reliance thereupon has been placed by Mr. Sibaji Sen. In Stroud''s Judicial Dictionary of Words and Phrases, 5th Edn., encumbrance is defined as: being, ''a claim, lien, or liability, attached to property''; and this definition is wide enough to cover the plaintiff''s claim, which was, as assignee for value of a reversionary interest, against a person coming in under a subsequent title.

In Supreme Court on Words and Phrases it is stated that the word ''encumbrance'' means a burden or charge upon property or a claim or lien upon an estate or on the land.

In Advanced Law Lexicon, encumbrance is defined as:

An infringement of another''s right or intrusion on another''s property.

In Black''s Law Dictionary encumbrance is defined as:

Any right to, or interest in, land which may subsist in another to diminution of its value, but consistent with the passing of the fee...."

Encumbrance, therefore, must be capable of being found out either on inspection of the land or the office of the Registrar or a statutory authority. A charge, burden or any other thing which impairs the use of the land or depreciates in its value may be a mortgage or a deed of trust or a lien or an easement. Encumbrance, thus, must be a charge on the property. It must run with the property. If by reason of the statute no such burden on the title which diminishes the value of the land is created, it shall not constitute any encumbrance."

23. The next relevant decision of the Apex Court is the one reported in Punjab Urban Planning and Dev. Authority and Others Vs. Raghu Nath Gupta and Others, It was held there as follows:

"14. We notice that the respondents had accepted the commercial plots with open eyes, subject to the abovementioned conditions. Evidently, the commercial plots were allotted on ''as-is-where-is'' basis. The allottees would have ascertained the facilities available at the time of auction and after having accepted the commercial

plots on ''as-is-where-is'' basis, they cannot be heard to contend that PUDA had not provided the basic amenities like parking, lights, roads, water, sewerage, etc. If the allottees were not interested in taking the commercial plots on ''as-is-where-is'' basis, they should not have accepted the allotment and after having accepted the allotment on ''as-is-where-is'' basis, they are estopped from contending that the basic amenities like parking, lights, roads, water, sewerage, etc. were not provided by PUDA when the plots were allotted."

24. Applying the said meaning to the issue under consideration and allowing the appeal before it by reversing the decision of the High Court, the Apex Court in the decision reported in The Rajasthan State Industrial Development and Investment Corporation and Another Vs. Diamond and Gem Development Corporation Ltd. and Another, observed as follows:

"30. The terms and conditions incorporated in the lease deed reveal that the allotment was made on ''as-is-where-is'' basis. The same was accepted by the respondent Company without any protest whatsoever. The lease deed further enabled the appellant to collect charges, in case it decided to provide the approach road. Otherwise, it would be the responsibility of the respondent Company to use its own means to develop such road, and there was absolutely no obligation placed upon the appellant to provide to the respondent the access road. As the respondent Company was responsible for the creation of its own infrastructure, it has no legal right to maintain the writ petition, and the courts cannot grant relief on the basis of an implied obligation. The order of the High Court is in contravention of Clause 2(g) of the lease deed."

25. To the extent relevant for the present controversy, what follows from these decisions is this. Viewed in the context of sale of an immovable property on as-is-where-is basis, the terms of the sale/auction notice are of paramount importance and have to be construed purposively. Normally, encumbrance is a burden or charge on property. To constitute an encumbrance in a case of the nature under discussion, one must be in a position to see or feel the encumbrance upon inspection of, inter alia, the land or the immovable property. To constitute an encumbrance, as held in AI Champdani Industries Ltd. (supra), there must be a burden on the property which must run with it and diminish its value.

26. There cannot be any doubt that in relation to a property [which is a secured asset within the meaning of section 2(zc) of the SARFAESI Act and is put up for auction for recovery of the secured debt of the secured creditor in terms of the provisions thereof] occupied by persons either in the capacity of an owner or as a tenant or as a lessee, such occupation would amount to an intrusion on the property and if it is for the auction purchaser to get rid of those occupants after the sale is effected to have vacant physical possession thereof according to law, the value that such property would fetch in auction is likely to be lesser compared to a situation where the self-same property is put up for auction, free of occupants.

27. In the event a public auction of an immovable property is conducted on as-is-where-is-basis, a prospective purchaser would not in the normal run of events participate in the auction without utilising the opportunity of inspection of the property. He would bid in the auction bearing in mind the existing situation, position and condition of the property. If the property is encumbrance free (includes the non-occupancy factor) and amenities attached thereto are to his liking, most certainly he would offer a higher amount. The offer would most certainly be on the lower side, should the property be encumbered (occupied) or suffer from any disadvantages. In case the property is not to his liking, he is free not to participate in the auction. Once with open eyes he participates in the auction, he cannot expect a better deal that he was not assured of on the day he offered his bid. It might well be so that had the secured creditor represented in the auction notice that sale on as-is-where-is basis would be followed by making over vacant physical possession of the property put up for auction (secured asset), more and more people would have been interested and that would have ensured wider participation. Without there being any such representation in the notice, the petitioners cannot now turn around and claim a mandamus on the respondents to take steps for making over vacant and peaceful physical possession of the secured asset to them while alleging that their legal right of being delivered such possession has been infringed. If an encumbrance exists, say the secured creditor has only been in symbolic possession with the borrowers in actual possession of the secured asset, and the prospective purchaser bids with full knowledge of such encumbrance, it is not open to him after the sale certificate is issued to contend that it carries with it the duty of the secured creditor to put him in actual possession of the secured asset. There is no reason as to why the principle of ''caveat-emptor'' shall not apply in such a situation.

28. While construing the provisions of the SARFAESI Act that confers extensive powers to a secured creditor to recover its secured debt without the intervention of the Courts/Tribunals, one must not ignore the interest of the borrower. If the auction notice were to contain a clause that the sale on as-is-where-is basis would be followed by making over vacant physical possession of the property put up for auction (secured asset) to the auction purchaser, it would have attracted better offers and the highest bid received by the secured creditor, on its acceptance, would have enabled the secured creditor to appropriate its dues and remit the balance to the borrower. Absence of any such clause would obviously not arouse interest in purchasers who believe in value for money.

29. The petitioners must have noticed the encumbrance on the date of inspection i.e. the authorised officer was not in actual physical possession, or else the question of the so-called assurance being given [as alleged in paragraph 3(f)] out of nothing would not have arisen. With open eyes and knowing fully the exact nature of occupation of the secured asset and its advantages and disadvantages, the petitioners participated in the public auction. The possibility of the petitioners'' bid being influenced by consideration of the secured asset not being free from

encumbrance (read presence of occupants in the property) cannot be totally ruled out. They cannot now wriggle out of the confirmed bid, turn around and be heard to claim that they are not bound by the terms and conditions of the notice. They are in fact estopped from voicing a grievance that the respondents are under any duty to deliver actual peaceful and vacant possession of the secured asset. Nothing also turns on the letters issued by the third respondent to the District Magistrate, Darjeeling urging him to exercise power u/s 14 of the SARFAESI Act and the exchange of correspondence that followed between the local civil administration and the third respondent, whereby the intentions to initiate steps for taking physical possession of the property upon evicting the borrower were evinced. If indeed the same had fructified, that would have altered the status-quo of the property and the stipulation that it was put up for auction on as-is-where-is basis rendered futile.

30. Insofar as the statutory form is concerned, it records handing "over the delivery and possession of the" secured asset to the purchasers, i.e. the petitioners. The secured asset having been put up for sale on as-is-where-is basis, and the sale being "made free from all encumbrances" would imply that there is no burden or charge on the property except that which could be seen or felt on inspection of the secured asset.

31. None of the cited decisions dealt with a secured asset put up for sale on as-is-where-is basis. The law laid down in the decisions in Kottakkal Co-operative Urban Bank (supra) and Kathikkal Tea Plantations (supra) do not fit in the facts of the present case and, thus, the decisions are factually distinguishable and, therefore, do not aid the petitioners. I, accordingly, hold that there has been no occasion for a legitimate grievance of the petitioners to be redressed.

32. However, in an appropriate case it would require consideration in view of the decision of the Apex Court reported in Standard Chartered Bank Vs. V. Noble Kumar and Others, as to whether a secured creditor would be empowered to put up an immovable property (secured asset) for sale without physical possession thereof being handed over to it in pursuance of a Section 14 action or without the secured creditor obtaining such possession independent of Section 14. It has been held there as follows:

"36. Thus, there will be three methods for the secured creditor to take possession of the secured assets:

36.1. (i) The first method would be where the secured creditor gives the requisite notice under Rule 8(1) and where he does not meet with any resistance. In that case, the authorised officer will proceed to take steps as stipulated under Rule 8(2) onwards to take possession and thereafter for sale of the secured assets to realise the amounts that are claimed by the secured creditor.

36.2. (ii) The second situation will arise where the secured creditor meets with resistance from the borrower after the notice under Rule 8(1) is given. In that case

he will take recourse to the mechanism provided u/s 14 of the Act viz. making application to the Magistrate. The Magistrate will scrutinise the application as provided in Section 14, and then if satisfied, appoint an officer subordinate to him as provided u/s 14(1-A) to take possession of the assets and documents. For that purpose the Magistrate may authorise the officer concerned to use such force as may be necessary. After the possession is taken the assets and documents will be forwarded to the secured creditor.

36.3. (iii) The third situation will be one where the secured creditor approaches the Magistrate concerned directly u/s 14 of the Act. The Magistrate will thereafter scrutinise the application as provided in Section 14, and then if satisfied, authorise a subordinate officer to take possession of the assets and documents and forward them to the secured creditor as under clause 36.2.(ii) above.

36.4. In any of the three situations above, after the possession is handed over to the secured creditor, the subsequent specified provisions of Rule 8 concerning the preservation, valuation and sale of the secured assets, and other subsequent rules from the Security Interest (Enforcement) Rules, 2002, shall apply."

(underlining for emphasis by me)

33. I would read the above passage as an exposition of the law that a process of sale cannot be undertaken before possession of the secured asset is either taken over by the secured creditor or handed over to it in exercise of power conferred by Section 13(4) read with Section 14 of the SARFAESI Act.

34. Two thoughts that come to my mind on reading paragraph 36 of V. Noble Kumar (supra) may be shared. It seems from the above extract that (i) issuance of notice under Rule 8(1) of the 2002 Rules [in Appendix IV] before possession of the secured asset is taken over and (ii) handing over of possession of the secured asset to the secured creditor, have been construed as conditions precedent for taking steps for preservation, valuation and sale thereof under Rule 8(4) thereof and the following sub-rules. According to the Court (see paragraph 36.1), if no resistance is faced after issuance of the notice under Rule 8(1), the secured creditor "will proceed to take steps as stipulated under Rule 8(2) onwards to take possession and thereafter for sale of the secured assets ***." Paragraph 36.2 reiterates that the notice under Rule 8(1), if followed by resistance, the secured creditor is free to proceed u/s 14 of the SARFAESI Act for activating the relevant magistrate to take possession of the secured asset through its authorised officer. My reading of Rule 8(1) of the 2002 Rules with Appendix IV was that the said provisions do not make service of a notice prior to taking possession of the secured asset mandatory, since the second paragraph of Appendix IV makes it clear that the notice follows possession of the secured asset being taken. This position has also been noticed in the passage quoted above from M/s. Transcore (supra), which was not placed when V. Noble Kumar (supra) was decided. However, my reading of the law is no longer of any

relevance and since the decision in V. Noble Kumar (supra) now rules the field, I am bound to apply the law laid down therein.

35. The other important aspect discernible from V. Noble Kumar (supra), hitherto before not laid down either by the Apex Court or any other High Court, is relating to the right of action to approach the Tribunal u/s 17. It has been held that an "*** appeal u/s 17 is available to the borrower only after losing possession of the secured asset" (emphasis supplied by me). The words "any of the measures referred to in sub-section (4) of Section 13 ***" appearing in Section 17 of the SARFAESI Act enables a borrower to exercise the right to approach the Tribunal in other circumstances too and not limited to the circumstance of losing possession of the secured asset. In paragraph 28 of the report, the aforesaid words extracted from Section 17 do not find mention. When symbolic possession of a secured asset is taken, it is well known, it does not involve the person in actual occupation being physically dispossessed of his possession of the concerned property. Therefore "losing possession" must refer to physical possession being taken over upon dispossessing the occupant. In the context of the SARFAESI Act, taking of symbolic possession of the secured asset is not impermissible. There is no warrant for reading the word "possession" in Section 13(4)(a) of the SARFAESI Act in a restricted manner so as to connote ''physical possession'' only. Rule 8(3) of the 2002 Rules is a provision that ordains what should be the duty of an authorised officer, if he takes actual possession of a secured asset. M/s. Transcore (supra) lays down the law that the dichotomy between symbolic and physical possession does not find place in the SARFAESI Act. In view of such provisions and judicial pronouncement, the secured creditors so long were entitled to take symbolic possession of the secured assets and had in fact been doing so, and the person aggrieved could approach the Tribunal even after symbolic possession were taken by the secured creditor without there being any physical dispossession. However, the decision in V. Noble Kumar (supra), on interpretation of Sections 13 and 17 has deferred the time for exercise of the right of a person aggrieved to approach the Tribunal u/s 17 only after physical possession of the secured asset is handed over to the secured creditor. With respect, I may not agree with the said view in V. Noble Kumar (supra), yet, it is binding on me and has necessarily to be applied in cases that come up for decision.

36. The questions are, thus, answered by holding that (i) the respondents do not owe a duty to hand over vacant and peaceful physical possession of the secured asset to the petitioners and (ii) making a direction in this behalf does not arise.

37. Before concluding the hearing, I had enquired from Mr. Roy whether a direction on the respondents to remit the purchase value to the petitioners with such amount of interest the Court may award would satisfy them or not. Mr. Roy upon taking instructions submitted that the Court may decide on the merits, and hence there is no scope to make such direction after the conclusion I have reached that the respondents do not owe any duty of delivering vacant and peaceful possession of

the secured asset to the petitioners.

38. The writ petition stands dismissed, without costs.

39. However, the respondents shall take follow up steps to perfect the title of the petitioners. The petitioners shall also be free to take such legal steps for obtaining vacant and peaceful physical possession of the secured asset according to law, as they may be advised.

Urgent photostat certified copy of this order, if applied for, shall be furnished to the applicant at an early date.