

(2022) 06 DEL CK 0003

In the Delhi High Court

Case No : Civil Writ Petition No.) 10164, 11080 Of 2021, Civil Miscellaneous
Application No. 31351 Of 2021

Pahwa Buildtech Pvt. Ltd

APPELLANT

Vs

Jagmohan Singh Arora & Ors

RESPONDENT

Date of Decision : 01-06-2022

Acts Referred:

Constitution Of India, 1950 — Article 226, 227
Code Of Civil Procedure, 1908 — Order 21 Rule 64, Order 21 Rule 85
Security Interest (Enforcement) Rules, 2002 — Section 2(a), 8(1), 8(5), 8(6), 9(1), 9(3), 9(4), 85, 86
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 — Section 2(1)(m), 13(2), 13(4), 14, 17, 17(1), 17(7), 24
Limitation Act, 1963 — Section 4, 5, 6, 7, 9, 10, 11, 12, 14, 15, 16, 17, 18, 29(2)
Recovery Of Debts And Bankruptcy Act, 1993 — Section 20, 29

Citation : (2022) 06 DEL CK 0003

Hon'ble Judges : Vipin Sanghi, J; Jasmeet Singh, J

Bench : Division Bench

Advocate : Ravi Gupta, Lalit Gupta, Siddharth Arora, Sanjiv Kakra, Sanjiv Kakra, Amit Dhall, Sunil Dalal, Ruchi Gour Narula, Mohit Bhadu, Devashish Bhadauria

Final Decision : Allowed

Judgement

1. The two writ petitions are assailing the final order dated 31.08.2021 passed by the Debts Recovery Appellate Tribunal (DRAT), Delhi in Appeal No. 123/2020 titled as "Sh. Jagmohan Singh Arora & Ors Vs. Indiabulls Commercial Credit Ltd. & Ors." W.P.(C) 10164/2021 has been preferred by Pahwa Buildtech Pvt. Ltd. i.e., the Auction Purchaser and W.P.(C) 11080/2021 has been preferred by Indiabulls Commercial Credit Ltd (the financial institution) i.e., the Secured Creditor. Both the petitions are challenging the same order on mostly overlapping issues, and hence are being dealt with by this common judgment.

2. The substantial prayer in W.P.(C) 10164/2021 reads as under:

a) "Pass a writ of certiorari or any other appropriate writ, order or direction

thereby quashing/ setting aside the Final Order dated 31.08.2021, passed by the Ld. DRAT in Appeal No. 123/ 2020, titled as "Sh. Jagmohan Singh Arora & Ors. Vs. India Bulls Commercial Credit Ltd. &Ors.", and consequently, restore the Final Order dated 01.12.2020, passed by the Ld. Presiding Officer, DRT-III, Delhi, in S.A. No. 72/ 2019, titled as "Mr. Jagmohan Singh Arora &Ors. Vs. India Bulls Commercial Credit Ltd. &Ors.", alongwith costs and litigation expenses throughout; and

b) ..."

and the substantial prayer in W.P.(C) 11080/2021 reads as under:

(i) "Issue a writ of Certiorari or any other Writ, Order or Direction of similar nature setting aside the impugned order dated 31.08.2021 passed by Ld. Debt Recovery Appellate Tribunal, Delhi, in Appeal No. 123/2020 and restore the Final Order dated 01.12.2020, passed by the Ld. Presiding Officer-III, DRT-III, Delhi, in S.A. No. 72/2019, titled as "Mr. Jagmohan Singh Arora & Qrs. Vs. India Bulls Commercial Credit Ltd. &Ors;

(ii)"

3. For the purpose of convenience, we are going by the Memo of Parties as filed in W.P.(C) 10164/2021. The respondents, namely Mr. Jagmohan Singh Arora, Mrs. Preeti Kaur, Mr. Gurpreet Singh Arora (hereinafter referred to as respondent Nos. 1 to 3) were borrowers as per Section 2(1)(f) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter also referred to as the "SARFAESI Act" for short). Respondent No.4 is Indiabulls Commercial Credit Ltd., a Financial institution, within the meaning of Section 2(1)(m) of the SARFAESI Act, (hereinafter referred to as respondent No. 4) and is also the petitioner in W.P.(C) 11080/2021. Respondent no.5 is the Authorized Officer of the Respondent no.4 within the meaning of Section 2(a) of the Security Interest (Enforcement) Rules, 2002.

4. The brief facts of the case are that:

a) On 11.04.2018, the account of respondent Nos. 1 to 3 was declared as a Non-Performing Asset (hereinafter referred to as NPA) and a notice under section 13(2) of the SARFAESI Act was issued by respondent no. 4 on 12.04.2018, thereby demanding an amount of Rs. 4,69,02,758/-, which was due as on 11.04.2018.

b) Thereafter, on 30.04.2018, a notice under section 13(2) of the SARFAESI Act was published in the Business Standard newspaper stating that an amount of Rs. 4,69,02,758/- was due as on 11.04.2018 towards Loan Account no. HLLADMT00285020 of respondent Nos. 1 to 3.

c) On 07.07.2018, a notice under section 13(4) of SARFAESI Act read with Rule 8(1) of Security Interest (Enforcement) Rules, 2002 was issued by respondent No. 4. However, the same was withdrawn by respondent no. 4 on the same day,

and a fresh notice under section 13(4) of the SARFAESI Act, read with Rule 8(1) of the Security Interest (Enforcement) Rules, 2002 was issued by respondent no. 4 on 17.07.2018.

d) This was followed by a notice for sale under Rule 8(6) of the Security Interest (Enforcement) Rule, 2002 issued by respondent No. 4 on 24.07.2018, intimating respondent nos. 1 to 3 of the proposed sale of the secured asset i.e., property bearing no. 24/20, Block No. 24, Roshanara Extension Scheme, Sabzi Mandi, Shakti Nagar, Delhi-110007, admeasuring 200 square yards (hereinafter also referred to as the "Secured Asset" for short)for a recovery of Rs. 4,91,12,189/ through e-Auction on 31.08.2018.

e) On 28.07.2018, a notice for sale of the Secured Asset through e-Auction under Rule 9(1) of the Security Interest (Enforcement) Rules, 2002, was published in 'The Mail Today' newspaper, scheduling the date of the e-Auction as 31.08.2018.

f) On 29.08.2018, Earnest Money Deposit (hereinafter referred to as 'EMD') of Rs. 47,50,000/- (being 10% of the Reserve Price Amount fixed by respondent Nos. 4 & 5) was deposited by the petitioner with respondent No. 4 and 5 vide DD No. 032417 dated 29.08.2018.

g) On the very next day i.e., on 30.08.2018, an order was passed by the Ld. Chief Metropolitan Magistrate, Central District, Tis Hazari Court, Delhi, allowing the application filed under section 14 of the SRFAESI Act by respondent no. 4, and thereby appointing a Court Receiver for taking possession of the Secured Asset after 15 days advance notice.

h) On 31.08.2018, the Secured Asset was sold to the petitioner through e-Auction for a sum of Rs. 4,75,01,000/-. It is the case of the petitioner and respondent No.4, that before the said auction could be concluded, the public dealing hours of the banking institutions were over. Due to this, the petitioner handed over the cheque of Rs. 71,25,250/- drawn in the name respondent No. 4, in respect of the 15% of the Sale Price Amount to the respondent No. 4 and 5 on 31.08.2018

i) On 31.08.2018 the sale of the Secured Asset was confirmed by respondent Nos. 4 and 5, and a Letter of Confirmation of Sale was issued by them, confirming the sale of the Secured Asset in favour of the petitioner upon receipt of 25% of the Sale Price Amount amounting to Rs. 1,18,75,250/- i.e., Rs. 47,50,000/- (towards 10% EMD amount already received) plus Rs. 71,25,250/- (balance 15% of the Sale Price Amount).

j) Aggrieved by the said sale, Respondent Nos. 1-3 filed a Securitization Application, impugning the notices dated 17.07.2018 and 24.07.2018, and seeking time for repaying the entire outstanding of loan amount. The same was dismissed by the learned Presiding Officer of DRT-III, Delhi on 20.09.2018, thereby holding that –

- (i) The Loan Account was validly declared as NPA,
- (ii) Valuation of the Secured Asset was proper,
- (iii) The sale of the Secured Asset through e-Auction had been given vide publicity,
- (iv) There was no illegality or irregularity in the actions/ measures taken under SARFAESI Act by the respondent No. 4,
- (v) The S.A. was not maintainable, as the respondent nos. 1 to 3 were yet to be physically dispossessed.

k) The Petitioner states that since 01.09.2018 was a Saturday; 02.09.2018 was a Sunday, and; 03.09.2018 was a Gazetted Holiday on account of Janmashtami, the Cheque bearing No. 000844 dated 01.09.2018 for Rs.71,25,250/- – which was given by the Petitioner, was deposited by respondent Nos. 4 and 5 with their own bank account on 04.09.2018, and encashed on the subsequent date i.e., 05.09.2018. The actual physical possession of the Secured Asset was taken over from respondent nos. 1 to 3 by respondent Nos. 4 and 5 on 20.09.2018.

l) On the petitioner's request, on 11.09.2018, a letter of extension was issued by the respondent Nos. 4 & 5, thereby granting extension of time to the Petitioner till 15.10.2018, for making payment of the balance 75% of the Sale Price. The petitioner sent another request letter on 12.10.2018 to respondent Nos. 4 and 5, seeking extension till 05.11.2018 for making payment of balance 75% of the Sale Price. Respondent Nos. 4 and 5, vide letter dated 13.10.2018, granted extension to the petitioner till 05.11.2018 to make payment of the balance 75% of the sale amount.

m) On 15.10.2018, respondent No. 3 filed writ petition bearing WP (C) No. 11717/2018 titled as "Gurpreet Singh Arora Vs. Indiabulls Commercial Credit Ltd." impugning the final order dated 20.09.2018, passed in SA No. 294/2018. On 30.10.2018, the writ petition was dismissed as withdrawn, with liberty to raise the grounds raised therein before the appropriate forum.

n) On 05.11.2018, after receiving the entire sale consideration, the sale certificate in respect of the auctioned property was executed and registered by the Respondent No.4 in favour of the petitioner. The requisite stamp duty, registration fee etc. were paid by the Petitioner.

o) Thereafter, another Securitization Application u/s 17 of the SARFAESI Act dated 19.11.2018 was filed by respondent nos. 1 to 3, bearing SA No. 72/2019, titled as "Mr. Jagmohan Singh Arora & Ors. Vs. Indiabulls Commercial Credit Ltd. & Ors.", impugning: (a) the sale of the Secured Asset through e-Auction on 31.08.2018; (b) the confirmation of sale which was also done on 31.08.2018 itself; (c) the issuance of the registered sale certificate dated 05.11.2018. The same was dismissed by the learned Presiding Officer on 01.12.2020 – holding that the sale of the Secured Asset was in consonance with the provisions of the

SARFAESI Act and Rules framed thereunder.

p) On 11.12.2020, respondent No. 3 filed an Appeal before the DRAT, Delhi, bearing No. 123/2020, titled as "Sh. Jagmohan Singh Arora Vs. Indiabulls Commercial Credit Ltd." u/s 18 of the SARFAESI Act impugning the final order dated 01.12.2020 passed by the learned DRT-III in SA No. 72/2019. As per the petitioner, it was in this Appeal No. 123/2020, that respondent Nos. 1 to 3, for the first time, agitated grounds in relation to valuation, fixation of reserve price, mis-description, alleged inadequate publicity, and fraud & collusion. The DRAT vide its final order, which is impugned herein – dated 31.08.2021, allowed Appeal No. 123/2020, and set aside the auction sale of the Secured Asset held on 31.08.2021 in favour of the petitioner, and has ordered forfeiture of 25% of Sale Price consideration and further directed that this forfeited amount be appropriated in the account of respondent Nos. 1 to 3/defaulting borrowers, and the balance amount be refunded by respondent No. 4 to the petitioner.

q) Further, the DRAT quashed the final order of the DRT dated 01.12.2020, and held that payment of 15% of the bid amount, by way of cheque, was not permissible. The DRAT has further held that the confirmation letter dated 31.08.2018 – confirming payment of 15% when, admittedly, the cheque had not been presented for encashment – and was encashed only on 05.09.2018, was a fundamental defect which went to the root of the matter, and proved apparent collusion between the authorized officer of Respondent No.4 and the petitioner. The DRAT was of the view that the DRT should have set aside the auction sale in favour of the petitioner. It was of the view that the mortgaged property had been sold by the authorized officer in gross violation of rule 9(3) of Security Interest (Enforcement) Rules, 2002. Hence, the DRAT directed the petitioner/auction purchaser to surrender possession of the property sold to it within 10 days, failing which the respondent No. 4 was directed to take possession. It was further directed that in case of any resistance, assistance from DRT would be taken. A direction was issued, that 75% of the auction money should be returned to the petitioner, and EMD money be forfeited and be appropriated towards borrower accounts. These findings have been challenged in the two writ petitions.

5. When the matter came before this bench, we issued notice on 14.09.2021 in W.P.(C) 10164/2021, and on 29.09.2021 in W.P.(C) 11080/2021. We also directed maintenance of status quo with regard to the operation of the impugned order. Since both the petitions were assailing the same order, we heard these petitions together.

Arguments advanced by the Petitioner

6. Mr. Ravi Gupta, learned Senior Counsel for the Petitioner has argued that DRAT has failed to appreciate that the Cheque dated 01.09.2018 for a sum of Rs.71,25,250/- – being the 15% of Sale Price, was paid on 31.08.2018 itself, which was duly encashed on presentation and, therefore, the same was a legal and valid tender of money as understood in normal business/ commercial

transactions.

7. The petitioner submits that if the secured creditor delayed in depositing the cheque, the auction purchaser cannot be faulted for the same.

8. Mr. Gupta has further argued that the DRAT has failed to appreciate that 25% of the sale amount was duly paid and, thereafter, even the 75% of the sale amount was duly accepted by respondent Nos. 4 and 5. It was only after the entire payment being made, that a sale certificate was issued and registered in favour of the petitioner i.e., upon realisation of the entire 100% Sale consideration. Hence, the observation of fraud and collusion against the petitioner and the respondent no.4 in the impugned order was without any basis and unjustified.

9. Mr. Gupta further submitted that the DRAT failed to appreciate the fact that the petitioner, as well as respondent Nos. 4 and 5, have given sufficient and plausible explanation for deposit of cheque on 04.09.2018 in as much, as: (i) 01.09.2018 was Saturday; (ii) 02.09.2018 was a Sunday, and; (iii) 03.09.2018 was a Gazetted Holiday on account of Janmashtami.

10. Mr. Gupta submitted that the petitioner throughout had the means for making the requisite payment from 31.08.2018 onwards. In this regard, the monetary liquidity of the petitioner and its sister concerns/ Directors/ family members of Directors was placed before the DRAT, which has not been appreciated by the DRAT. The said information is as follows:

S. No.

Account Name

Amount in INR

1.

M/s Pahwa Buildtech Private

Limited (HDFC Bank Current A/c)

50,15,184.83

2.

M/s Pahwa Buildtech Private

Limited (Axis Bank Current A/c)

6,28,147.70

3.

Mr. Chetan Pahwa (HDFC Bank

Savings A/c)

11,02,747.99

4.

Mrs. Anita Pahwa (Axis Bank-
FDR)

10,27,158.93

5.

Mrs. Anita Pahwa (Axis Bank-
FDR)

5,23,471.00

6.

Mrs. Anita Pahwa (Axis Bank-
FDR)

4,88,696.00

7.

M/s. Lucky Brass Pvt. Ltd. (HDFC
Bank Overdraft A/c)

4,57,393.93

Total

92,42,800.38

11. Learned Senior Counsel has thereafter taken us through the sale notice dated 24.07.2018, and highlighted some portions of the sale notice, which reads as under:

"The Earnest Money Deposit would be 10% (Ten Percent) of the Reserve Price and shall be deposited through DD/RTGS/NEFT to the credit of Indiabulls Commercial Credit Limited, AXIS BANK Account No. 913020001654524, IFSC Code UTIB0000131, Branch DLF, GURGAON(HR), GURGAON, 122009, before submitting the tender online. The successful bidder shall pay a deposit of 25% of the amount of the Sale Price (less 10% amount paid with the Bid) at the time of acceptance of Bid i.e. on the same day or not later than next working day. Balance 75% of the Sale Price is required to be deposited within 15 days from the date of acceptance of the Bid." (emphasis supplied)

12. It has been argued that the petitioner deposited 10% of the Reserve Price Amount fixed by the Respondent Nos. 4 & 5 i.e., Rs.47,50,000/-on 29.08.2018 vide Demand Draft bearing No. 032417, dated 29.08.2018.

13. The submission of the petitioner is that only the 10% of the reserve price was to be deposited through DD/RTGS/NEFT. This 10% of the reserve price had to be deposited, before the submission of the tender online. There was no such condition attached to the deposit of the remaining 15% amount, which had to be deposited on the same day, or on the next working day. The tender document did not mandate that 15% of the Sale Amount is to be paid through DD/RTGS/NEFT, and there was no bar in the tender document against the making of the payment of the balance 15% through cheque.

14. The Petitioner has also relied upon Rule 8(5) of the Security Interest (Enforcement) Rules, 2002, which states that an immovable property can even be sold by a private treaty. Rule 8(5) reads as under:

"8(5) Before effecting sale of the immovable property referred to in sub-rule (1) of rule 9, the authorised officer shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods:—

- (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."

15. Thus, the Authorised Officer has been vested with wide discretion in the matter. All that the Authorised Officer has to ensure is that there should be transparency in his dealings, which rule out the possibility of fraud or collusion between any two parties involved in the transaction.

16. Mr. Gupta further submits that on 24.07.2018, the respondent No.4 sent a sale notice under Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 to the respondent Nos.1 to 3, informing them about the e-auction proceedings. He submits that this notice was issued in compliance of Rule 8(6), which reads as under:

"(6) The authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5): Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which shall include,—

- (a) The description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;
- (b) the secured debt for recovery of which the property is to be sold;

- (c) reserve price, below which the property may not be sold;
- (d) time and place of public auction or the time after which sale by any other mode shall be completed;
- (e) depositing earnest money as may be stipulated by the secured creditor;
- (f) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property.” (emphasis supplied)

In the present case, the notice clearly mentioned the reserve price of Rs.4,75,00,000/-, and that the EMD of 10% had to be deposited through DD/ RTGS/NEFT before submitting the tender online. No such stipulation with regard to deposit of the remaining 15% amount by the successful bidder was laid down in the Public Notice.

17. It is further submitted by Mr. Gupta that the auction took place on 31.08.2018, whereas the SA No. 72/ 2019, titled as “Jagmohan Singh Arora & Ors. Vs. Indiabulls Commercial Credit Ltd. & Ors.”, was filed by respondent Nos. 1 to 3 on 19.11.2018 and, hence, SA No. 72/ 2019 was filed beyond the statutory period of limitation – being 45 days, which expired in mid of October 2018. Hence the Securitization application was barred by Section 17(1) of the SARFAESI Act. In *Akshat Commercial Pvt. Ltd. v. Kalpana Chakraborty*, 2010 SCC OnLine Cal 1361, the High Court observed as follows:

“Therefore, the learned Single Judge did not appreciate the specific law laid down in the case of *Gopal Sardar v. Karuna Sardar* (supra), approving *Serish Maji* (supra), and erred in law in holding that Section 5 of the Limitation Act applies to a proceedings under Section 17(1) of the Act by placing reliance upon the principles laid down in the decisions of the Apex court in the case of *Kerala State Electricity Board and Asia Resorts Ltd* (supra) which have no application to a proceeding before the Tribunal.

Our aforesaid interpretation of Section 17(1) gets support from the intention of the legislature as reflected in the said Section itself where in subsection (5) thereof, a time-limit of 60 days has been given for the disposal of such application and according to sub-section (6), if the application is not disposed of by the Tribunal within 4 months, any party to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal.

Therefore, there being specific time-limit of 45 days for invoking the original jurisdiction of Section 17 of the SARFAESI Act, which has been found to be, in essence, a suit and a further tentative time-limit of 60 days for disposal of the proceedings, and giving a right to the party to complain before the appellate forum for compliance of such provisions alleging violation thereof if not completed within four months, it was never the intention of the legislature to

apply Section 5 of the Limitation Act to such original proceeding by giving power to entertain the application under Section 17(1) of the SARFAESI Act by merely showing sufficient cause for the delay without putting any restriction upon the Tribunal and we, therefore, hold that the time period of 45 days provided in Section 17 of the SARFAESI Act which is original in nature cannot be extended by taking aid of Section 5 of the Limitation Act.

Once we hold that the proceedings under Section 17(1) of the Act is like that of a suit and that the Limitation Act applies as far as may be applicable by virtue of Sections 17(7) and 24 of the two Special Laws, Section 29(2) of the Limitation Act has no application and thus, the various decisions cited on behalf of the respondent by showing the applicability of Section 29(2) of the Limitation Act cannot have any application to the original proceedings like a suit before a tribunal. The other provisions of the Limitation Act, for instance, Sections 4, 6, 7, 9, 10, 11, 12, 14, 15, 16, 17, 18 etc. should, however, apply in appropriate cases.

We, therefore, hold that the learned Single Judge erred in law in holding that Section 5 of the Limitation Act applies to a proceeding under Section 17 of the SARFAESI Act.” (emphasis supplied)

18. Mr. Gupta submitted that in view of the above judgment, the delay in filing of a Securitization Application (S.A.) could not have been condoned.

Arguments advanced by Respondent No.4 i.e., the Financial Institution:

19. Learned Counsel for respondent No. 4, has taken us through the Tender document, Terms and Conditions of Online E-auction for Sale of Property – more particularly, Clause (vii) and (xiii), which read as under:

“vii) The Tender shall be accompanied by an Earnest Money Deposit (EMD) equal to 10% of the reserve price, by DD/RTGS/NEFT in favor of India bulls Commercial Credit Limited.

x x x x x x x x x

xiii) In case of immovable property, the successful bidder will have to pay 25% of the Sale Price (less 10% EMD amount deposited/ submitted along with the bid) immediately i.e. on the same day or not later than next working day by DD / RTGS / NEFT in favour of India bulls Commercial Credit Limited” and the balance 75% payment by way of DD / RTGS / NEFT/ Cheque on or before the 15 days of confirmation of sale by the Auctioneer. Auctioneer may, on the written request of the successful bidder, at its discretion allow further time to pay the balance amount as may be agreed between the purchaser and secured creditor, in any case not exceeding three months (from the date of confirmation of sale). In the event of any default in payment of any of these amounts, or if the sale is not completed by reason of any default on the part of the purchaser, the Auctioneer shall be entitled to forfeit all the amounts till then paid by the purchaser and put up the property, in question, for re-auction/resale/disposal in its absolute discretion, and the defaulting purchaser shall forfeit all claim to the property or

to any part of the sum for which it may be subsequently sold.”

20. The learned Counsel has further taken us through Rule 9(3) and (4) of Security Interest (Enforcement) Rules, 2002 to argue that under the applicable Rules, there is no prescription of the mode of payment. They read as follows:

“Rule 9(3): On every sale of immovable property, the purchaser shall immediately, i.e. on the same day or not later than next working day, as the case may be, pay a deposit of twenty five percent of the amount of the sale price, which is inclusive of earnest money deposited, if any, to the authorized officer conducting the sale and in default of such deposit, the property shall be sold again;

Rule 9(4): The balance amount of purchase price payable shall be paid by the purchaser to the authorized officer on or before the fifteenth day of confirmation or sale of the immovable property or such extended period as may be agreed upon in writing between the purchaser and the secured creditor, in any case not exceeding three months.”

21. Respondent No.4 has argued that the respondent Nos.1-3 – the defaulting borrowers, have clearly refused to pay the dues of the Respondent No.4 as recorded in the order dated 16.12.2020 passed by the DRAT. Relevant extract of the order dated 16.12.2020 reads as under:

“During the course of hearing today, Id. Counsel for the appellants was asked whether they were ready to deposit the auction money, the answer was that since they had challenged the very auction conducted by the respondent no.1 FI and even certain illegalities have also been pointed by the DRT also, there is no question of the borrower depositing the money with this Tribunal. Mr.Bhandari also requests for early hearing of the matter before 31.12.2020. However, that is not possible.”

22. In this view, it is submitted by the respondent no.4 that there is no material breach of the terms and conditions of the auction or any Rules under which the auction was conducted, i.e., The Security Interest (Enforcement) Rules, 2002. It is further submitted that there was no irregularity in acceptance of cheque for the balance 15% and it was a valid tender.

23. It is further submitted that no prejudice was caused to the borrower/respondent Nos.1-3 upon acceptance of the cheque for 15% of the sale amount on the day of the auction.

24. Learned Counsel submitted that mere acceptance of 15% of Sale Price by Account Payee Cheque cannot be said to be a patent illegality, which would go to the root of the matter, especially in the facts and circumstances of the present case when: (i) the Respondent Nos. 1 to 3 were, admittedly, in default of repayment of loan and were not willing to deposit the auction money, much less settle the claim of respondent No.4; (ii) the Cheque has been duly encashed upon first presentation itself, without any default; (iii) 100% payment has been

made by the Petitioner; (iv) Sale Certificate has been issued after receipt of 100% Sale consideration by the Respondent Nos. 4 & 5, and; (v) Sale Certificate has been registered in favour of Petitioner upon payment of 7% Stamp Duty and e-Registration Fees around three (3) years ago.

25. Our attention has also been drawn to the judgment of the Supreme Court, namely *L&T Housing Finance Ltd. v. Trishul Developers*, (2020) 10 SCC 659, and more particularly para 18 &19, which read as under:

“18. It may be relevant to note that the respondents (borrower) did not deny advancement of loan, execution of facility agreement, their liability and compliance of the procedure being followed by the secured creditor (appellant) prescribed under the SARFAESI Act.

19. In the facts and circumstances, when the action has been taken by the competent authority as per the procedure prescribed by law and the person affected has a knowledge leaving no ambiguity or confusion in initiating proceedings under the provisions of the SARFAESI Act by the secured creditor, in our considered view, such action taken thereof cannot be held to be bad in law merely on raising a trivial objection which has no legs to stand unless the person is able to show any substantial prejudice being caused on account of the procedural lapse as prescribed under the Act or the Rules framed thereunder still with a caveat that it always depends upon the facts of each case to decipher the nature of the procedural lapse being complained of and the resultant prejudice if any, being caused and there cannot be a straitjacket formula which can be uniformly followed in all the transactions.”. (emphasis supplied)

26. He has also drawn our attention to the judgment of the Supreme Court in *ICICI Bank Ltd. v. Aburubam & Co.*, (2018) 15 SCC 267, more particularly para 9, which reads as under:

“9. We have considered the matter, particularly, the grounds which have prevailed upon the High Court to interfere with the orders passed by DRT and DRAT. A consideration of the materials on record would go to show that the offset price was fixed on the basis of a report of the Valuation Officer and in the fixation of the said price the respondents were associated being party to the proceedings before DRT. That apart the said grievance of the respondent borrowers must be considered in the light of the fact that the respondent borrowers had persistently failed either to liquidate the dues or to bring a willing purchaser who could offer a reasonable price for the mortgaged properties.” (emphasis supplied)

27. Learned Senior Counsel for respondent No. 4 has also sought to distinguish the judgment of *Rao Mahmood Ahmad Khan v. Ranbir Singh*, 1995 Supp (4) SCC 275, to argue that the judgment is not applicable in the facts of the present case, as Rule 285 D of The U.P. Zamindari Abolition and Land Reforms Act, 1950 is not *pari materia* with Rule 9(4). Moreover, in *Rao Mehmood Ahmad Khan* (supra), there was no requirement of making any EMD deposit and, therefore, cheque was considered as an invalid tender, while in the present case, 10% of the bid

amount had already been deposited towards EMD, and it was only balance 15% which was deposited by cheque on the day of the auction.

28. Respondent No.4 submitted that the deposit of 15% by way of cheque was valid deposit. The Supreme Court in *K. Saraswathy (Dead) by LRs vs. P.S.S. Somasundaram Chettiar*, (1989) 4 SCC 527, had categorically held that payment by cheque realized subsequently on the cheque being honoured and encashed, relates back to the date of the receipt of the cheque, and in law the date of payment is the date of delivery of the cheque. Moreover, as per the bid form, only 10% EMD was to be paid by DD/RTGS/NEFT, which was compiled by the Petitioner. The incongruity in the Sale Notice and the terms & conditions has to be resolved in the light of the Rules – which do not state that the 15% of the sale price has to be deposited only by DD/ RTGS/ NEFT, and if there was any confusion, it could not be resolved so as to prejudice the rights and interest of the auction purchaser. Hence there is no contravention of any mandatory requirement.

29. It is submitted that tender is an offer document and not a contract. Only when the offer is accepted, it becomes a concluding contract. In terms of Clause (xii) of the Tender document, Terms and Conditions of Online E-auction for Sale of Property, the respondent No.4 has the right to change terms of sales which has been so done in the sale notice. The said clause reads as follows:

"xii) The Company has the absolute right and discretion to accept or reject any or all bid/bids or to adjourn/postpone/ cancel the sale/modify any terms and conditions of the sale without any prior notice and assigning any reason thereof."

30. Lastly, it has been submitted that with grave effort, the respondent 4 found a single bidder in the auction. There was no other bidder. The entire amount has been received and, hence the order of DRAT deserves to be set aside. No prejudice has been caused to respondent Nos.1 to 3.

Arguments advanced by Respondent No.1-3

31. Per contra, Mr. Sanjiv Kakra, Id. senior counsel appearing for the respondent Nos. 1-3 has submitted that the provisions of the SARFEASI Act, and, more particularly, Rules 85 and 86 of the Security Interest Rules are mandatory, and not merely directory, which read as follows:

"Rule 85 Order XXI of Code of Civil Procedure 1908 "Time for payment in full of purchase money"

The full amount of purchase money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property:

Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under rule 72.

Rule 86 Order XXI of Code of Civil Procedure 1908 "Procedure In default of

payment"

In default of payment within the period mentioned in the last preceding rule, the deposit may, if the Court thinks fit, after defraying the expenses of the sale, be forfeited to the Government, and the property shall be re-sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold."

32. Learned counsel for the respondents further submitted that the petitioner was acting in collusion with the authorized officer of the Respondent No.4, and has flouted the terms and conditions of the sale notice dated 24.07.2018, with a clear motive of making unlawful and wrongful gains, by usurping the respondents property at throw-away price. The independent valuer, as per his valuation report, has valued the property at Rs.6,30,75,000/-, which includes constructed/ built-up area of 3 floors valued at Rs.60,75,000/-, and the value of the land had been taken at Rs.5.70 crores. Despite the said valuation, the reserve price of the property was fixed at Rs. 4,75,00,000/-, reducing the value by Rs. 1,55,75,000/-, without any justifiable reasons.

33. It is also submitted that had there been a proper reserve price fixed in relation to the residential three storied property built upon a 200 square yards plot after proper valuation, the necessity of selling the entire property would not have arisen at all and, in fact, the respondent NBFC/authorized officer violated the provision of Rule 8(5) Security Interest (Enforcement) Rules 2002, which is *pari materia* to the Order 21 Rule 64 Civil Procedure Code, 1908 and Rule 52(1) of second Schedule to Income Tax Act.

34. The respondent further submitted that there is no reason given as to why the valuation report dated 17.07.2018 has been accepted, and the valuation report dated 26.09.2016 has been rejected.

35. The respondent has submitted that the e-auction notice dated 24.07.2018 – with the scheduled date as 31.08.2018, was only published in 'Mail Today' and 'Rashtriya Sahara', which have negligible circulation. 'Mail Today' for the period 31.10.2017 to 28.02.2019 had circulation of 2,09,136, and 'Rashtriya Sahara' from 20.02.2017 to 24.02.2019 had circulation of 81,220.

36. While relying on proviso to Rule 8(6), he submits that these newspapers, by no stretch of imagination, could be called as 'leading newspapers', having wide circulation and there was no way that the general public would have known about the auction of the property.

37. Rule 8(6) of Security Interest (Enforcement) Rules 2002 [Rules2002] reads as under:-

"Rule 8(6): The authorized officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5):

[Provided that if the sale of such secured asset is being effected by either inviting

tenders from the public or by holding public auction, the secured creditor shall cause a public notice in the Form given in Appendix IV-A to be published in two leading newspapers including one in vernacular language having wide circulation in the locality.]”

38. It is further submitted that the collusion of the respondent No.4 with the petitioner is also evident from the confirmation letter dated 31.08.2018. A bare perusal of the letter shows that on 31.08.2018, despite the fact that respondent No.4 bank had not received the entire 25% of the bid amount, they went ahead and issued a confirmation letter, confirming that they had received the total amount of Rs. 1,18,75,250/- towards 25 % of the sale price.

39. Learned counsel submitted that even as per respondent no.4, the cheque for balance 15% was dated 01.09.2019 and handed over on 31.08.2018, and therefore even the tender of the 15 % amount had not been made on 31.08.2018, the date on which the confirmation letter was issued. The respondent nos.1-3 have further, with their counter affidavit, filed a list of holidays of the respondent No.4 bank, where both 1st and 3rd September of 2018 were shown as working days.

40. Respondent Nos.1 to 3 further submitted that the Security Interest Enforcement Rules, 2002 were amended with effect from 04.11.2016, and the only amendment was that one extra day was granted to the purchaser to deposit 25% of the amount of sale price.

41. Learned counsel submits that in the present case, even though the cheque was dated 01.09.2018, from the documents on record, it is evident that the petitioner did not have the requisite funds in its account, and made an auction bid without having the requisite finances.

42. As per respondent nos.1-3, the delivery of Cheque bearing number 000844 dated 01.09.2018 for sum of Rs. 71,25,250/-, was not a good tender, either on the 1st, or on the 3rd September 2018. Learned counsel further submitted that the respondent Nos. 1 to 3 are seeking return of the property to them. It is their valuable right to see that the auction of their property fetches the optimum price, which, in the present case – due to the collusive actions on part of the respondent No.4 and the petitioner, has not happened. Learned counsel for the respondent Nos. 1 to 3 has relied upon *Manilal Mohanlal Shah v. Sardar Sayed Ahmed Sayed Mahmad*, (1955) 1 SCR 108, wherein it has been held inter-alia as under:-

“8. The provision regarding the deposit of 25 per cent by the purchaser other than the decree-holder is mandatory as the language of the Rule suggests. The full amount of the purchase money must be paid within fifteen days from the date of the sale but the decree-holder is entitled to the advantage of a set-off. The provision for payment is, however, mandatory.... (Rule 85). If the payment is not made within the period of fifteen days, the court has the discretion to forfeit the deposit, and there the discretion ends but the obligation of the court to resell

the property is imperative. A further consequence of non-payment is that the defaulting purchaser forfeits all claim to the property.... (Rule 86).

x x x x x x x x

11. Having examined the language of the relevant rules and the judicial decisions bearing upon the subject we are of opinion that the provisions of the Rules requiring the deposit of 25 per cent of the purchase-money immediately, on the person being declared as a purchaser and the payment of the balance within 15 days of the sale are mandatory and upon non-compliance with these provisions there is no sale at all. The Rules do not contemplate that there can be any sale in favour of a purchaser without depositing 25 per cent of the purchase-money in the first instance and the balance within 15 days. When there is no sale within the contemplation of these Rules, there can be no question of material irregularity in the conduct of the sale. Non-payment of the price on the part of the defaulting purchaser renders the sale proceedings as a complete nullity. The very fact that the court is bound to re-sell the property in the event of a default shows that the previous proceedings for sale are completely wiped out as if they do not exist in the eye of law. We hold, therefore, that in the circumstances of the present case there was no sale and the purchasers acquired no rights at all."

43. Lastly, the respondent nos.1-3, while supporting the impugned judgment of the learned DRAT, highlighted the flaws in the auction process as under:-

- * The auction was conducted on 31.08.2018, and the sale claimed to be confirmed on 31.08.2018 on receipt of EMD of 10 % only i.e. Rs. 47,50,000/-

- * The balance amount of 15% of Rs.71,25,250/- was deposited by respondent No.4 on 05.09.2018, which was cheque number 000844 dated 01.09.2018 drawn on HDFC Bank Roop Nagar Branch, Delhi. The favoritism and colorable exercise of power by respondent No.4 is evident from the fact that it accepted Post Dated Cheque bearing No. 000844 dated 01.09.2018 for 15% of the sale price, and presented the same for payment on 05.09.2018 to favour the petitioner because, till 05.09.2018, the petitioner did not have the sufficient amount in its account to clear the cheque.

- * The NBFC / respondent No.4 was legally required to accept only DD/ RTGS/ NEFT for the balance 15% of the Sale Price as per terms of the sale notice, but a clear departure was made from the same.

- * 01.09.2018 – being Saturday, was working day for respondent 4. 02.09.2018 – being Sunday, and 03.09.2018 was Restricted Holiday (RH) on account of Janmashtmi (no bank holiday), and respondent No.4 was doing banking business activity. Despite the same, the Respondent no.4 did not encash the cheque of 01.09.2018 and has no explanation for the same.

44. We have heard learned counsel for the parties and have gone through the pleadings. We have considered the submissions of the parties as above referred. In our view, the order dated 31.08.2021 passed by DRAT in Appeal No. 123/2020

is erroneous, and deserves to be set aside, as it has not correctly appreciated the correct factual matrix, as well as the legal issues involved in the present case. Our analysis is as under:

A. Purpose of SARFAESI Act.

i. At the outset we must emphasize the purpose of SARFAESI Act. Its Statement of Object and Reasons, reproduced hereinunder:

"..The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is a legislation that provides for speed up the recovery of defaulting loans and mounting levels of non-performing assets of banks and financial institutions..."

ii. As is clear from the Statement of Object and Reasons, the SARFAESI Act was brought in to relieve the financial sector in India which was plagued by delays in the recovery of defaulting loans. Before the SARFAESI Act, the Indian Financial sector was burdened with a mounting level of non-performing assets of banks and financial institutions as they did not have any power to take possession of the securities, and sell them. SARFAESI Act brought into force legal provisions to facilitate the securitization of the financial assets of the banks and financial institutions. SARFAESI Act was, thus, an empowering act which gave banks and financial institutions power to take possession of the securities and to sell them without the intervention of the Court i.e., allow faster recovery of debts by the secured creditors, without the intervention of the court.

iii. Keeping the objective of the Act in mind, in our view, interference with any sale of a secured asset under the SARFAESI Act should not be interfered with lightly by any tribunal or Court and, only when the same appears to be collusively undertaken to defeat the rights of the borrower, or causes serious prejudice to the borrower, the same may be interdicted with by the Tribunal(s) or the Court.

iv. While dealing with a challenge to the auction of the secured asset, the question that needs to be asked and answered is whether there is any real prejudice suffered by the borrower due to adoption of the method complained of, as not being in conformity with the Rules.

B. Only Secured Creditor i.e., Respondent no.4 can raise objections

i. From a perusal of the Rules, reproduced herein before, it is clear that Rules 9(3) and 9(4) of the Security Interest (Enforcement) Rules, 2002 are framed for the benefit of the Secured Creditor. The Rules may be waived by a party for whose benefit such provision has been made, and if there is any irregularity – which is procedural and does not amount to a fraud or collusion, the entire proceeding cannot be set-aside as it is a matter between the secured creditor and the auction purchaser. Accordingly, the borrower herein has no right, title & or interest to challenge the same. Pertinently, prior to its amendment on 03.11.2016, Rule 9(4) read:

“(4) The balance amount of purchase price payable shall be paid by the purchaser to the authorised officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the parties.”

However, after the amendment, the word ‘borrower’ stands deleted. Thus, the borrower is no longer required to be consulted, and his consent is not required to be obtained. This is precisely for the reason that a borrower may, invariably, put spokes in the wheel and try to obstruct the sale of the secured asset by being unreasonable. He may hold the auction purchaser and the Financial Institution to ransom, after himself failing to liquidate his liabilities.

ii. In *Vasu P. Shetty v. Hotel Vandana Palace*, (2014) 5 SCC 660 : (2014) 3 SCC (Civ) 304 : 2014 SCC OnLine SC 363, the Supreme Court held:

“16. This Court in *Ikbal* case [(2013) 10 SCC 83: (2013) 4 SCC (Civ) 638], after interpreting the provisions of Rule 9, returned a categorical opinion that the said provision is mandatory in nature. It was further held that even though this Rule is mandatory, that provision is for the benefit of the borrower. The Court held that it is a settled position in law that even if a provision is mandatory, it can always be waived by a party (or parties) for whose benefit such provision has been made. The provision in Rule 9(1) being for the benefit of the borrower and the provisions contained in Rule 9(3) and Rule 9(4) being for the benefit of the secured creditor (or for the benefit of the borrower), the secured creditor and the borrower can lawfully waive their rights. These provisions neither expressly nor contextually indicate otherwise. Obviously, the question whether there is waiver or not depends on the facts of each case and no hard-and-fast rule can be laid down in this regard.”(emphasis supplied)

C. Whether the 15% deposit of the Sale Price Amount was to be paid by DD/RTGS/NEFT only?

i. The next question which arises for our consideration is whether the petitioner could have tendered the 15% of the initial payment of 25% of the Sale Price by the way of a cheque, or the amount was only to be paid by DD/RTGS/NEFT. A perusal of the Terms and Conditions of Sale provided in the Tender Document for e-auction and the Sale notice dated 24.07.2018 shows that there was some confusion regarding the modes of payment. While the Terms and Conditions of Sale provided in the Tender Document for e-auction provided the mode of payment through DD/RTGS, the sale notice dated 24.07.2018, provides no such mode, and only mentioned that the 25% of the sale price has to be paid ‘on the same day or not later than the next working day.’

ii. We are of the view that if there is any confusion amongst the two documents regarding the modalities for sale of the secured asset, the terms of sale of the secured assets that are in consonance with the relevant Rules, and which further the objective of the SARFAESI Act (i.e., to recover the dues of the secured creditor), must be preferred.

In *Keshrevial Jivji Shah v. Bank of Maharashtra*, 2004 SCC OnLine Bom 368, the Bombay High Court has observed:

"33. The provisions do not get themselves incorporated completely. They have to be read into as far as possible and subject to such modifications, as the context as well as object and purpose of the Act, require. The setting in which the words occur, the Statute in which they appear, the object and purpose for which the Statute has been enacted and the mischief that is sought to be taken care of and remedied, are factors which would be extremely relevant in determining such issues. In the case of *N.K. Chauhan v. State of Gujarat* reported in AIR 1977 SC 251 the Supreme Court has held that these words are to be assigned one and the same meaning. Whenever, the Legislature says as far as practicable, as far as possible it conveys one and the same meaning. If the purpose of RDB Act is to expediently recover public monies in a summary manner then an interpretation which would advance this purpose should be placed on section 29 of R.D.B. Act. So interpreted and considered, in our view, it will not be possible to read provisions of second schedule and more particularly Rule 11 in their entirety in section 29. They will have to be read as far as possible and with such modifications as the facts and circumstances of a case and the nature of an investigation require. Though it is not possible or advisable to lay down a general rule in this behalf. However, Rule 11 need not be completely adhered to by the Recovery Officer always. If the contentions of Shri Naphade are accepted, it would result in investigation of claim or objection to attachment and sale never achieving any finality in proceedings under R.D.B. Act. If outcome of such investigation is made subject to another round of litigation by way of civil suit, then the very purpose of establishing Tribunals and creating machinery for speedy and expeditious recovery of public monies would be defeated. If Banks and financial institutions are made to face another round of litigation in the form of civil suit after consideration of the claim to attachment and sale then it will become impossible for them to recover and realise their dues. Even otherwise, in the case of *Gopalpur Tea Co. v. Corporation of Calcutta* reported in AIR 1966 Calcutta 51, it has been held that non following of procedure of seizure strictly in accordance with the provisions made in that behalf, would not vitiate the seizure itself once the Legislature does not make it obligatory and mandatory to follow the same. Similar analogy can be applied here. The Parliament does not make it mandatory nor compulsory for the recovery officer to apply the second and third Schedule of I.T. Act and 1962 Rules, advisedly because the Legislature has provided safeguards after investigation of claims and objections by recovery officer. This investigation can be challenged in Appeal under section 30 of the Act which has been substituted with effect from 17th January 2000. Even proceedings in such appeal are not final because section 20 of R.D.B. Act provides for a further appeal by person aggrieved against any order made or deemed to have been made by a Tribunal under R.D.B. Act. Such an appeal lies to the Debt Recovery Appellate Tribunal. To compel banks or financial institutions to either institute or defend proceedings after all this before a Civil Court is

defeating and frustrating the Legislative intent completely. Investigation and adjudication cannot be endless. That apart, the remedy to approach this Court in appropriate cases by invoking its jurisdiction under Articles 226 and 227 of the Constitution of India is always available. Hence, question No. 2 is answered in these terms that it is not obligatory to apply second and third schedule of I.T. Act, and 1962 Rules while investigating a claim or objection to attachment and sale during the course of execution of recovery certificate under R.D.B. Act. We are supported in these conclusions by a Division Bench decision of A.P. High Court reported in AIR 2004 A.P. 94.” (emphasis supplied)

iii. In the present case, the payment was duly made and was duly received by the secured creditor. Respondent Nos.1 to 3 have not pointed out any prejudice suffered by them on account of the 15% sale price being offered in the form of a cheque, which was tendered on the same day as the successful auction in favour of the petitioner. The period of one day is given to the auction purchaser so that he could arrange to pay the remaining 15%, as, he would not know in advance, at what price his bid would be accepted, and what would be the exact amount which would constitute 15% of the sale price. If the auction purchaser tenders the cheque on the same day, or even the following day, it is to be presumed that he has the financial capacity to ensure that the cheque would be honoured upon presentation.

iv. It is settled law that a payment made by cheque, which is realised subsequently on the cheque being honoured and encashed, relates back to the date of receipt of the cheque and, in law, is considered as the date of payment. In *K. Saraswathy v. Somasundaram Chettiar*, (1989) 4 SCC 527, the Supreme Court held:

“5. It is contended before us on behalf of the appellant that the cheque for Rs 6,02,000 was tendered in court on 29-5-1980 and that it was duly honoured by the bank and money was realised under the cheque, and therefore it must be taken that payment had been effected by the appellant on 29-5-1980 within the time stipulated by this Court in its order dated 29-11-1979. In *CIT v. Ogale Glass Works Ltd., Ogale Wadi* [AIR 1954 SC 429 : (1955) 1 SCR 185 : (1954) 25 ITR 529] it was laid down by this Court that payment by cheque realised subsequently on the cheque being honoured and encashed relates back to the date of the receipt of the cheque, and in law the date of payment is the date of delivery of the cheque. Payment by cheque is an ordinary incident of present day life, whether commercial or private, and unless it is specifically mentioned that payment must be in cash there is no reason why payment by cheque should not be taken to be due payment if the cheque is subsequently encashed in the ordinary course. There is nothing in the order of this Court providing that the deposit by the appellant was to be in cash. The terms of the order dated 29-11-1979 are conclusive in this respect and it is the intent of that order which will determine whether payment by cheque within the period stipulated in that order was excluded as a mode in satisfaction of the terms of that order. The time

for payment is governed by the order of this Court.” (emphasis supplied)

v. Pertinently, the respondent Nos. 1 to 3 have not been able to point out anything fraudulent about the auction sale itself. Thus, the purchase price offered by the petitioner can be considered to be the market value of the property in question, of course, subject to some depreciation which is bound to take place wherever a property is sold in a public auction of this nature. This is because of the strict conditions of auction/ tender and, more importantly, because of the uncertainty that lurks any such sale, due to challenges that may be raised by the borrower – as in this case, or by another interested bidder. There is also uncertainty, as the offer/ tender inviting authority may choose not to accept the bid, despite it being the highest – for one or the other reason. Since the price offered by the petitioner can be considered as the market price, as it was offered in an open and transparent tendering/ auction process, no prejudice can be said to have been caused to respondent Nos.1 to 3.

vi. Rule 9(3) and 9(4) of the Security Interest (Enforcement) Rules, 2002 make it evident that there is no bar on the mode of payment through which a payment has to be tendered by the auction purchaser. Hence, the acceptance of cheque dated 01.09.2018 of the 15% amount, and encashment thereof by the respondent no.4 is in compliance with Rule 9(3) and Rule 9(4) of the Security Interest (Enforcement) Rules, 2002. Even if it were to be accepted that the respondent Nos.4 & 5 delayed the encashment of the said cheque, that delay, if any, cannot be to the prejudice of the petitioner, who had tendered the same in time. Nothing prevented respondent Nos. 4 & 5 from depositing the said cheque for encashment on 01.09.2018 itself. If at all, the respondent Nos. 1 to 3 may have a claim that the interest liability should not be computed for the period for which the encashment of the cheque was delayed. We are of the opinion that there was no mandatory requirement for the Petitioner to make payment of the 15% amount by way of DD/RTGS/NEFT only. The controversy sought to be raised, in our view, is hyper technical which if entertained will only prevent the secured creditor from recovering its long outstanding dues.

D. No prejudice to Borrower i.e., Respondent Nos. 1-3

i. The Respondent Nos. 1-3 do have the right to challenge the initial actions/ measure taken by the respondent no.4, the Financial Institution qua declaring the account NPA and thereafter, issuance of notice under section 13(2) of SARFAESI Act, 2002 and the notice issued under section 8(1) & 9(1) of the Security Interest (Enforcement) Rules, 2002 qua publication and auction of the property in question. It manifests from the record, that the respondents have already raised these issues and they have been dealt with in detail in the previous SA filed by the applicant i.e., SA 294/2018. In the order dated 20.09.2018 passed in S.A. 294/2018, it was held by the DRT-III that: (i) there was no illegality or irregularity in the actions/ measures taken under SARFAESI Act by the Respondent No. 1; (ii) the Loan Account was validly declared as Non-Performing Asset (NPA); (iii) the valuation of the Secured Asset was proper; (iv)

the sale of the Secured Asset through E-Auction had been given wide publicity, and; (v) the SA was not maintainable as the Appellants were yet to be physically dispossessed. The order passed in that matter dated 20.09.2018 remained unchallenged and, therefore, the findings in the same have attained finality.

In our view, the objections raised by the respondent Nos. 1-3 are technical objections, which are raised only with the intention of creating hurdles in the sale of the secured asset, without any substance. We cannot lose sight of the fact that there is nothing on the record to show that any injury or prejudice has been caused to respondent no.1-3, due to the alleged collusive or fraudulent conduct of the petitioner and respondent Nos.4 & 5. In fact, as late as 16.12.2020, the DRAT even offered the respondent nos.1-3 to deposit the auction sale price, which they refused to do. This itself shows that the auction sale was able to generate a healthy price for the secured asset, comparable to the market price thereof. The auction – which is conducted to realize public monies, cannot be set aside on trivial or hypertechnical objections. In this context, reliance can also be placed on, *L&T Housing Finance Ltd. v. Trishul Developers*, (2020) 10 SCC 659, wherein it has been held:

“19. In the facts and circumstances, when the action has been taken by the competent authority as per the procedure prescribed by law and the person affected has a knowledge leaving no ambiguity or confusion in initiating proceedings under the provisions of the SARFAESI Act by the secured creditor, in our considered view, such action taken thereof cannot be held to be bad in law merely on raising a trivial objection which has no legs to stand unless the person is able to show any substantial prejudice being caused on account of the procedural lapse as prescribed under the Act or the Rules framed thereunder still with a caveat that it always depends upon the facts of each case to decipher the nature of the procedural lapse being complained of and the resultant prejudice if any, being caused and there cannot be a straitjacket formula which can be uniformly followed in all the transactions.

20. Adverting to the facts of the instant case, we are of the view that the objection raised by the respondents was trivial and technical in nature and the appellant (secured creditor) has complied with the procedure prescribed under the SARFAESI Act. At the same time, the objection raised by the respondents in the first instance, at the stage of filing of a securitization application before DRT under the SARFAESI Act is a feeble attempt which has persuaded the Tribunal and the High Court to negate the proceedings initiated by the appellant under the SARFAESI Act, is unsustainable more so, when the respondents are unable to justify the error in the procedure being followed by the appellant (secured creditor) to be complied with in initiating proceedings under the SARFAESI Act.” (emphasis supplied)

ii. Similarly, it is also held in *State Bank of India Vs. Hon'ble Debts Recovery Appellate Tribunal &Ors.*, 2010 (115) DRJ 304 (DB), (following *Bachahan Devi & Anr. Vs. Nagar Nigam, Gorakhpur & Anr.*, (2008) 12 SCC 372), that even in case

of an irregularity which caused no damage to the mortgagor, it was not open to the mortgagor to challenge the auction since no injury was caused to the mortgagor on account of there being a technical defect in the auction notice. In *State Bank of India (supra)* the Division Bench of this Court, while upholding the sale of the secured asset in favour of the auction purchaser, observed that it was not the case of the mortgagor that the mortgagor was in a position to redeem the mortgage as on date of finality of the proceedings before the High Court.

E. Whether there is violation of Rule 9(3) and 9 (4) of the Security Interest (Enforcement) Rules, 2002?

i. The submission of respondents Nos.1-3 is that there is violation of Rule 9(3) and 9 (4) of the Security Interest (Enforcement) Rules, 2002, on the ground that the Petitioner was required to deposit 25% of the balance bid amount on the same day, or on the next working day through NEFT/ RTGS/ DD, as Rule 9 (3) uses the expression "immediately".

ii. In the present case, the cheque was dated 01.09.2018 i.e., the next date of the auction. The case of the petitioner and respondent Nos.4 & 5 is that it was tendered on 31.08.2018 after the conduct of the auction. For whatever reasons, the secured creditors chose to encash it on 05.09.2018. We are of the opinion that this does not violate Rules 9(3) and 9(4), as the payment was tendered by the auction purchaser on the same day through cheque dated 01.09.2018, and the said cheque on presentation was honoured.

iii. The reliance of the respondent Nos.1-3 on *Rao Mahmood Ahmad Khan v. Ranbir Singh*, 1995 Supp (4) SCC 275, which dealt with Rule 285 and Rule 85 Order XXI of Code of Civil Procedure 1908 is misplaced. Rule 285D of the U.P. Zamindari Abolition and Land Reforms Act, 1950 is not *Pari materia* with Rule 9(3) of the Rules. Rule 285D of The U.P.Zamindari Abolition and Land Reforms Act, 1950 states that The person declared to be the purchaser shall be required to deposit immediately twenty-five per cent of the amount of his bid, and in default of such deposit the land shall forthwith be again put up and sold and such person shall be liable for the expenses attending the first sale and any deficiency of price which may occur on the re-sale which may be recovered from him by the Collector as if same were an arrear of land revenue. Thus, under the said Rule, there is no requirement of making an EMD deposit with the Auctioneer in advance, and any non- payment would vitiate the auction without any recourse. As per the said Rule, the property has to be sold on the very same day without wasting any time, because of which there is no provision of any EMD, to secure the Auctioneer. The meaning of the word "immediately" has to be determined by the context in which it has been used, and the purpose for which the statute was enacted. It appears that the intention of the Legislature, while framing the U.P. Zamindari Act, was that as soon as it becomes known that the purchaser has failed to deposit 25 per cent of the bid amount, immediately thereafter, he is declared as defaulter, and the property shall be put to re-sale forthwith without any loss of time or postponement of the date of resale. In the present case, the

10% payment has been made by DD No. 032417, dated 29.08.2018, and deposit of 15% was made by the auction purchaser on 01.09.2018 by cheque. Hence the judgment in Rao Mahmood Ahmad Khan (supra) is not attracted in the facts of the present case.

iv. The word "immediately" means with all reasonable speed, and the term "immediately" cannot be construed to mean "without interval of time." The construction of the word "immediately" cannot be such as to require something which is not possible to be performed. The fact that Rule 9(3), while using the word "immediately", also goes on to state "or not later than next working day" shows that "immediately" does not mean "instantly", or "forthwith" in the context of Rule 9(3). Yes, it connotes "with dispatch" and "by the next working day". We must again stress that Rule 9(3) and Rule 9(4) are for the benefit of the secured creditor. Hence, even if the said provision was not complied with, it is for the secured creditor to raise this objection. In the present case, no possible objection can be raised, since the alleged non-compliance is by respondent Nos.4 & 5, and not the petitioner.

45. The petitioner has been able to show, facially, that it had funds to make payment even if the cheque were to be deposited/ presented for payment on 01.09.2018 itself. This, coupled with lack of any other material being brought forth by respondent Nos.1 to 3, show that there was no collusion or fraud practiced by the petitioner and respondent Nos.4 & 5.

46. Hence, we find no force in the contentions raised by the Id. Counsel for the respondent Nos.1-3, that there was an irregularity in the auction process, much less, so serious and grave, as to render the entire auction process void. We are of the view that the entire auction proceedings cannot be set-aside merely on the grounds of trivial objections, and hence allow both the writ petitions. Consequently, the impugned order of the DRAT dated 31.08.2021 is set aside. The order of the DRT dated 01.12.2020, and the auction of the property in favour of the Petitioner i.e., Pahwa Buildtech Pvt. Ltd., are held valid. Parties are left to bear their respective costs.