(2010) 09 KL CK 0055

In the High Court Of Kerala

Case No : Writ Petition (C) No. 37498 of 2007

Varghese Ukken and Another — APPELLANT

Vs

State Bank of India and Others — RESPONDENT

Date of Decision : 28-09-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 72A, Order 21 Rule 72A(2), Order 21 Rule 90
Constitution of India, 1950 — Article 226
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(10), 13(12), 13(2), 13(4), 17
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Rules, 2004 — Rule 8, 8(5), 8(6), 9, 9(2)

Citation : AIR 2011 Ker 41 : (2011) 3 BC 94 : (2011) 1 KLT 114

Hon'ble Judges : P.R. Ramachandra Menon, J

Bench : Single Bench

Advocate : K.P. Dandapani and Paul Mathew, for the Appellant; K.K. Chandran Pillai, for Respondents 1 and 2, T.M. Chandran, V.A. Sasidharan and Joseph Albin Neduntlhally for 3rd Respondent, V.K. Shamsudheen, Government Pleader for Respondents 4 and 5 and P.K.R. Menon, for 5th Respondent, for the Respondent

Final Decision : Dismissed

Judgement

P.R. Ramachandra Menon, J.—Whether sale of the secured asset for the ''Reserve Price'' fixed in respect of the property will stand vitiated, for not having obtained ''consent of the borrower/defaulter'' by virtue of the ''second proviso'' to Rule 9(2) of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as ''the Rules'') is the primary question to be answered in this case. The incidental question is; whether interference is warranted, invoking the discretionary jurisdiction under Article 226 of the Constitution of India, in view of the several other Writ Petitions and proceedings filed earlier, wherein the challenge raised against allegedly inadequate ''reserve price'' has been rejected; when the opportunities given to the defaulters to satisfy the liability in a phased manner have not been utilized and when the relief sought for availing alternate remedy u/s 17 of the SARFAESI Act, by filing S.A. 49 of 2007 before the DRT, Ernakulam has been given up, causing the S.A. to be dismissed as withdrawn.

2. Before considering the question of law involved as aforesaid, it is necessary to encapsulate the factual matrix for the purpose of effective adjudication. The Petitioners, father and son respectively, were running different establishments under different name and style. The first Petitioner was running an establishment under the name and style as M/s Ukken Stores, while the second Petitioner was running an establishment in the name and style as M/s Ukken Paper Marts. Both the Petitioners were running, as partners, Anr. establishment by name and style as M/s Ukken Paper and Boards.

3. In connection with the business transactions as above, the Petitioners had borrowed various amounts (about Rs. 2 crores), by way of ''cash credit facility'' and ''term loan'' from the first Respondent Bank, creating security interest over the properties concerned. In the course of events, a total sum of Rs. 1.25 crores was paid and the account in respect of the establishment by name M/s Ukken Stores was closed. But, since the Petitioners continued to be defaulters in respect of the other establishments, the accounts were declared as ''NPA'' and the Bank proceeded with steps under the SARFAESI Act, leading to issuance of notice u/s 13(2), way back in the year 2006 (22-6-2006).

4. Despite the several rounds of litigations and futile assurances given by the defaulters, the liability was not cleared, when the Bank was constrained to issue Ext. P-1 notification on 8-10-2007, proclaiming the sale of the properties to be held on 9-11-2007. The Petitioners preferred Ext. P-2 statement of objections on 12-11-2007, pointing out some alleged defects with regard to the absence of proper/sufficient notice and also as to the omission to note the various encumbrances over the property. However, the sale was conducted on 9-11-2007 in favour of the 3rd Respondent for a total sum of Rs. 1.65 crores, which was the ''reserve price'' noted in Ext. P-1 sale notification, as against the outstanding liability of Rs. 1,05,34,941 with amounts due under such other heads. The sale was confirmed and Ext. P-4 sale certificate was issued, which is under challenge in this Writ Petition.

5. The Respondent Bank has filed a statement, followed by a detailed counter-affidavit, producing copies of the relevant documents to substantiate their stand and the course of events. The third Respondent/successful bidder has also filed a counter-affidavit pointing out the sequence of events and contending that the sale is not liable to be interfered under any circumstances. The fourth Respondent/Revenue has filed a counter-affidavit mainly with regard to the liability due to the State and the Petitioners have filed a reply affidavit in respect of the counter-affidavit filed by the Respondents 1 and 2, reiterating the contentions raised in the Writ Petition.

6. The learned Counsel for the Petitioners submits that, the sale conducted by the Respondents 1 and 2 and the confirmation of the sale, issuing Ext. P-4 sale

certificate, are per se wrong and illegal in all respects, insofar as various provisions under the relevant rules with regard to the sale have been caused to be violated, particularly with regard to the notice of 30 days to be given before sale. It is also stated that, much liability is there towards the State, in respect of the sales tax arrears and also to the Income Tax Department, by way of direct taxes. It is further pointed out that, there were some attachments over the property, (ordered by the concerned Civil Courts, in respect of different transactions) and these aspects, as shown in Ext. P-3 ''encumbrance certificate'', were not disclosed in Ext. P-1 sale notification and this being the position, the sale and all further proceedings are liable to be interfered with. It is also stated by the learned Counsel that the ''second proviso'' to Rule 9(2) of the Rules clearly stipulates that, if the authorized officer fails to obtain a price higher than the reserve price, sale is possible only with the consent of the borrower and the secured creditor. In the instant case, the property has been sold for Rs. 1.65 crores, which is the ''reserve price'' itself and not a price higher than the reserve price and since the consent of the borrower has not been obtained, the sale is stated as liable to be set aside, in view of the mandate under the ''second proviso''. It is contended that, since there is a statutory bar for effecting the sale for a price lesser than the reserve price, which is separately taken care of by virtue of the ''first proviso'' to Rule 9(2), the situation contemplated under the ''second proviso'' specifying to obtain the consent of the borrower and the secured creditor, if the authorised officer is not in a position to procure higher price than the reserve price, is very much crucial and has to be given effect to. Since there is no case for the first and second Respondents, that they had obtained the consent of the borrower as stipulated under the ''second proviso'' to Rule 9(2), the sale has to be set aside; submits the learned Counsel. Reliance is also sought to be placed on the decision rendered by the Apex Court in S. Sundaram Pillai and Others Vs. `R. Pattabiraman and Others, as to the scope of interpreting a ''proviso''.

7. With regard to the incidental aspects, the learned Counsel for the Petitioners submits that, the name of the village, survey number, boundaries and such other particulars have not been correctly given in Ext. P-1 sale notification, nor has it been correctly given in Ext. P-4 sales certificate as well. Similarly, the factum of non-mentioning of the encumbrances in Ext. P-1 sale notification; lack of proper/ wide publication (but for the publication in only one daily) availability of only one bidder i.e. 3rd Respondent etc. are also pointed out as the reasons, seeking to set aside the sale.

8. The learned Counsel for the first and second Respondents/Bank submits that, there is absolutely no merit or bona fides in the contentions raised by the Petitioners as to the alleged defects. It is contended that, the Petitioners had pursued different rounds of litigations, at different points of time and many an opportunity was given to have the liability cleared by way of installments and otherwise including by way of private sale, in spite of which, no earnest effort was taken to utilize the same. It is also stated that, the only idea of the

Petitioners is to protract things somehow or the other. After approaching this Court and losing the battle (and also not complying with the condition imposed with regard to the deposits ordered to be made), the Petitioners chose to approach the DRT, invoking the statutory remedy available u/s 17 of the SARFAESI Act, by filing S.A. No. 49 of 2007, which was also finally dismissed as withdrawn. It is thereafter, that the Petitioners have turned up before this Court again, which cannot but be deprecated, more so, in view of the categoric observations made by this Court, on an earlier occasion, while declining interference, but granting time to clear the liability on or before 15-9-2007, as per the judgment dated 1-8-2007 in W.P. (C) 20787 of 2007 [Annexure R-1 (e)]; however sparing the cost for the time being.

9. With regard to the alleged discrepancies as to the omission to show the encumbrances in Ext. P-1 sale notice, it is stated that, absolutely no prejudice has been caused to the Petitioners in this regard and that, by virtue of the subsequent turn of events, since the Petitioners did not satisfy the conditions imposed by this Court, in the concerned Writ Petition/I.As., the sale price procured was apportioned and the liability to the State towards sales tax arrears has also been cleared by the Bank, which is liable to be set off against the sale price. It is pointed out that, the alleged mistakes with regard to the name of village/survey number in respect of the properties concerned (which actually consists of two items), have not caused any loss or prejudice to the Petitioner. With regard to the absence of proper notice and as to the fixation of ''reserve price'', it was submitted, with reference to the contents of the counter-affidavit and the materials on record that, the notice of sale was issued in conformity with the statutory prescription and that the ''reserve price'' was fixed after getting the Valuation report'' as prescribed and that there was no infringement of any statutory prescription in this regard. With regard to the alleged violation of the ''second proviso'' to Rule 9(2), it is contended that the contention of the Petitioners is rather ''hyper technical'' and is contrary to the Scheme of the Statute.

10. The learned Counsel appearing for the 3rd Respondent submits that, the 3rd Respondent has acted in tune with the notification issued by the Respondents 1 and 2 and parted with the money to an extent of Rs. 1.65 crores. After effecting the necessary modifications to the building, on the strength of valid permit issued by the local authority, the 3rd Respondent is stated as enjoying the same, which is not liable to be intercepted under any circumstances. The challenge raised against the sustainability of the sale and also as to the alleged infringement of the statutory prescriptions, are seriously opposed from the part of the said Respondent as well. It was also pointed out by the learned Counsel that, the orders/verdicts passed by this Court in the connected/incidental proceedings have never been violated by the said Respondent causing to demolish the building or to cause any damage, so as to reduce the value of the building and on the other hand, has acted only in conformity with the permitted extent, effecting the constructions/modifications at the cost and risk of the said

Respondent as ordered by a Division Bench of this Court vide judgment dated 25-5-2009 in W.A. No. 955 of 2009, on the strength of the permit issued by the local authority; which is stated as virtually contributing more value to the building/asset

11. Heard the learned Government Pleader, who appeared on behalf of the other Respondents as well.

12. Going by the sequence of events, as observed earlier, the Petitioners had availed different loans from the Respondent Bank, on the strength of security interest created over two different items of properties and when the Petitioners turned to be defaulters, there was no other alternative for the Bank, but to declare the accounts as N.P.A. and to proceed with further steps under the SARFAESI Act, issuing notice u/s 13(2) of the Act on 22-6-2006. The Petitioners immediately rushed to this Court by filing W.P. (C) Nos. 24586 of 2006, 24587 of 2006 and 24763 of 2006, in respect of the three different concerns and all the three cases were disposed of as per Annexure R1(a) judgment dated 16-10-2006, whereby the Petitioners were directed to deposit a sum of Rs. 20 lakhs, 10 lakhs and 5 lakhs respectively and to approach the Bank by filing representations seeking for appropriate accommodation for payment of the balance amount The Petitioners did not satisfy the amount as ordered above and filed an I.A. for extension of time, which was allowed. Since the amounts were not satisfied, even after the extension of time as aforesaid, the Bank proceeded with further steps and took possession of the properties on 2-12-2006, when the Petitioners approached this Court again, by filing W.P. (C) 34649 of 2006. As borne by Ext. R-1(b) judgment, interference was declined, observing (in opening sentence itself) that, the Writ Petition was not maintainable, the Petitioner having already approached this Court, in respect of the same subject-matter and suffered a judgment, however making it clear that, it was without prejudice to approach the Bank directly. Still, the Petitioners did not choose to liquidate the liability, by approaching the Bank, proposing any concrete measures as to the repayment; under which circumstances, the sale was notified to be held on 15-3-2007. This made the Petitioners to file Anr. Writ Petition [W.P.(C) 8572 of 2007] wherein Ext. R-1(c) interim order was passed, directing the Petitioners to remit a sum of Rs. 35 lakhs on or before 30-3-2007 and a further sum of Rs. 15 lakhs on or before 12-4-2007, holding that the impugned step shall not be proceeded further till 30-6-2007, and that, if there was any default, the benefit granted as per the interim order would stand automatically withdrawn. Since, no payments were effected as ordered in Ext. R-1 (c), interference was declined in the Writ Petition and it was later dismissed as per Ext. R-1 (d), however, without prejudice to the rights of the Petitioners to avail the statutory remedy u/s 17 of the Act.

13. Pursuant to Ext. R-1(d) verdict, the Petitioners approached the DRT, Ernakulam, by filing S.A. 49 of 2007, challenging the steps taken under the SARFAESI Act. During the pendency of the above proceedings, the Petitioners

chose to approach this Court again by riling W.P.(C) 20787 of 2007, stating that the DRT was not sitting and obtained an interim order of stay. The matter was heard finally on 1 -8-2007 and observing that it was the ''6th Writ Petition'' filed by the Writ Petitioner, without mentioning anything about the earlier Writ Petitions except ''one'' and also about the Petitioners'' failure to comply with the directions issued by this Court, interference was declined. However, taking note of the persuasive submissions on behalf of the Petitioners that the Petitioners would immediately arrange ''private sale'', it was held that the auction could be pursued by the Bank only after 15-9-2007, if the Petitioners failed to satisfy the liability in the meantime. Taking note of the turn of events and the various opportunities granted at different points of time, it was clearly observed and ordered that the Petitioners should not be allowed to drag the matter before the DRT and that the Petitioners were being spared from payment of'' cost'' for the time being, making it clear that, if they ventured into untenable litigations, they should be made to pay heavy cost In spite of the said verdict, as borne by Ext. R-1(e), the Petitioners did neither satisfy the liability, nor make any arrangement to have the property to be sold by way of private sale. Subsequently, the S.A. 49 of 2007, preferred by the Petitioners before the DRT, Ernakulam availing the alternate remedy u/s 17 of the Act was sought to be withdrawn and accordingly, the same was dismissed as withdrawn on 3-9-2007, based on the endorsement made by the learned Counsel for the Petitioners who was appearing before the Tribunal.

14.Inm the above circumstances, the ''reserve price'' was fixed as Rs. 1.65 crores, based on the valuation report and fresh proceedings were taken to have the properties sold by issuing Ext. P-1 sale notice dated 8-10-2007. The said notification was published in the ''Indian Express Daily'' and ''Mathrubhoomi'' Daily dated 8-10-2007 as borne by Exts. R-1(f) and R-1(g). As it stands so, the contentions raised by the Petitioners that Ext. P-2 sale notice was published only in ''one Daily'' and that there is violation of the statutory prescription in this regard does not hold any water at all.

15. While so, one of the alleged creditors of the Petitioners, a Chitty/Kuri Company, who had filed some civil suit for recovery of the due amount, had approached this Court by filing W.P. (C) 33036 of 2007 to adjourn the sale scheduled on 9-11 -2007. This Court passed Ext. R-1(h) interim order, making it clear that the sale could go on; however the sale proceeds were ordered to be kept in tact, subject to further orders to be passed as to the appropriation.

16. The sale was conducted on 9-11-2007, as scheduled and on the very next day, the Petitioners were informed of the position as per Ext. R-1(i) communication, sent by registered post, enabling them to redeem the property by liquidating the dues, including interest/expenses payable to the successful bidder, within 15 days, as specified, which however evoked no response. It was in the said circumstances, that the sale was confirmed in favour of the 3rd Respondent and Ext. P-4 sale certificate was issued.

17. Meanwhile, the Income Tax Department had issued Ext. R-1(j) dated 12-11-2007 as to the liability of the Petitioners to an extent of Rs. 34 lakhs, which was sought to be cleared. The State Government had also put in a claim of Rs. 4,26,855 towards the sales tax arrears. The position was immediately let known to the Petitioners; more so, since the Respondent Bank was not in a position to satisfy the said liability from the sale price, in view of Ext. R-1(h) interim order passed by this Court in the Writ Petition filed by the Chitty Co. In the said circumstances, the Bank filed I.A.4616 of 2008 in the said case, wherein Ext. R-1(k) order was passed on 31-3-2008, directing to keep a sum of Rs. 43,26,885 in a separate account (in respect of the liability to the Income Tax Department and the State) and permitted the Bank to appropriate the balance amount towards the liability of the defaulters.

18. While so, the Bank approached the concerned Civil Court, in the suit filed by the Chitty Company (Petitioner in W.P. (C) 33036 of 2007) and on substantiating the factual and legal position, the attachment was lifted, holding that, the Bank was having the ''first charge'' over the property. On bringing the above factual position to the notice of this Court, W.P.(C) 33036 of 2007 filed by the Chitty Company was disposed of as per Ext. R-1(m) judgment dated 9-2-2009, making it clear that the Bank was free to appropriate the amount in deposit also recording the submission that the liability towards the Income Tax Department and the Sales Tax Department had already been cleared--though there is an averment in paragraph 2 of the counter-affidavit filed by the 4th Respondent in the present Writ Petition that a further sum of Rs. 14,514 plus interest and collection charges is still due to be realized, for which a letter dated 25-3-2010 has been issued to the Bank in this regard.

19. Going by the sequence of events, as narrated above and also in view of the specific observations made by this Court in Ext. R-1(e) judgment in W.P.(C) 20787 of 2007, no further interference is warranted, exercising the discretionary jurisdiction of this Court, under Article 226 of the Constitution of India. The alternate remedy availed by the Petitioner u/s 17 of the Act, filing S.A. 49 of 2007 in respect of the steps taken by the Bank u/s 13(4) of the Act (i.e. after failing to comply with the directions of this Court issued at different points of time to satisfy portions of the liability, to avail the benefit of interim stay) has been voluntarily/consciously caused to be dismissed as withdrawn. The Petitioners were very much aware of the ''Reserve Price'' fixed by the Bank as notified and communicated. No objection whatsoever was raised with regard to the ''identity'' of the property any time before the sale. The alleged discrepancies of survey numbers, boundaries, villages etc. as now raised in the present Writ Petition, are much after the sale. The only objection filed by the Petitioner by way of Ext. P-2 is obviously after the sale effected on 9-11-2007 and further, no such dispute as mentioned above has been raised even in Ext. P-2, but for contending that there was no proper notice; that the property was not valued by an approved valuer; that the reserve price fixed was low; that there was only one bidder; that the property was already under attachment by Sales Tax/

Income Tax Department and by Civil Court and thus seeking not to confirm the sale, requesting for a fresh sale. This clearly shows that the said objection was filed only as ab afterthought This being the position, no interference is warranted in respect of alleged discrepancies referring to the ''identity'' of the property, which was never disputed by the Petitioners.

20. With regard to the non mentioning of the encumbrances covered by Ext. P-3 ''encumbrance certificate'' and such other heads, it is very much relevant to note that, the liability to the Income Tax as well as the Sales Tax Departments has already been cleared by the Bank as observed in paragraph 2 of Ext. R-1(e) judgment, since the Petitioners did not choose to satisfy the same, in spite of issuance of Ext. R-1(i) letter. The attachment by the Civil Court was lifted upholding the ''priority right'' of the Bank as per Ext. R-1 (1) order passed by the concerned Civil Court, which in turn was recorded and W.P.(C) 33036 of 2007 filed by the concerned Chitty Company (Plaintiff before the Civil Court) was disposed of, permitting the Bank to appropriate the sale proceeds as per Ext. R-1 (m) judgment Even otherwise, non mentioning of the encumbrances, if any, in the sale notification is not fatal or significant as far as the defaulter is concerned and absolutely no prejudice has been caused to the Petitioners in this regard. If at all anybody is to be aggrieved, it can only be the prospective purchasers like the 3rd Respondent who do not have any such grievance, to contend that the amount quoted by them was on the firm belief that there was no encumbrance, in turn seeking to avoid the liability under the contract. As it stands so, there is absolutely no legal or factual basis for the contentions raised by the Petitioners on this score.

21. The only remaining ground is whether the sale is vitiated because of the alleged violation of the ''second proviso'' to Rule 9(2) of the Security Interest (Enforcement) Rules, 2002, when the property has not been caused to be sold for a price ''higher than the reserve price'', but for the reserve price itself.

Rule 9 of the Security Interest (Enforcement) Rules stipulates as follows:

9. Time of sale, issues of sale certificate and delivery of possession etc.--(1) No sale of immovable property under there 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 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.

22. Referring to the mandate under Rule 8(6)(c) of the Rules, it was contended that, ''Reserve Price'' is the one, below which the property cannot be sold and this fact is specifically taken care of under the ''first proviso'' to Rule 9(2) stipulating that no sale under this rule shall be confirmed if the amount offered by the sale price is less than the reserve price specified under Sub-rule 5 to ''Rule 9'' (the figure ''9'' appears to be a mistake and the reference can only be to Rule 8). By virtue of the above rule, it is contended from the part of the Petitioners that, the sale contemplated under the Act/Rules is always for a price ''higher than the reserve price'' and if no such higher price is procured, the consent of the borrower and the secured creditor is very much essential. The question is, whether the sale could be conducted for the ''reserve price'' itself, as shown in the notification, to be in conformity with the rules, though it is not ''less than'' the reserve price.

23. This Court is very much aware of a decision rendered by a division bench of the Madras High Court reported in K. Ramaselvam v. Indian Overseas Bank AIR 2010 Mad 93. The sale involved in the said case was for the ''reserve price'' itself and no consent was obtained from the borrower/defaulter. Accepting the contentions of the Petitioner (borrower/defaulter) and turning down the version of the Respondent Bank, it was held by the Madras High Court that, the stipulation under the'' second proviso'' to Rule 9(2) was mandatory. It was observed that, 3 circumstances were possible i.e.

(i) Sale for a price higher than the reserve price.

(ii) Sale for a price less than the reserve price

(iii) Sale for the reserve price, if no higher price than the reserve price is obtained.

(Paragraph 9 of the judgment)

In respect of the first situation, even if sale is for a price higher than the reserve price, concurrence of the ''secured creditor'' is warranted, as stipulated under Sub-rule 2 to Rule 9, while concurrence of both the ''secured creditor'' and the ''borrower'' is necessary in respect of the second situation by virtue of the ''second proviso'' to Rule 9(2). Reference is made in the said paragraph to "reserve price" and simultaneously to "upset price", (presumably treating both as analogous terms), though the Rules only refer to ''reserve price'' and not the ''upset price''. It is stated in the said verdict that, if the bid amount is less than the "upset price", no sale shall be confirmed as contemplated under the ''first proviso'' to Rule 9(2). In respect of the third situation, it has been observed that, the sale can be ''confirmed'' only when the consent of the ''borrower'' and the ''secured creditor'' are obtained (when the price offered is the same as the reserve price). On the basis of the reasoning and discussions given therein, it was held that, in respect of the sale for a price which was ''equal'' to the reserve price, consent of the borrower/defaulter was essential and accordingly, the sale was intercepted as violative of the ''second proviso'' to the Rule 9(2).

24. Even though, the factual position with regard to the turn of events and the different proceedings pursued by the Petitioners at different points of time (obtaining favourable orders from this Court in different petitions, availing of alternate remedy and subsequent dismissal of the S.A. 49/2007 as withdrawn and the default to satisfy the conditions imposed by this Court while intercepting the coercive proceedings on different occasions) stand entirely on a different footing, than the factual position appearing in the case dealt with by the Madras High Court, this Court finds that the proceedings require a closer scrutiny, in view of the ''question of law'' raised.

25. The Security Interest (Enforcement) Rules have been formulated by the Government, in exercise of the rule making power u/s 38(1) and (2)(b) of the SARFAESI Act, read with Sub-sections 4, 10, 12 of Section 13, so as to give effect to the various provisions of the Act. This Court finds it difficult to accept the proposition that there is a total ''statutory bar'' in causing the property to be sold for a price lesser than the reserve price. Even though, the Madras High Court has used both the expressions ''reserve price'' and ''upset price'' in paragraph 9 and elsewhere of the decision cited supra (to mean analogical situation), it appears that there is some difference between the two terms as made clear by a Division Bench of this Court with reference to Rule 72A(2) of Order XXI, Code of Civil Procedure, in Nedungadi Bank Ltd. Vs. Ezhimala Agrl. Products, . It has been observed in paragraph 11 of the said verdict as follows:

11. The expression "upset price" is more one of language than of law. The said expression though very much in use in the context of sales does not figure even once in the Code nor has the same been defined in the General Clauses Act. But law and language dictionaries give sufficient cue as to what the term means. According to Black''s Law Dictionary, Fifth Edn. "upset price" means "The price below which property exposed to sale is not to be sold". According to the Seventh Edition of the same dictionary, "upset price" means "The lowest amount that a seller is willing to accept for property or goods sold at auction". The expression "reserve price" though not defined in the Code appears at Order XXI, Rule 72A. Black''s Law Dictionary, Seventh Edn. has defined "reserve price" as "The price announced at an auction as the lowest that will be entertained". It would appear at first blush that me terms "upset price" and "reserve price" are synonymous. In fact, a Division Bench of the Madras High Court in A.U. Natarajan v. Indian Bank, Madras AIR 1981 Madras 151 did define the term "upset price" as the lowest selling price or reserve price and thus indicated that the two terms are synonymous. A Division Bench of this Court in Anto Nitto Vs. South Indian Bank Ltd., virtually approved the said view of the Madras High Court by taking the view that simply because the executing court had employed the words "upset price" in place of "reserve price" it is not possible to contend that reserve price has not been fixed. We however are of the view that the terms

"reserve price" and "upset price" though analogous and almost homologous are not synonymous. While understood in the context in which expression is employed in the code, "reserve price" means a price reserved at an auction as the minimum amount realizable by sale of the property so as to realise the entire mortgage debt or a proportionate portion of the mortgage debt--a price which will remain static during the sale unless the court on grounds of genuine diffidence on the side of the decree-holder chooses to reduce the same. Fixation of reserve price is peculiar to situations where court grants permission to mortgagee--decree-holders to bid in the auction. Upset price and reserve price are certainly the lowest prices for which the properties will be sold in auction. But me term "reserve price" is exclusive to mortgage--purchasers. The term "upset price" is used generally in respect of purchases by all Ors. including third parties. When upset price has been fixed, the bid should commence with that price and the sale will ultimately be held for an amount higher than that price. But in the case of reserve price, the bid can commence with the upset price which may be an amount below the reserve price. But the moment the mortgage--decree-holder avails the leave granted to him by the court, the sale will be knocked down in his favour for me reserve price, though nothing prevents a conscientious decree-holder from bidding and purchasing for a higher amount.

Neither the Act nor the Rules does/do refer to any ''upset price'', but for making a mention to the ''reserve price'', which is rather explained as the price below which the property ''may not be'' sold as given in Clause (c) of Sub-rule 6 to Rule 8 of the Rules. The terminology used is very significant as Rule 8(6)(c) does not say that ''reserve price'' is one below which the property ''shall not be sold''. The intention of the law making authority in choosing the word ''may'', instead of ''shall'' is more discernible and relevant from the usage, when it comes to the ''first proviso'' to Rule 9(2), wherein it says that no sale under this Rule ''shall be'' confirmed, if the sale price is less than the reserve price specified under Sub-rule 5 to ''Rule 9'' [wrongly mentioning in place of Rule 8]. The expression in the ''first proviso'' to Rule 9(2) is with reference to the stage of ''confirmation'' which is a subsequent event.

26. The Scheme of the Statute clearly reveals that, even if the sale fetches a price higher than the reserve price, the ''secured creditor'' can very well refuse to give effect to the same and may go for a fresh sale, in view of the mandate under Sub-rule 2 to Rule 9, which specifies that, it shall be subject to the confirmation by the secured creditor. This is for the obvious reason that the secured creditor is not only interested to realize its debt, but also to act as a trustee on behalf of the borrower so that highest possible amount can be generated and surplus, if any, can be refunded as observed in paragraph 22 of the decision of the Madras High Court cited supra. There may be some other circumstances, like that the amount due to be realized may be far in excess than the reserve price of the property concerned, which also contemplates the situation where concurrence of the secured creditor is necessary, though the sale price is higher than the reserve price. The consent of the ''borrower/defaulter''

becomes relevant only when the sale price happens to be lower than the reserve price, with regard to which, no prior intimation can be presumed as available to the borrower. The position is different with regard to the factum of ''reserve price'', which is very much known to the borrower/defaulter right from the beginning and the only stipulation as contained in Rule 8(6), as to the contents of the sale notification, is the stipulation of the ''reserve price'' under Sub-clause (c), which is stated as the price below which, the property may not be sold. In other words, in view of the conspicuous absence of any specific bar in the Statute, it is very much possible to have the property sold for a ''lesser price'', for which concurrence of the borrower defaulter is also simultaneously stipulated, along with the consent of the secured creditor, which is the idea behind the ''second proviso'' to Rule 9(2). But, for the above ''two provisos'' and Rule 8(6)(c), there is no specific provision in the Act/Rule which says that property can or cannot be sold for a lesser price than the reserve price. There may be some or other compelling circumstance when the borrower may be in dire necessity to have the sale completed and to have the sale proceeds set off to such extent and this right to have the property sold for a lesser price than the reserve price cannot be defeated by anybody, if the same is agreed upon by the defaulter and the secured creditor. It is in this context, that the consent of the borrower becomes relevant. The availability of such a course has been recognized by the Madras High Court as well, in view of the observations made in paragraph 22 of the decision cited supra, as follows:

The first proviso in no uncertain terms makes it clear that no sale can be confirmed by the authorised officer, if the amount offered is less than the reserve price specified under Rule 8(5). However, the subsequent proviso gives discretion to the authorised officer to confirm such a sale even if the bid is less than the reserve price, provided the borrower and the secured creditor agree that the sale may be effected at such price which is not above the reserve price. This obviously so because because the property belongs to the borrower and as security for the secured creditor and both of them would be obviously interested to see that the property is sold at a price higher than the reserve price. However, if both of them agree that the property can be sold, even it has not fetched a price more than the reserve price, the authorised officer in its discretion may confirm such auction.

From the above, it is very much clear that a situation of sale for a price below the ''reserve price'' has been read into the ''second proviso'' to Rule 9(2) by the Madras High Court, provided both the borrower and the secured creditor agree to have such a course. This Court finds, giving effect to the above line of appreciation, that the purpose of the enactment and Rules thereunder, which do not cast a bar in selling the property for a price lesser than the reserve price on ''mutual consent'', can only be with reference to sale for a price which is lesser than the reserve price, the extent/quantum of which was not known to the borrower before the sale.

27. It is true, applying the principles of the celebrated decision in Taylor v. Taylor 1875 (1) Ch. D. 426 which is being followed in Indian context as well and also by virtue of the mandate in Indian Banks'' Association, Bombay and Others Vs. Devkala Consultancy Service and Others, , when the law stipulates to pursue an act in a particular manner, it has to be done in that manner alone and in no other way. But, the rules formulated by the Government, have to be read and understood, giving a purposive interpretation, so as to give effect to the provisions of the Act. It is also settled that, the law has to be read and understood by its spirit and not by letters. What was in the mind of the rule making authority, when they created Rule 8(6)(c) stipulating the ''reserve price'' and the ''provisos'' to Rule 9(2), has to be analysed with reference to the object sought to be achieved. If the interpretation sought to be given from the part of the Petitioners to the ''second proviso'' to Rule 9(2) that, even for effecting any sale for a price equal to the reserve price, consent of the borrower is necessary, it is quite obvious that no borrower who disputes the fixation of ''reserve price'' will ever give any such consent and as such, the very concept of fixation of ''reserve price'' itself will be rendered otiose, more so, when the safeguard under Rule 8(6)(c) is that ''Reserve Price'' is one, below which such property ''may not be'' sold. If nobody quotes a higher amount, but for the ''reserve price'' and if the proposition of the Petitioners is to be considered as the correct interpretation, it is always open to anybody to defeat the said provision, if just ''Re. 1'' is added to the ''reserve'' price and the bid amount is quoted accordingly. Since the Statute does not say any minimum gap/difference between the ''reserve price'' and the ''higher price'' for effecting the sale without the consent of the borrower, the property can be sold for a higher price than the reserve price by adding just ''Re. 1'' to the reserve price as above. This obviously is not the intention of the rule making authority, while stipulating under the ''second proviso''; as to the necessity to obtain the consent of the borrower; which can only be read to mean the sale for a price ''lesser than the reserve price''. No prejudice will be there to the borrower in this regard, as it is always open to the borrower to challenge the fixation of the ''Reserve Price'' and the Sale itself, availing the remedy u/s 17 of the SARFAESI Act.

28. With regard to the rights and liberties of the parties concerned in a civil suit under similar circumstances involving the sale, Civil Court is having power to reduce the ''reserve price'' by virtue of Rule 72A to Order XXI of the Code of Civil Procedure, of course after hearing the judgment-debtor. The sale can be set aside only if any prejudice is caused to the concerned party, as made clear by a Division Bench of this Court in Sivaprasad v. Sasidharan ILR 2006 (1) Ker. 602 referring to the mandate under Rule 90 of Order XXI of the Code of Civil Procedure. It is also true that, the provisions of the CPC are not applicable to the proceedings under the SARFAESI Act/Rules. But the scope and object of the Legislation can be easily understood with regard to the analogous circumstances available in the two different contexts.

29. On analysing the position in above background, it cannot but be held that the

Scheme of the Statute, particularly the stipulation under the ''second proviso'' to Rule 9(2) pointing out the necessity to obtain the consent of the borrower-when the sale does not fetch a price higher than the reserve price enabling the authorized officer to sell the property at "such price" only means "such lesser price". This Court respectfully disagrees with the observations made by the Madras High Court in the decision cited supra, to this extent and holds it accordingly.

30. In the above facts and circumstances, this Court finds that the Petitioners have failed to make out a case either on facts or in law. None of the grounds raised in support of the prayers to set aside the sale and to conduct a fresh auction or to permit the Petitioners to clear the liability by way of OTS/ installments does serve its purpose. No interference is warranted. The Writ Petition fails and it is dismissed accordingly.

