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In the Karnataka High Court

Case No : Writ Petition Nos. 22348 of 2015 (GM-DRT), 29362 of 2015 (GM-RES) and 57597 of 2014 (GM-DRT)

Sree Jayalakshmi Textiles and Others — APPELLANT

Vs

International Asset Reconstruction Company Private Limited and Others — RESPONDENT

Date of Decision : 15-12-2015

Acts Referred:

Banking Regulation Act, 1949 — Section 9
Constitution of India, 1950 — Article 300A
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 30
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(1), 13(2), 13(4), 13(8)
Transfer of Property Act, 1882 — Section 60, 69, 69A

Citation : (2016) AIR (Kar) 40 : (2016) 1 AKR 836 : (2016) 2 KarLJ 398

Hon'ble Judges : Anand Byrareddy, J.

Bench : Single Bench

Advocate : Paras Jain, Advocate, for the Appellant; R. Ashok Kumar, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Anand Byrareddy, J.—These petitions are heard and disposed of by this common order, as the question of law that arises for consideration is identical.

2. In the writ petition bearing WP No. 22348/2015, the facts are as follows:

"The first respondent, an asset reconstruction company, is said to have issued a public notice dated 11.1.2014, inviting bids for the sale of immovable property, under the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (Hereinafter referred to as the ''SARFAESI Act'', for brevity). The said property was a security asset, namely, non-agricultural land bearing No. RS 21, Khata No. 3681, Mathadakurubarahatty, Pune-Bangalore Highway, Chitradurga taluk. The reserve price was at Rs. 7.5 crore."

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The tenders were said to have been opened on 24.1.2014. The petitioner was said to be the highest bidder at Rs. 8.01 Crore. The bid was said to have been accepted and the petitioner was called upon to pay 25% of the bid amount. The petitioner is said to have paid the amount. The sale was endorsed in favour of the petitioner and was told that it would be confirmed after further directions from the Debt Recovery Tribunal (DRT), Bangalore. This was on account of an Order, dated 21.2.2014, passed by the DRT, whereby the confirmation of the sale was to be kept in abeyance until further orders. This order had been passed in an appeal preferred before it pertaining to the original proceedings.

It is stated that one Jayanna was the original owner of the above property which measured about 6.20 acres, when he purchased it at a court auction, under a sale certificate dated 23.1.1981. Jayanna is said to have died and his legal representatives, who were said to be carrying on business as a partnership firm, are said to have offered the said property as security for a loan borrowed from M/ s. Axis Bank, in a sum of Rs. 10 crore, in the year 2008. There was said to be a default in servicing the loan, and proceedings under the SARFEASI Act were said to have been initiated in December 2009, by issuing a notice under Section 13(2) . The same not having been complied with and after further proceedings, the bank is said to have assigned its right to recover the monies to the first respondent, under an agreement dated 31.3.2011. Possession of the property was said to have been taken on 27.6.2013. The first respondent is said to have issued a sale notice on 10.1.2014, fixing the date of auction as 24.2.2014.

The second respondent had not chosen to file any appeal against the measures taken by the first respondent company. However, the second respondent having approached the first respondent company for a ''One Time Settlement'' (OTS), the said respondent had permitted the second respondent to settle the account and had permitted the second respondent to make payments on or before 31.5.2015. This arrangement is said to have been arrived at without notice to the petitioner. In the result, the petitioner having been deprived of the transfer of the property in his favour, is before this court for appropriate directions to prevent the settlement arrived at, subsequent to the auction sale in favour of the petitioner and other reliefs.

The writ petition in WP 29362/2015 is filed in the light of subsequent developments, subsequent to the filing of the first of these petitions, by the very petitioner. In that, the appeal said to have been filed by one of the partners of the borrower firm, was dismissed by the DRT in July 2015. However, the first respondent is said to have informed the petitioner by a letter dated 16.6.2015 that a settlement had been arrived at between itself and the second respondent and hence, it was constrained to cancel the auction process and was thus returning the advance price paid pursuant to the auction sale, to the petitioner. The petitioner has hence questioned the said action of the first respondent and has filed the second of these petitions.

3. In the writ petition in WP 57597/2014 the facts are as follows:

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"The petitioner is a company incorporated under the Companies Act, 1956, having its registered office at Bangalore. The second respondent is said to have borrowed a loan from the first respondent in the month of February 2004. The said respondent having defaulted in payment of the loan amount, the first respondent bank is said to have initiated proceedings under the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (Hereinafter referred to as the ''1993 Act'', for brevity) before the DRT, Bangalore. The application is said to have been allowed by the DRT."

Pursuant to the declaration of the Security Asset as a Non Performing Asset, a demand under Section 13(2) of the SARFEASI Act is said to have been issued as on 26.10.2012. The respondent No. 2 is said to have admitted the liability but sought time to discharge the loan amount. Therefore, a possession notice, under Section 13(4) of the SARFAESI Act was said to have been issued and also published in a daily newspaper on 19.2.2013. It is said that the bank had then taken possession of the property.

The property was then said to have been brought to sale, under a notice dated 21.3.2014. It is stated that in an e-auction, the petitioner was declared as the highest bidder. The sale having been confirmed in favour of the petitioner, it is said to have deposited 25% of the bid value.

In this circumstance, the second respondent is said to have filed an appeal before the DRT seeking that the sale notice issued by the bank be set aside. The DRT is said to have passed an order in the following terms:

"The respondent Bank is at liberty to go ahead with the proposed sale of the schedule property to be held through e-auction on 09.05.2014 between 3.00 P.M. and 4.00 P.M. as required under law. However, confirmation of sale stands deferred in respect to the schedule property, subject to the condition that the appellant shall deposit Rs. 2.00 lakh prior to sale and Rs. 3.00 lakh on or before 30.5.2014 into the loan account in question with the respondent Bank.

If applicant fails to comply with the stipulated conditions, the order granted today by this Tribunal stands automatically cancelled and respondent Bank is at liberty to proceed further as required under law".

It transpires that the respondent failed to comply with the condition and had not deposited the said amount. On the other hand, the petitioner is said to have paid the entire bid amount as on 30.6.2014 and was thus entitled to claim a completed sale in his favour.

Respondent No. 2, on the one hand, is said to have sought for extension of time to make the deposits as directed earlier by the DRT. The petitioner is then said to have filed an application to come on record as a party to the proceedings before the DRT. The second respondent is said to have filed yet another application seeking further extension of time to make the deposit as undertaken earlier.

The DRT is said to have passed the following Order, dated 25.11.2014:

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"(1) The Confirmation of Sale in favour of respondent No. 2 stands set aside subject to the condition that the petitioner/appellant shall pay entire loan amount to the satisfaction of the respondent Bank.

(2) The petitioner/appellant shall pay entire loan amount to the satisfaction of the respondent Bank on or before 15.12.2014 towards the loan account of the borrower.

(3) If the petitioner/appellant fail to pay loan amount as stipulated above, the Bank is at liberty to issue Sale Certificate in favour of respondent No. 2.

(4) Respondent No. 1 Bank shall return the entire deposited amount paid by respondent No. 2 to respondent No. 2 forthwith. However, petitioner/appellant shall pay interest on the said deposited amount of respondent No. 2 at the rate of 11% p.a., with quarterly rests from the date of deposit of the amount of respondent No. 2 till full amount is paid to respondent No. 2 on or before 15.12.2014.

(5) If the petitioner/appellant fails to do so i.e., pay interest as stipulated above, the respondent No. 1 Bank is at liberty to issue Sale Certificate as required under law in favour of respondent No. 2 in respect to the secured asset.

(6) Respondent No. 1 Bank is at liberty to return the documents deposited by the Borrower to the present petitioner/appellant only after obtaining the written consent and concurrence from the present Borrower-Cum-Owner of the secured asset as required under law.

(7) In the event of non-getting such written consent and concurrence from the Borrower-Cum-Owner of secured asset, respondent No. 1 Bank shall not release the documents in favour of the present petitioner/appellant.

(8) Consequently, present SA stands disposed of as it does not survive for consideration in the light of disposal of Memo and I.A. No. 5167/2014."

It is this order, which is sought to be challenged in the present petition - on the primary ground that the above Order is contrary to the Scheme of the SARFAESI Act and the Rules made thereunder. When the respondent had defaulted in making payment, repeatedly, as directed by the DRT, it had no discretion to extend further time and frustrate a completed sale transaction in favour of the petitioner.

4. The learned counsel for the petitioners, Shri Paras Jain, has contended at length with reference to the provisions of the SARFAESI Act and the Rules thereof and on an interpretation of the same by the Apex Court in several decisions of the Apex court, that the DRT was not in a position to reverse or negate the auction sale in favour of the petitioners and a right to have the property transferred in the purchaser''s favour having vested, it was legally not capable of being divested. As this is the primary ground that requires to be considered in these petitions, we may directly examine the legal position as laid

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down by the Apex Court.

5. It would be useful to reproduce the following provisions of law that are relevant in addressing the issue, namely, Section 13 and Section 17 of the Act and Rules 8 and 9 of the Security Interest (Enforcement) Rules, 2002 (Hereinafter referred to as the ''SIE Rules'', for brevity)

"13. Enforcement of security interest (1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under subsection (4).

(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

(3A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A .

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:--

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

PROVIDED that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

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Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt.

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

(5) Any payment made by any person referred to in clause (d) of sub-section (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.

(5A) Where the sale of an immovable property, for which a reserve price has been specified, has been postponed for want of a bid of an amount not less than such reserve price, it shall be lawful for any officer of the secured creditor, if so authorized by the secured creditor in this behalf, to bid for the immovable property on behalf of the secured creditor at any subsequent sale.

(5B) Where the secured creditor, referred to in subsection (5A), is declared to be the purchaser of the immovable property at any subsequent sale, the amount of the purchase price shall be adjusted towards the amount of the claim of the secured creditor for which the auction of enforcement of security interest is taken by the secured creditor, under sub-section (4) of section 13 .

(5C) The provisions of section 9 of the Banking Regulation Act, 1949 (10 of 1949) shall, as far as may be, apply to the immovable property acquired by secured creditor under sub-section (5A).

(6) Any transfer of secured asset after taking possession thereof or take over of management under subsection (4), by the secured creditor or by the manager on behalf of the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

(7) Where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.

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

(9) In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

Provided that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956):

Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen''s dues with the liquidator in accordance with the provisions of section 529A of that Act:

Provided also that the liquidator referred to in the second proviso shall intimate the secured creditors the workmen''s dues in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen''s dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen''s dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator:

Provided also that in case the secured creditor deposits the estimated amount of workmen''s dues, such creditor shall be liable to pay the balance of the workmen''s dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen''s dues, if any.

Explanation : For the purposes of this sub-section,-

(a) "record date" means the date agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding on such date;

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(b) "amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

(10) Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower.

(11) Without prejudice to the rights conferred on the secured creditor under or by this section, the secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in clauses (a) to (d) of sub-section (4) in relation to the secured assets under this Act.

(12) The rights of a secured creditor under this Act may be exercised by one or more of his officers authorised in this behalf in such manner as may be prescribed.

(13) No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor. "

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17. Right to appeal.--(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application alongwith such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken:

"Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation : For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under sub-section (1) of Section 17 .

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If the Debts Recovery Tribunal, after examining the facts and circumstances

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of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13 , taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the secured assets to the borrower, or restoration of possession of the secured assets to be borrower, it may by order, declare the recourse to any one or more measures referred to in subsection (4) of section 13 taken by the secured assets as in valid and restore the possession of the secured assets to the borrower or restore the management of the secured assets to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13 .

(4) If the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13 , is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), 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 and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder."

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"8. Sale of immovable secured assets.--(1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in

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Appendix IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.

(2) [The possession notice as referred to in sub-rule (1) shall also be published, as soon as possible but in any case not later than seven days from the date of taking possession, in two leading newspapers] one in vernacular language having sufficient circulation in that locality, by the authorised officer.

(3) In the event of possession of immovable property is actually taken by the authorised officer, such property shall be kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as a owner of ordinary prudence would, under the similar circumstances, take of such property.

(4) The authorised officer shall take steps for preservation and protection of secured assets and insure them, if necessary, till they are sold or otherwise disposed off

(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.

(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;

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(e) depositing earnest money as may 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.

(7) Every notice of sale shall be affixed on a conspicuous part of the immovable property and may, if the authorised officer deems it fit, put on the website of the secured creditor on the Internet.

(8) Sale by any methods other than public auction or public tender, shall be on such terms as may be settled between the parties in writing.

9. Time of sale, Issue of sale certificate and delivery of possession, etc-

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

(2) The sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid or tender or quotation or offer to the authorised officer and shall be subject to confirmation by the secured creditor:

Provided that no sale under this rule shall be confirmed, if the amount offered by sale price is less than the reserve price, specified under sub-rule (5) of rule 9:

Provided further that if the authorised officer fails to obtain a price higher than the reserve price, he may, with the consent of the borrower and the secured creditor effect the sale at such price.

(3) On every sale of immovable property, the purchaser shall immediately pay a deposit of twenty-five per cent of the amount of the sale price, to the authorised officer conducting the sale and in default of such deposit, the property shall forthwith be sold again.

(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.

(5) In default of payment within the period mentioned in sub-rule (4), the deposit shall be forfeited and the property shall be resold 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.

(6) On confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorised officer exercising the power of sale shall issue a certificate of sale of the immovable property in favour of the purchaser in the Form given in Appendix V to these rules.

(7) Where the immovable property sold is subject to any encumbrances, the

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authorised officer may, if he thinks fit, allow the purchaser to deposit with him the money required to discharge the encumbrances and any interest due thereon together with such additional amount that may be sufficient to meet the contingencies or further cost, expenses and interest as may be determined by him.

[Provided that if after meeting the cost of removing encumbrances and contingencies there is any surplus available out of money deposited by the purchaser such surplus shall be paid to the purchaser within fifteen day, from date of finalisation of the sale.]

(8) On such deposit of money for discharge of the encumbrances, the authorised officer [shall] issue or cause the purchaser to issue notices to the persons interested in or entitled to the money deposited with him and take steps to make, the payment accordingly.

(9) The authorised officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in sub-rule (7) above.

(10) The certificate of sale issued under sub-rule (6) shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not"

In the case of Mathew Varghese Vs. M. Amritha Kumar and Others, , the facts were as follows:

"The first and the second respondents therein were the guarantors in respect of a credit facility, granted by the bank, the fourth respondent therein, in favour of a company- JM. The guarantors had created an equitable mortgage in favour of the said bank, by depositing the title deeds pertaining to several items of properties."

When the transaction became a non performing asset, (NPA, as it is popularly called by the bankers), the fourth respondent bank is said to have filed an application (OA 31/2002) for recovery of the money with interest thereon. It is said to have also issued a notice under Section 13(2) of the SARFAESI Act on 11.8.2006. On 20.2.2007, the bank is said to have taken possession of the mortgaged properties, invoking Section 13(4) of the said Act, read along with Rules 8 and 9 of the SIE Rules. The guarantors are said to have filed a securitisation application (SA 20/2007) before the DRT, challenging the possession notice and sought an order of restraint against the bank from evicting them.

On 14.8.2007, the bank had issued a notice to the guarantors and others, of their intention to sell the property. The sale notice having been published in daily newspapers, the appellant and another are said to have submitted their tenders.

It is thereafter that the guarantors had filed a writ petition before the High Court challenging the proceedings initiated under the SARFAESI Act. The petition is

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said to have been disposed of with a direction to the DRT to hear the application of the guarantors as well as that of the bank, referred to above. The court also granted liberty to the parties to arrive at a settlement on certain conditions that were imposed. The proposed sale was directed to be deferred by six weeks.

The settlement had not come about even after expiry of six weeks from the date of Order, passed by the High court. It transpires that the application of the guarantors was dismissed by the DRT. The very next day, the bank is said to have accepted the tender of the appellant. In terms of the bid, the appellant is said to have deposited 25% of the bid amount and he was required to deposit the balance amount within 15 days. The sale is said to have been confirmed on 31.12.2007. The appellant is said to have deposited the entire sale price thereafter. The guarantors were then said to have been informed by the bank of the confirmation of sale in favour of the appellant.

The guarantors had filed a Review petition before the High Court in the writ petition filed earlier. The said Review petition was said to have been summarily dismissed.

The guarantors then are said to have filed another writ petition challenging the vires of the 2002 Rules, on the ground that it violated their right of redemption by denying them adequate opportunity and time to repay the borrowed sum and the action of the bank in having sold the property mortgaged, surreptitiously, without informing them. That petition was also said to have been dismissed as it was held that the guarantors had an alternative remedy.

The bank then transferred the property in favour of the appellant under a duly registered certificate of sale.

In an appeal filed before a Division Bench, against the order of the single judge, the appeal was allowed, holding that the sale was not conducted in a fair and proper manner, that when the sale was initially postponed by six weeks, the Bank ought to have re-notified the sale or at least extended the time for receiving further tenders. And that the guarantors were also informed belatedly of the confirmation of sale. The sale was set aside on the condition that the guarantors deposit Rs. 2 crore in favour of the appellant, within a period of two months. There was also a direction to the Sub-Registrar to restore the title in favour of the guarantors.

The guarantors did not deposit the amount as required. They had sought further extensions of time which was granted by the Division Bench. And ultimately at the instance of the guarantors, on the money being deposited, the sale was directed to be made in favour of one Koshi Phillip.

It is in the above background that the appellant was before the Apex Court.

After a detailed reference to the relevant provisions of law, the Apex Court asserted the following legal position:

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"27. Under Section 13(1) , it is provided that any security interest created in favour of the secured creditor may be enforced without the intervention of the Court and Tribunal by such creditor in accordance with the provisions of this Act. The non-obstante clause in the opening set of expressions contained in Section 13(1) , as pointed out by Mr. Singh, learned Senior Counsel for the borrowers, is restricted to Section 69 or Section 69A of the T.P. Act. Apart from noting the said statutory impediment, to be noted in Section 13(1) , the more important feature to be noted is that a free hand is given to the secured creditor for the purpose of enforcing any security interest created in favour of secured creditor, without the intervention of the Court or Tribunal. The only other relevant aspect contained in the said sub- section is that such enforcement should be in accordance with the provisions of this Act. A reading of Section 13(1) , therefore, is clear to the effect that while on the one hand any secured creditor may be entitled to enforce the secured asset created in its favour on its own without resorting to any court proceedings or approaching the Tribunal, such enforcement should be in conformity with the other provisions of the SARFAESI Act.

28. Keeping the said stipulation contained in Section 13(1) in mind, it will have to be examined as to what are the other statutory requirements to be fulfilled when enforcement of a right created in favour of any secured creditor in respect of a security interest is created. As we are concerned with the sale of property mortgaged by the borrowers, for the present we leave aside any other form or mode of enforcement, except the one relating to the equitable mortgage created in favour of the Bank. For that purpose, we find that sub- section (8) of Section 13 would be relevant.

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.

29.1 A plain reading of sub- section (8) would show that a borrower can tender to the secured creditor the dues together with all costs, charges and expenses incurred by the secured creditor at any time before the date fixed for sale or transfer. In the event of such tender once made as stipulated in the said provision, the mandate is that the secured asset should not be sold or transferred by the secured creditor. It is further reinforced to the effect that no further step should also be taken by the secured creditor for transfer or sale of the secured creditor asset. The contingency stipulated in the event of the tender being made by a debtor of the dues inclusive of the costs, charges, etc., would be that such tender being made before the date fixed for sale or transfer, the secured creditor should stop all further steps for effecting the sale or transfer. That apart, no further step should also be taken for transfer or sale.

29.2 When we analyze in depth the stipulations contained in the said sub-section (8), we find that there is a valuable right recognized and asserted in favour of the borrower, who is the owner of the secured asset and who is extended an opportunity to take all efforts to stop the sale or transfer till the last

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minute before which the said sale or transfer is to be effected. Having regard to such a valuable right of a debtor having been embedded in the said subsection, it will have to be stated in uncontroverted terms that the said provision has been engrafted in the SARFAESI Act primarily with a view to protect the rights of a borrower, inasmuch as, such an ownership right is a Constitutional Right protected under Article 300A of the Constitution, which mandates that no person shall be deprived of his property save by authority of law.

29.3 Therefore, de hors, the extent of borrowing made and whatever costs, charges were incurred by the secured creditor in respect of such borrowings, when it comes to the question of realizing the dues by bringing the property entrusted with the secured creditor for sale to realize money advanced without approaching any Court or Tribunal, the secured creditor as a TRUSTEE cannot deal with the said property in any manner it likes and can be disposed of only in the manner prescribed in the SARFAESI Act."

It was further elucidated that the effect of the procedure prescribed under the SIE Rules and the significance of the same being complied with to the letter, thus:

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

32. The other prescriptions contained in the proviso to sub- rule (6) of Rule 8 relates to the details to be set out in the newspaper publication, one of which should be in ''vernacular language'' with sufficient circulation in the locality by

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setting out the terms of the sale. While setting out the terms of the sale, it should contain the description of the immovable property to be sold, the known encumbrances of the secured creditor, the secured debt for which the property is to be sold, the reserve price below which the sale cannot be effected, the time and place of public auction or the time after which sale by any other mode would be completed, the deposit of earnest money to be made and any other details which the authorized officer considers material for a purchaser to know in order to judge the nature and value of the property.

33. Such a detailed procedure while resorting to a sale of an immovable secured asset prescribed under Rules 8 and 9(1). In our considered opinion, it has got a twin objective to be achieved:

33.1 In the first place, as already stated by us, by virtue of the stipulation contained in Section 13(8) read along with Rules 8(6) and 9(1), the owner/ borrower should have clear notice of 30 days before the date and time when the sale or transfer of the secured asset would be made, as that alone would enable the owner/borrower to take all efforts to retain his or her ownership by tendering the dues of the secured creditor before that date and time.

33.2 Secondly, when such a secured asset of an immovable property is brought for sale, the intending purchasers should know the nature of the property, the extent of liability pertaining to the said property, any other encumbrances pertaining to the said property, the minimum price below which one cannot make a bid and the total liability of the borrower to the secured creditor. Since, the proviso to sub- rule (6) also mentions that any other material aspect should also be made known when effecting the publication, it would only mean that the intending purchaser should have entire details about the property brought for sale in order to rule out any possibility of the bidders later on to express ignorance about the factors connected with the asset in question.

33.3 Be that as it may, the paramount objective is to provide sufficient time and opportunity to the borrower to take all efforts to safeguard his right of ownership either by tendering the dues to the creditor before the date and time of the sale or transfer, or ensure that the secured asset derives the maximum price and no one is allowed to exploit the vulnerable situation in which the borrower is placed.

34. At this juncture, it will also be worthwhile to refer to Rules 8(1) to (3) and in particular sub- rule (3), in order to note the responsibility of the secured creditor vis-?-vis the secured asset taken possession of. Under sub- rule (1) of Rule 8, the prescribed manner in which the possession is to be taken by issuing the notice in the format in which such notice of possession is to be issued to the borrower is stipulated. Under sub- rule (2) of Rule 8 again, it is stated as to how the secured creditor should publish the notice of possession as prescribed under sub- rule (1) to be made in two leading newspapers, one of which should be in the vernacular language having sufficient circulation in the locality and also such publication should have been made seven days prior to the intention of taking

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possession. Sub-rule (3) of Rule 8 really casts much more onerous responsibility on the secured creditor once possession is actually taken by its authorised officer. Under sub- rule (3) of Rule 8, the property taken possession of by the secured creditor should be kept in its custody or in the custody of a person authorized or appointed by it and it is stipulated that such person holding possession should take as much care of the property in its custody as a owner of ordinary prudence would under similar circumstances take care of such property. The underlining purport of such a requirement is to ensure that under no circumstances, the rights of the owner till such right is transferred in the manner known to law is infringed. Merely because the provisions of the SARFAESI Act and the Rules enable the secured creditor to take possession of such an immovable property belonging to the owner and also empowers to deal with it by way of sale or transfer for the purpose of realizing the secured debt of the borrower, it does not mean that such wide power can be exercised arbitrarily or whimsically to the utter disadvantage of the borrower.

35. Under sub- rule (4) of Rule 8, it is further stipulated that the authorized officer should take steps for preservation and protection of secured assets and insure them if necessary till they are sold or otherwise disposed of. Sub-rule (4), governs all secured creditor assets, movable or immovable and a further responsibility is created on the authorised officer to take steps for the preservation and protection of secured assets and for that purpose can even insure such assets, until it is sold or otherwise disposed of Therefore, a reading of Rules 8 and 9, in particular, sub- rule (1) to (4) and (6) of Rule 8 and sub- rule (1) of Rule 9 makes it clear that simply because a secured interest in a secured asset is created by the borrower in favour of the secured creditor, the said asset in the event of the same having become a non-performing asset cannot be dealt with in a light- hearted manner by way of sale or transfer or disposed of in a casual manner or by not adhering to the prescriptions contained under the SARFAESI Act and the abovesaid Rules mentioned by us."

The apex court had then addressed the facts of the case, vis-?-vis the legal position and dismissed the appeal in these words:

"54. Having pronounced the legal position as above, when we refer to the facts of the present case, the initial sale was notified to take place on 25.09.2007. The paper publication was made on 23.08.2007. Therefore, applying Rule 9(1) read along with the proviso to sub- rule (6) of Rule 8, there can be no quarrel as to the procedure followed in effecting the publication for resorting to sale on 25.09.2007. When it comes to the question of the intimation to the borrower as required under sub- rule (6) of Rule 8, we find that admittedly Respondents 1 and 2 were informed by the 4th Respondent- Bank only on 30.08.2007. Therefore, as the sale date was 25.09.2007 it did not fulfill the mandatory requirement of 30 clear days notice to the borrower as stipulated under sub- rule (6) of Rule 8. In fact, on this score itself it can be held that if the sale had been effected on 25.09.2007, it would not have been in accordance with Section 13(8)

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of the SARFAESI Act, read along with Rules 8 and 9(1). But at the intervention of the Court, namely, the orders passed in M. Amritha Kumar v. Indian Bank in Writ Petition 27182 of 2007 dated 20.09.2007(Ker), the sale date fixed on 25.09.2007 was adjourned by six weeks. In any case, the sale was not effected even after the six weeks period expired as directed in the said Order dated 20.09.2007. The Securitisation Application No. 20 of 2007, came to be disposed of by the DRT only on 27.12.2007.

55. Therefore, once the Securitisation Application of the borrowers, namely, Respondents 1 and 2 was dismissed on 27.12.2007, even assuming that there was no impediment for the secured creditor, namely, the 4th Respondent- Bank to resort to sale under the provisions of the SARFAESI Act, as held by us in the earlier paragraphs, there should have been afresh notice issued in accordance with Rules 8(6) and 9(1) of the Rules, 2002. Unfortunately, the 4th Respondent-Bank stated to have effected the sale on 28.12.2007 by accepting the tender of the Appellant and by way of further process, directed the Appellant to deposit the 25% of the amount on that very day and also directed to deposit the balance amount within 15 days, which was deposited by the Appellant on 11.01.2008. In fact, after the deposit of the 25% of the amount on 28.12.2007, the 4th Respondent- Bank stated to have confirmed the sale in favour of the Appellant on 31.12.2007. After the deposit of the balance amount on 11.01.2008 by communication dated 02.02.2008, the Respondent- Bank informed the 1st and 2nd Respondents about the confirmation of sale and thereby, provided no scope for Respondents 1 and 2 to tender the dues of the secured creditor, namely, the 4th Respondent- Bank with all charges, expenses etc., as has been provided under Section 13(8) of the SARFAESI Act. Therefore, the whole procedure followed by the 4th Respondent- Bank in effecting the sale on 28.12.2007 and the ultimate confirmation of the sale on 11.01.2008, stood vitiated as the same was not in conformity with the provisions of the SARFAESI Act and the Rules framed thereunder. Though, such a detailed consideration of the legal issues was not made by the Division Bench while setting aside the sale effected in favour of the Appellant, having regard to the construction of the provisions of the SARFAESI Act, the RDDB Act and the relevant Rules, we are convinced that the Judgment of the Division Bench dated 08.03.2010, passed in M. Amritha Kumar v. Union of India in Writ Appeal 1555 of 2009, was perfectly justified and we do not find any infirmity with the same."

In the case of Sadashiv Prasad Singh Vs. Harendar Singh and Others, , the facts are as follows:

A partnership firm consisting of three partners had mortgaged certain properties to a bank to secure a loan. There was default in repayment and hence the bank had filed an application before the Debts Recovery Tribunal for recovery. The application was allowed.

A direction was issued for recovery. The bank had initiated recovery proceedings on 28.11.2000. During the pendency of the recovery proceedings, one of the

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partners had died. Just prior to his death a property belonging to him, which was mortgaged, was said to have been attached by the recovery officer. The deceased partner''s brother filed an objection petition before the recovery officer, to the effect that the attached property did not belong to the judgment debtors and that it had been purchased by him from his deceased brother under an unregistered agreement of sale. That objection was pursued for some time and abandoned. The recovery proceedings were kept pending for a further period of two years. Eventually, there was an order for sale of the property. At the auction, the appellant before the Apex Court was the highest bidder. Accordingly, the sale was ordered in favour of the appellant. And physical possession was also delivered.

Mutation proceedings having been initiated by the purchaser, the mutation entries were also effected in favour of the purchaser- appellant.

It was thereafter that the brother of the deceased partner, filed a petition before the High Court assailing the auction sale. That petition having been dismissed, by a learned single judge, an appeal was said to have been preferred on the principal contention that the original loan was Rs. 14.70 lakh, the bank had sought to recover Rs. 75.75 lakh. The property was sold for Rs. 13.20 lakh. And that the appellant was ready to pay Rs. 39 lakh before the court.

It transpired that the bank agreed to receive Rs. 45 lakh, if Rs. 15 lakh was paid immediately and Rs. 30 lakh over a period of two years. However, there was no settlement. Eventually, the appellate bench held that the Recovery Officer had failed to comply with Rule 11, sub-rule (2) of the Second Schedule to the Income Tax Act, 1961, which is made applicable to proceedings before the Recovery Officer, and set aside the proceedings, including the sale of the property.

The Apex Court held that in the absence of fraud or collusion, the High Court could not have interfered with the auction sale. It was held that the High Court could not have, in order to work out equities between the parties, proceeded to set aside the auction sale. The agreement of sale set up by the brother of the deceased to file objections before the Recovery Officer was held to be a sham document. Secondly, the Recovery Officer had not committed any fault in permitting the sale, as the objections filed before him were abandoned by the applicant. Further, there was a remedy of appeal under Section 30 of the RDDB Act.

It was concluded thus:

"23.5. All these facts cumulatively lead to the conclusion that after 26.10.2005, Harender Singh had lost all interest in the property in question and had therefore, remained a silent spectator to various orders which came to be passed from time to time. He had, therefore, no equitable right in his favour to assail the auction-purchase made by Sadashiv Prasad Sinha on 28.8.2008.

23.6. Finally, the public auction under reference was held on 28.8.2008.

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Thereafter the same was confirmed on 22.09.2008. Possession of the property was handed over to the auction-purchaser Sadashiv Prasad Sinha on 11.3.2009. The auction-purchaser initiated mutation proceedings in respect of the property in question. Harender Singh did not raise any objections in the said mutation proceedings. The said mutation proceedings were also finalized in favour of Sadashiv Prasad Sinha. Harender Singh approached the High Court through CWJC No. 16485 of 2009 only on 27.11.2009. We are of the view that the challenged raised by Harender Singh ought to have been rejected on the grounds of delay and latches, especially because third party rights had emerged in the meantime. More so, because the auction purchaser was a bona fide purchaser for consideration, having purchased the property in furtherance of a duly publicized public auction, interference by the High Court even on ground of equity was clearly uncalled for."

In the case of Vedica Procon Private Ltd. Vs. Balleshwar Greens Private Ltd. and Others , the facts are as follows:

A company, O, was said to have been ordered to be wound up by the company judge of the High Court, by an order dated 6.3.1990. The Official liquidator was said to have been appointed as the liquidator of the Company.

By an order dated 26.3.2013, the official liquidator was directed to put the freehold land of the company to auction for sale by inviting tenders. An upset price of Rs. 55 crore and earnest money deposit of 10% was said to have been fixed.

It appears several offers were received and after inter-se bidding, the appellant, before the apex court, was said to be the highest bidder, with an offer of 148 crore. Whereas the first respondent, was said to be the second highest bidder. The High Court is said to have accepted the highest bid. The Official Liquidator (OL) is said to have confirmed the sale by a letter dated 19.12.2013. The appellant was called upon to deposit the sale amount in two instalments comprising of 25% and 75% by 16.2.2014 and 16.4.2014, respectively. The same was said to have been complied with. The OL had then called upon the appellant to take possession of the property by a letter dated 16.4.2014.

Though the appellant had deposited the entire amount on 16.4.2014, it transpires that it had made an application prior to the said date seeking extension of time to deposit the 75% of the amount. The High Court is said to have granted time to deposit the same by 31.7.2014. However, the amount had been deposited earlier as stated above, without availing of the extension granted. The first respondent is said to have challenged the order of the company judge granting extension, in an appeal. The first respondent is said to have expressed its willingness to raise its offer to Rs. 160 crore, in the appeal.

On 17.4.2014, possession of the property is said to have been delivered to the appellant.

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The Division bench permitted the first respondent to move the company judge, seeking permission to apply afresh for the bid. The parties were directed to maintain status quo till such time. The said order was passed on 17.4.2014.

On the single judge is said to have recalled his earlier order directing sale, and directed refund of the amount paid by the appellant and ordered a fresh auction to be held.

The appellant having challenged the said order before a division bench, the same is said to have been dismissed.

The apex court held that the High Court was not justified in recalling the order dated 17.12.2013. The highest bid of the appellant was accepted by the Company Court and all the stake holders of the company in liquidation were heard before such an acceptance. None objected to it, including the first respondent, at that stage on any ground whatsoever, such as, that there was any fraud or irregularity in the sale nor was there any objection from any one of them that the price offered by the appellant was inadequate. The appeals were dismissed.

It cannot be said that the present petitioners on hand can place reliance on the decided cases cited above, having regard to the facts of the cases therein.

In the case of Mathew Varghese, supra, in the light of the sequence of events and the effect of Section 13(8) of the SARFAESI Act and Rules 8 and 9 of the SIE Rules - as succinctly discussed in paragraphs 54 and 55 of its judgment by the Apex Court. It cannot be said that the facts are in way similar to the case on hand. The appeal in fact was preferred by an auction purchaser, such as the petitioners herein. It was a case where there was completed sale transaction which was set aside by the High Court. There is no completed sale transaction in the cases on hand.

In the case of Sadashiv Prasad Singh, supra, it was again a situation where there was a completed sale transaction, which was sought to be questioned on grounds, which the Apex Court has held to be untenable.

In the case of Vedica Procon Private Ltd., supra, the sale of property of a company in liquidation under the Companies Act, 1956, was, inter-alia, challenged on the ground that the sale was not confirmed by the Company Court, though the entire sale price was paid by the auction purchaser and he had been put in possession of the property. The Apex Court upheld the sale and observed that as there was no specific format in which a sale conducted by the Official Liquidator is to be confirmed by the Company Court, the mere absence of an expression to the effect that the " sale is confirmed", or words to that effect in the Order of acceptance of the highest bid was of little consequence.

It may be seen, on the other hand, that in the first of these cases, there was no confirmation of the sale in favour of the auction purchaser. In view of further proceedings having been kept in abeyance by the DRT and the matter having

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been settled in the borrower having repaid the entire amount apart from meeting other expenses.

In the second of these cases though there was a confirmation of sale and that the auction purchaser had deposited the sale amount, by virtue of the borrower having repaid the entire loan amount, though with some difficulty and only by virtue of more than one extension granted by the DRT, to comply with the same, and as observed by the Apex Court in Mathew Varghese case, itself, the provision contained in Section 13(8) of the SARFAESI Act is specifically for the protection of the borrowers inasmuch as, ownership of the secured assets is a constitutional right vested in the borrowers and protected under Article 300A of the Constitution of India. The borrower is to be given the opportunity to take all possible steps for retrieving his property. The process of sale should also ensure that the secured assets would be sold to provide the maximum benefit to the borrowers. The secured creditor or anyone on its behalf ought not to be allowed to exploit the situation by virtue of proceedings initiated under the SARFAESI Act.

The right of redemption which is embodied in Section 60 of the Transfer of Property Act, 1882, is available to the mortgagor unless it has been extinguished by the act of parties. In India, it is only on execution of the conveyance and registration of transfer of the mortgagor''s interest by a registered instrument that the mortgagor''s right to redeem would be extinguished. The mortgagor''s right to redeem will survive until there has been completion of the sale by the mortgagee executing and registering a deed of conveyance. In the instant case, by the issuance of a Certificate of Sale.

However, if a Certificate of Sale had indeed been executed in favour of the auction purchaser, it would not have been possible to set aside the same on the ground of balancing equities or on the mere circumstance that the borrower was thereafter ready to repay the entire dues and meet other liabilities and expenses. Unless it could be demonstrated that the sale was vitiated by fraud or other irregularity.

Hence, in the view of this court, the petitions lack merit and are dismissed.

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