

(2015) 09 MAD CK 0215

In the Madras High Court

Case No : C.R.P.(NPD) No. 2210 of 2015 and M.P. No. 1 of 2015

K. Kailasam

APPELLANT

Vs

The Authorised Officer, Canara Bank and Others

RESPONDENT

Date of Decision : 03-09-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22
Constitution of India, 1950 — Article 227
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(1), 13(2), 13(8), 29, 37
State Financial Corporations Act, 1951 — Section 29

Citation : (2015) 09 MAD CK 0215

Hon'ble Judges : Satish K. Agnihotri, J;K.K. Sasidharan, J

Bench : Division Bench

Advocate : R. Gowthama Narayanan for V. Muthukrishnan, for the Appellant; AR.L. Sundaresan, Senior Counsel assisted by Santhi Meenakshi, Advocates for the Respondent

Final Decision : Allowed

Judgement

K.K. Sasidharan, J.

Introductory:

1. The Debt Recovery Appellate Tribunal, Chennai arrived at a factual finding that the Authorised Officer, Canara Bank conducted auction of secured assets in violation of Rule 9 of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as "the Rules") and as such, it was an improper and illegal sale. Even after saying so, the Appellate Tribunal refused to set aside the sale on the technical ground that confirmation was not challenged by the petitioner, ignoring the position that in case the sale is declared illegal consequential confirmation would also be a nullity.

The facts:

2. The petitioner availed financial assistance from SAF Branch, Canara Bank. The residential property of the petitioner was given as security by creating equitable mortgage. Since the petitioner suffered loss in Horticulture business, the loan amount was not repaid within the time granted by the Bank. The Bank initiated proceedings under the provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI Act"). The auction notice issued by the Bank was challenged before the Debts Recovery Tribunal, (hereinafter referred to as "DRT"), Coimbatore in S.A. No. 65 of 2009. The proceedings in S.A. No. 65 of 2009 was dismissed.

3. The Bank issued a fresh sale notice on 22 January 2010 fixing the auction on 25 February 2010. The petitioner deposited a sum of Rs. 2.50 lakhs on 24 February 2010. The Authorised Officer postponed the sale without indicating any particular date. The auction was subsequently conducted on 5 March 2010, without issuing fresh notification. There was only one bidder. The bid submitted by the second respondent was accepted by the Bank. The petitioner unsuccessfully challenged the sale proceedings in S.A. No. 34 of 2010.

4. The order passed by the DRT dated 31 May 2011 in S.A. No. 34 of 2010 was challenged before the Debts Recovery Appellate Tribunal (hereinafter referred to as "DRAT"). The appeal was allowed. The Bank challenged the said order in R.A. (S.A.) No. 131 of 2011 dated 7 August 2012 before the High Court in W.P. No. 27569 of 2012. The Division Bench was pleased to remit the matter to the DRAT for fresh consideration. The Review petition filed by the auction purchaser was dismissed.

5. The DRAT after remand dismissed the appeal. The said order was challenged by the petitioner in C.R.P.(NPD) No. 3237 of 2014. The High Court set aside the order and directed the DRAT to consider the matter afresh.

6. The DRAT considered the matter once again on merits. The DRAT found that the auction conducted on 5 March 2010 was in clear violation of Rule 9, inasmuch as fresh auction notification was not issued giving a gap of thirty days. The DRAT therefore opined that the sale deserves to be set aside. The DRAT also arrived at a finding that issuance of sale certificate without confirmation of sale is bad. The DRAT in spite of observing that the petitioner was able to show that holding of the sale was improper and illegal, refused to set aside the sale solely on the ground that the prayer was only against confirmation. The DRAT observed that confirmation having been made earlier, the sale cannot be set aside without seeking appropriate relief. Accordingly, the DRAT dismissed the statutory appeal. Feeling aggrieved, the petitioner is before this Court.

Rival contentions:

7. The learned counsel for the petitioner made the following submissions:

"(i) The sale was fixed on 25 February 2010. It is true that the petitioner paid Rs.

2.50 lakhs on 24 February 2010. The Authorised Officer, on 25 February 2010, without adjourning the sale to a particular date, postponed the same. There was no notice issued thereafter in terms of Rule 9. The auction is therefore bad in law and the DRAT was correct in giving such a positive finding.

(ii) The DRAT dismissed the appeal primarily on the ground that sale as such was not challenged. The petitioner filed an application to raise additional grounds. The application was dismissed by the DRT along with the substantive proceedings. Since proceedings are conducted in accordance with the provisions of the Civil Procedure Code, it is always open to the DRAT to mould the relief taking into account the particular facts of the case.

(iii) The fact that the petitioner filed a writ petition in W.P. No. 4322 of 2010 indicating that the sale was fixed on 5 March 2010 would not give a right to the Bank to abstain from issuing auction notice as per Statute.

(iv) The Bank conducted the auction sale in collusion with the second respondent. The re-schedule of the auction was not published locally and as such there were no other bidders. The second respondent alone took part in the bidding process. In case the sale was made by giving wide publication, it would have attracted better offers.

(v) The property was sold to the second respondent by adopting the process of distress sale. The petitioner is now made to pay the remaining amount in spite of the fact that the property sold would fetch considerable amount which would meet the arrears payable to the Bank.

(vi) The Division Bench of this Court on an earlier occasion very clearly held that the sale was made in violation of Rule 9. The said finding has become final. The matter was remitted only for the purpose of marking documents. However, the DRAT dismissed the appeal on the ground that the sale as such was not challenged."

8. The learned Senior Counsel for the Bank would submit:

"(i) The sale was adjourned at the instance of the petitioner. Therefore it was not necessary to issue a fresh notice in terms of Rule 9.

(ii) The petitioner was aware of the fact that the property would be sold on 5 March 2010 and the same is evident from his affidavit filed in support of the writ petition in W.P. No. 4322 of 2010. He has stated that the Bank would be conducting the auction on 5 March 2010. Therefore he was having knowledge with regard to the adjourned date of sale.

(iii) The High Court allowed the writ petition filed by the Bank and remitted the matter for fresh consideration. The finding with regard to illegality of the sale was a tentative one and on account of remitting the matter, the DRAT was within its province to consider the entire matter afresh."

The issue:

9. The core question that arises for consideration is whether the Authorised Officer was correct in conducting the sale on 5 March 2010 without issuing mandatory notice under Rule 8 and before the expiry of the statutory period of thirty days as provided under Rule 9.

Discussion:

10. The subject litigation has got a chequered history. The matter came up before this Court earlier on three occasions and the Division Bench very clearly indicated that the sale made on 5 March 2010 was in violation of Rule 9 and there was no proper publication or publicity.

11. The petitioner took a term loan from Canara Bank, SAF Branch, Coimbatore for developing his Horticulture business. The flower plant and fruit trees grown were damaged by elephants and thereby the petitioner suffered huge loss. Since the loan amount was not repaid as per schedule, the Bank charged over due interest.

12. Since the operation of the loan account was found unsatisfactory, the Bank treated it as a "Non Performing Asset" and initiated proceedings under the SARFAESI Act. The Bank issued notice under Section 13(2) on 28 October 2008 and took symbolic possession on 25 March 2009. The Bank initially issued a sale notice fixing the auction on 25 June 2009. The auction was postponed and after the dismissal of SARFAESI Proceedings initiated by the petitioner in S.A. No. 65 of 2009, a fresh sale notice was issued on 22 January 2010 fixing the date of sale on 25 February 2010. It is a matter of record that the petitioner deposited a sum of Rs. 2.5 lakhs towards the loan outstanding on 24 February 2010. The Authorised Officer adjourned the sale on 25 February 2010 without specifying a particular date. Subsequently, the sale was conducted on 5 March 2010. Before the date of sale, the petitioner filed W.P. No. 4322 of 2010 to restrain the Bank from conducting auction on 5 March 2010. The writ petition was dismissed as "not pressed". According to the petitioner, it was only to approach the DRT, the writ petition was withdrawn.

13. The Authorised Officer has come up with a contention that it was only at the instance of the petitioner, the auction was adjourned. Though an attempt was made by the Authorised Officer to prove that the sale was straightaway adjourned to 5 March 2010 on 25 February 2010, not even a scrap of paper was produced before the Writ Court earlier and as such the Division Bench made a clear observation that the Bank failed to prove their contention with regard to the adjournment of sale to 5 March 2010.

14. Since the petitioner raised a moot question with regard to the illegal sale made on 5 March 2010 in violation of the mandatory provisions of law, we have asked the learned Senior Counsel for the Bank as to whether there was any proceeding recorded by the Authorised Officer adjourning the sale from 25 February 2010 to 5 March 2010. The learned Senior Counsel on instructions very fairly submitted that the auction was just adjourned on 25 February 2010

without fixing any particular date. According to him, the Authorised Officer has not drawn the minutes of proceedings on 25 February 2010. The learned Senior Counsel confirmed the fact there are no documents to substantiate the contention taken by the Bank that the sale was adjourned at the instance of the petitioner. It is therefore very clear that while adjourning the auction on 25 February 2010, there was no decision taken with the knowledge of the petitioner that the sale would be conducted once again on 5 March 2010.

15. Similar contention regarding the illegality of the sale was taken up by the petitioner in the earlier round of litigation.

16. The original application filed by the petitioner in S.A. No. 34 of 2010 was dismissed by the DRT, Coimbatore vide order dated 31 May, 2011. The prayer in the said original application was to direct the Authorised Officer not to confirm the auction held on 5 March 2010 and to pass such other orders or further relief to be granted by the Tribunal as it deems fit and proper to grant in the circumstances of the case. The petitioner also filed an application to raise additional grounds to cancel the sale certificate issued to the second respondent. The application to raise additional grounds and amendment filed in I.A. No. 877 of 2010 was taken up by the DRT along with the proceedings in S.A. No. 34 of 2010. The Tribunal dismissed the substantive proceedings as well as the application for amendment by a common order.

17. The order dated 31 March 2010 in S.A. No. 34 of 2010 was challenged by the petitioner before the DRAT in R.A.(S.A.) No. 131 of 2011. The DRAT framed as many as five issues. The fifth issue relates to the violation of Rule 9(1) of Security Interest (Enforcement) Rules, 2002.

18. The DRAT found that the sale made on 5 March 2010 was not in accordance with the statute. The DRAT also found that the Authorised Officer has simply put up a notice on the Notice Board of the Bank regarding postponement of sale. There was no public notice indicating the adjourned date of auction. The DRAT therefore allowed the appeal and set aside the sale made by the Authorised Officer on 5 March 2010.

19. The Bank challenged the order in R.A.(S.A.) No. 131 of 2011 before this Court in W.P. No. 27569 of 2012. The Division Bench in its order dated 5 March 2013 very clearly observed that the sale was not made in accordance with Rule 9(1). The relevant portion of the order is extracted below:

"8..... As far as postponement of sale is concerned, the stand of the petitioner is that at the request of the second respondent only, the same was postponed. Whether at the request of the second respondent, the sale was postponed or otherwise, the procedure contemplated under Rule 9(1) of the Security Interest (Enforcement) Rules, should have been followed. As held by the Tribunal, when the object of the notice is to invite more offers to the property in question, the argument of the learned counsel for the petitioner that since as per the earlier sale notice, only the third respondent had complied with the condition

of deposit of Earnest Money Deposit, the question of issuing another notice does not arise, cannot be accepted. Without issuing sale notice, the sale could not have been conducted at a later date. Under such circumstances, we are of the opinion that as on date, as held by the Tribunal, though the Authorised Officer has the power to postpone the sale, he has to follow the procedure contemplated under the statute after duly informing the general public. Besides, as per the finding of the Tribunal, the sale notice has been affixed in the bank's notice board at Coimbatore, whereas, the property is at Perunthurai. "

20. The Division Bench after recording a finding with regard to the nullity of sale, permitted the Bank to produce documents and directed the DRAT to consider the matter again within a period of three months.

21. The auction purchaser/second respondent herein filed a review application in R.A. No. 94 of 2010 in W.P. No. 24806 of 2012 to review the common order dated 5 March 2013 contending that the request of the petitioner herein was to confirm the sale alone and in view of the fact that the sale was confirmed and sale certificate was issued on 30 March 2010 and that the sale has not been challenged, the very proceeding initiated by the petitioner has become infructuous and as such there is no scope of remitting the matter back to the DRAT. While dismissing the review application filed by the auction purchaser once again the Division Bench reiterated its earlier finding with regard to invalidity of the sale made on 5 March 2010. The relevant observation reads thus:

"16. Even as per the said judgment also, sale can be set aside if it causes a substantial injury. The object of notice of the intended sale is to invite more offers to the property in question while bringing the property for sale, to say in other words, to get more price for the intended sale. But, admittedly, though there is no need to give 30 days notice for every intended sale, here is a case where for the sale that took place on 05.03.2010, no notice was given. Consequence of this, except the Review Applicant, no other offerer had offered for it. Under such circumstances, if notice had been given, certainly, there would have been possibility for more bidders and bid price would have been more and thus, non-giving of notice for the intended sale on 05.03.2010, has caused substantial injury to the first respondent herein and that injury is certainly by the irregularity, that is to say, non-giving of notice, committed by the bank."

22. The auction purchaser by filing a review application secured an adverse finding from this Court to the effect that there would have been more bidders in case notice of intended sale was published by giving thirty days time in accordance with Rule 9(1). The finding recorded by the Division Bench has become final. Even then, the DRAT once again considered the alleged violation of Rule 9(1) at the instance of the petitioner.

23. The DRAT after remand passed an order on 13 August 2014 dismissing the appeal. The said order was challenged by the petitioner in CRP (NPD) No. 3237 of 2014. While concurring with the contentions taken by the petitioner, the

Division Bench in its order dated 21 November 2014 observed that the earlier order passed by this Court in the review applications having become final, the DRAT is bound to comply with the direction. The matter was remitted to the DRAT for fresh consideration. The DRAT on remand, considered the entire matter independently notwithstanding the observation made by the Division Bench earlier with regard to the invalidity of sale.

24. The DRAT considered the issue regarding invalidity of the sale on account of violation of Rules 8(6) and 9(1) in the light of the contentions taken by the Bank by placing reliance on the judgment of the Supreme Court in Mathew Varghese Vs. M. Amritha Kumar and Others, AIR 2015 SC 50 : (2014) AIRSCW 5581 : (2014) 3 JT 151 : (2014) 2 SCALE 331 : (2014) 5 SCC 610 . The DRAT scanned the provisions of the SARFAESI Act and the rules made thereunder and more particularly Rules 8 and 9(1) and arrived at a factual finding that the sale was made without giving thirty days notice and without proper publication. The DRAT also found that the Sale Certificate was issued without proper confirmation. The DRAT finally concluded that "this is a case where the appellant/borrower is able to show that the holding of the sale was improper and illegal."

25. The finding recorded by DRAT with regard to the illegality of the sale made on 5 March 2013 has become final. The Bank has not challenged the said finding.

26. The learned Senior Counsel for the Bank contended that in the counter affidavit filed in the present Civil Revision Petition, the Bank has taken up a contention that the finding with regard to the invalidity of the sale was made without any material.

Whether Bank is entitled to invoke Order 41 Rule 22:

27. This Civil Revision Petition also involved a question as to whether it is open to the Bank to challenge the adverse finding given by the DRAT in a revision petition filed against the final order by the appellant in the SARFAESI appeal, without filing separate revision petition against such finding.

28. Though we are of the opinion that the Bank has not specifically challenged the finding given by the DRAT with regard to the illegality of sale, still we are considering the question as to whether it is open to the Bank to challenge the adverse finding in a revision filed by the opposite party.

29. The proceedings before this Court is admittedly a revision petition filed against the order passed by the Appellate Tribunal under the provisions of SARFAESI Act. The revision was filed under Article 227 of the Constitution of India. There should be a specific provision enabling the opposite party to challenge the finding against him, notwithstanding the fact that he has not filed any appeal. Rule 22 of Order 41 of the Code of Civil Procedure permits the respondent to canvass points with respect to the adverse finding in an appeal filed against the decree by the opposite party. The explanation to Rule 22 of Order 41 gives right to the respondent in an appeal, aggrieved by a finding of the

Court in the judgment on which the decree appealed against is based, to file cross-objection in respect of the decree in so far as it is based on that finding. In case there is a specific provision like Rule 22 of Order 41 of the Code of Civil Procedure it would be open to the respondent to canvass points with regard to the adverse finding recorded without filing independent appeal. However, in the subject case, it is not a statutory appeal. The Court is exercising revisional jurisdiction within the parameters prescribed for exercising jurisdiction under Article 227 of the Constitution of India. In case the Bank is aggrieved they should have filed a revision petition challenging those adverse findings, atleast after filing revision by the petitioner challenging the final order.

30. The counter affidavit filed in the statutory revision petition is not in the nature of a cross objection. Even the said counter affidavit does not meet the findings given by the DRAT against the Bank. We are therefore of the view that it is not open to the Bank to canvass arguments in this Civil Revision Petition to the effect that the DRAT was not correct in declaring that the auction was made in violation of the statutory provisions.

31. The auction was fixed on 25 February 2010. It is true that on 24 February 2010 the petitioner paid a sum of Rs. 2.50 lakhs. The Authorised Officer would be justified in his act of non compliance of Rules 8(6) and 9(1) only in case it is proved that the sale was adjourned on 22 May 2010 fixing the fresh date on 5 March 2010. There is no proceeding recorded by the Authorised Officer to show that the petitioner was given notice that the sale would be held on 5 March 2010.

32. The condition regarding publication of sale notice and duration of thirty days between the notification and the date of sale are mandatory in nature. The fact that the petitioner filed a writ petition in W.P. No. 4322 of 2010 to restrain the Bank from conducting auction on 5 March 2010 would not amount to a waiver. Only three days before the date of sale the petitioner filed the writ petition. The Bank in the absence of documentary evidence cannot be heard to say that the petitioner got knowledge of the sale on 5 March 2010 and as such they are not bound to issue the notification. The Bank was therefore bound to comply with the requirements of Rule 8(6) and 9(1). The DRAT was therefore perfectly correct in its finding that the sale was made in violation of the mandatory provisions of the statute.

33. The property is situated about 50 kms away from Coimbatore. The auction was conducted only at Coimbatore. The petitioner has taken up a specific contention that the auction notice was not published in Perundurai, where the property is situated. The Division Bench also recorded a factual finding that the Authorised Officer miserably failed to prove by way of documentary evidence that the sale notice was published in Perundurai. The pleadings proceed as if the sale notice was published on the Notice Board of the Bank at Coimbatore. The publication of notice on the Notice Board of the Bank would not amount to a valid publication within the meaning of Rule 8.

34. The Supreme Court in Mathew Varghese Vs. M. Amritha Kumar and Others, AIR 2015 SC 50 : (2014) AIRSCW 5581 : (2014) 3 JT 151 : (2014) 2 SCALE 331 : (2014) 5 SCC 610 considered the provisions of SARFAESI Act and the mandatory nature of Rules 8 and 9(1). The Supreme Court in the said judgment very clearly observed that it is the constitutional and human right of a person to hold property and that in the event of a fundamental procedural error occurred in a sale, the same can be set aside. The Supreme Court indicated the mandatory nature of the publication and statutory period before the date of notification and sale in the following words:

"53. We, therefore, hold that unless and until a clear 30 days" notice is given to the borrower, no sale or transfer can be resorted to by a secured creditor. In the event of any such sale properly notified after giving 30 days" clear notice to the borrower did not take place as scheduled for reasons which cannot be solely attributable to the borrower, the secured creditor cannot effect the sale or transfer of the secured asset on any subsequent date by relying upon the notification issued earlier. In other words, once the sale does not take place pursuant to a notice issued under Rules 8 and 9, read along with Section 13(8) for which the entire blame cannot be thrown on the borrower, it is imperative that for effecting the sale, the procedure prescribed above will have to be followed afresh, as the notice issued earlier would lapse. In that respect, the only other provision to be noted is sub-rule (8) of Rule 8 as per which sale by any method other than public auction or public tender can be on such terms as may be settled between the parties in writing. As far as sub-rule (8) is concerned, the parties referred to can only relate to the secured creditor and the borrower. It is, therefore, imperative that for the sale to be effected under Section 13(8), the procedure prescribed under Rule 8 read along with Rule 9(1) has to be necessarily followed, inasmuch as that is the prescription of the law for effecting the sale as has been explained in detail by us in the earlier paragraphs by referring to Sections 13(1), 13(8) and 37, read along with Section 29 and Rule 15. In our considered view any other construction will be doing violence to the provisions of the SARFAESI Act, in particular Sections 13(1) and (8) of the said Act."

35. The requirement with regard to publication of auction notice in at least two newspapers was included in the statute for a larger purpose. In case there is wide publication, auction sale would attract bidders in large numbers and competitive offers. The Bank would be in a position to realize maximum amount by way of sale of secured asset. It would also relieve the borrower of his obligation to clear the loan amount. In case the property is sold at a lesser price on account of failure to give wide publicity and the absence of bidders, the borrower would be liable to pay the remaining amount notwithstanding the sale of his property. The approach of the Bank in a matter of this nature must be to advertise the proposed sale in a wide manner to attract more number of bidders and to secure the best price. In case there is a balance after sale and satisfying the amount due to the Bank, it would help the borrower also. Therefore, the

notification of the sale as provided under Rule 8 and giving sufficient time to the bidders to inspect the property and submit bids would serve the interest of the Bank as well as the borrower.

36. The provision relating to recovery proceeding is akin to that of a proceeding under Section 29 of the State Financial Corporations Act, 1951 which authorises the financial corporation to take possession of the assets of the defaulting company or business concern. The concept of best possible price is considered to be the dominant consideration for the sale under Section 29 of the State Financial Corporations Act, 1951, and as held by the Supreme Court in *Gajraj Jain Vs. State of Bihar and Others*, (2004) 3 BC 514 : (2004) 121 CompCas 112 : (2004) 5 SCALE 693 : (2004) 7 SCC 151 : (2004) 52 SCL 746 : (2004) 2 SCR 677 Supp , if publicity and maximum participation is to be attained, then the bidders should know the details of the assets and in the absence of the proper mechanism, the auction sale becomes only a pretence. The Supreme Court time and again underlined the need for publicity to ensure maximum participation of bidders which in turn requires that a fair and practical time to be given to the purchasers for the purpose of effective participation in the sale.

37. The need to secure best price in public auction was emphasized by the Supreme Court in *Chairman and Managing Director, SIPCOT, and Madras and others Vs. Contromix Pvt. Ltd. by its Director (Finance) Seetharaman, Madras and another*, AIR 1995 SC 1632 : (1995) 84 CompCas 110 : (1995) 6 JT 283 : (1995) 3 SCALE 717 : (1995) 4 SCC 595 : (1995) 1 SCR 415 Supp : (1995) 2 UJ 602 . The relevant paragraph reads as follows:--

"12. In the matter of sale of public property, the dominant consideration is to secure the best price for the property to be sold. This can be achieved only when there is maximum public participation in the process of sale and everybody has an opportunity of making an offer. Public auction after adequate publicity ensures participation of every person who is interested in purchasing the property and generally secures the best price. But many times it may not be possible to secure the best price by public auction when the bidders join together so as to depress the bid or the nature of the property to be sold is such that suitable bid may not be received at public auction. In that event, the other suitable mode for selling of property can be by inviting tenders. In order to ensure that such sale by calling tenders does not escape attention of an intending participant, it is essential that every endeavour should be made to give wide publicity so as to get the maximum price."

38. The following observations made by the Supreme Court in *Mathew Varghese Vs. M. Amritha Kumar and Others*, AIR 2015 SC 50 : (2014) AIRSCW 5581 : (2014) 3 JT 151 : (2014) 2 SCALE 331 : (2014) 5 SCC 610 would make the position very clear that the notice contemplated under Rule 8 and the period provided under Rule 9(1) were made to safeguard the interest of the borrower. The observation reads thus:

"29. A careful reading of sub-section (8), therefore, has to be made to appreciate the legal issue involved and the submissions made by the respective counsel on the said provision:

.....

29.4. Therefore, the creditor should ensure that the borrower was clearly put on notice of the date and time by which either the sale or transfer will be effected in order to provide the required opportunity to the borrower to take all possible steps for retrieving his property or at least ensure that in the process of sale the secured asset derives the maximum benefit and the secured creditor or anyone on its behalf is not allowed to exploit the situation of the borrower by virtue of the proceedings initiated under the SARFAESI Act. More so, under Section 13(1) of the SARFAESI Act, the secured creditor is given a free hand to resort to sale of the property without approaching the court or Tribunal.

30. Therefore, by virtue of the stipulations contained under the provisions of the SARFAESI Act, in particular, Section 13(8), any sale or transfer of a secured asset, cannot take place without duly informing the borrower of the time and date of such sale or transfer in order to enable the borrower to tender the dues of the secured creditor with all costs, charges and expenses and any such sale or transfer effected without complying with the said statutory requirement would be a constitutional violation and nullify the ultimate sale."

39. The learned Senior Counsel for the petitioner contended that even after conducting the sale, the petitioner was given time by the DRT to pay the loan amount and as such it is not open to him to attack the sale held on 5 March 2010. We do not find any merit in the said contention. Merely because the petitioner failed to avail the opportunity given by the DRT to pay the entire amount, it cannot be said he is not entitled to challenge the validity of the sale. The sale should be conducted in accordance with the provisions of the statute and it is immaterial as to whether the borrower availed the opportunity to pay the amount or not. It is the responsibility of the Authorised Officer to follow the mandatory provisions of the statute before holding auction. The failure on the part of the borrower to pay the money within the time granted by DRT pending proceedings challenging the auction, cannot be a sole reason to ratify the illegal sale.

40. The DRAT after recording a finding that the sale was made in violation of the statutory rules and it deserved to be set aside, dismissed the statutory appeal solely on the ground that appropriate relief was not prayed for by the petitioner. According to DRAT, the appellant filed the Original Application to restrain the Authorised Officer from confirming the sale made on 5 March 2010. The DRAT found that the petitioner filed I.A. No. 877 of 2010 to amend the prayer and it was dismissed and the said order was not challenged before the Appellate Court. It was only on this ground, the DRAT observed that much water has flown under the bridge and as such the sale cannot be set aside without appropriate relief.

41. We are not in a position to agree with the reasonings recorded by the DRAT for the following reasons.

"(i) The Tribunal found that the sale was made in violation of the Statute and as such, it is liable to be set aside. In fact while concluding the order, the DRAT observed that albeit the sale was not in accordance with the Rules, as the appellant allowed the issuance of the sale certificate and did not question the same, he is not entitled to question the sale at a later point of time.

(ii) The confirmation of sale is a consequential action directly referable to the factum of sale.

(iii) The petitioner filed I.A. No. 877 of 2010 for amendment of the prayer. The said application was not taken independently. It was disposed of along with S.A. No. 34 of 2010 by order dated 31 May 2011. The final order was challenged in R.A.(S.A.) No. 131 of 2011. The order in I.A. No. 877 of 2010 was part of the final order dated 31 May 2011 in S.A. No. 34 of 2010, which was challenged in appeal by the petitioner.

(iv) In the appeal, the prayer was to set aside the order dated 31 May 2011 in S.A. No. 34 of 2010. The order dated 31 May 2011 would include the order in I.A. No. 877 of 2010. Therefore the DRAT was not correct in its observation that the order in I.A. No. 877 of 2010 has become final on account of the failure on the part of the petitioner to challenge it before the Appellate Tribunal.

(v) The confirmation was made pursuant to the sale made on 5 March 2010. When it is made out that the sale itself was bad in law the confirmation would go automatically. There is no need for a further prayer to set aside the sale.

(vi) The petitioner has made a prayer requesting the DRAT to grant other reliefs befitting the facts and circumstances of the case. The DRAT is having jurisdiction to mould the relief taking into account the peculiar facts and circumstances of the case. Merely because confirmation was made and sale certificate was issued subsequently, it cannot be said that the petitioner is not entitled to canvass points with regard to the illegal sale.

(vii) The confirmation of sale itself is a disputed question of fact, in view of the observation made by the Division Bench in its order dated 5 March 2013 in W.P. No. 27569 of 2012. It reads thus:

"6..... Ld. Counsel stated that the sale certificate has been issued by the Authorized Officer and that no confirmation letter has been given to the Auction Purchaser so far."

(viii) Paragraph 17 of the order dated 8 October 2013 in Review Application Nos. 94 and 143 of 2013 clearly shows that the Bank itself has taken a stand that no confirmation letter was communicated to the auction purchaser. The said finding was given on the basis of the statement made by the Bank. Therefore it is very clear that there was no confirmation before issuing the sale certificate. Such

being the factual position, the DRAT was not correct in arriving at a finding that the very prayer has become infructuous on account of the issuance of sale certificate and therefore the petitioner is not entitled to a remedy not withstanding the invalidity of the auction sale."

Conclusion:

42. The petitioner very clearly demonstrated that the auction sale was in violation of Rules 8 and 9(1) and the said contention was accepted by DRAT by giving reasons. When it is made out that the auction was conducted in utter violation of the mandatory provisions of the Statute, the DRAT is bound to set aside the sale. When the invalidity goes to the root of the matter, technicality has no say. We are therefore of the view that the DRAT was not correct in dismissing the appeal in spite of its finding that the sale was conducted in utter violation of the statutory rules. The petitioner is therefore entitled to succeed.

43. In the result, the order dated 2 June 2015 on the file of DRAT is set aside. The appeal in R.A.(S.A.) No. 131 of 2011 is allowed as prayed for.

44. In the upshot, we allow the Civil Revision Petition. Consequently, the connected MPs are closed. No costs.