

M/S. MORION CHEMICALS LTD. v. UCO BANK, CHANDIGARH,(2022-1)205 PLR 444

PUNJAB AND HARYANA HIGH COURT

Before: Mr. Justice Jaswant Singh and Mr. Justice Girish Agnihotri.

M/S. MORION CHEMICALS LTD., CHANDIGARH and others – Petitioners,

Versus

UCO BANK, CHANDIGARH and others – Respondents.

Civil Writ Petition No. 16885 of 2013 (O&M)

(i) Security Interest (Enforcement) Rules, 2002 Rule 8(6), 8(7), 9(1) - Personal service of sale notice is the requirement in law, apart from publication in terms of Rule 9(1) of the Rules, 2002 - Service of sale notice is required to be effected by all three modes i.e. pasting of notice on the conspicuous portion of the property in terms of Rule 8(7), publication in two newspapers out of which one should be in vernacular newspaper and personal service in terms of Rule 9(1) of the Rules, 2002 - In view of the aforesaid clear position of law, it is held that it is mandatory for the creditor to serve the sale notice to the borrower by all means of service i.e. publication, pasting and personal service as required under Rule 8 and 9. [Para 22]

(ii) Security Interest (Enforcement) Rules, 2002 Rule 9(3) - Cancellation of sale - Sale which means that it is not required for an auction purchaser to wait till the expiry of 15 days to deposit the sale amount - Depositing the entire amount on the same date of sale, does not seem to be in contravention of Rule 9 (3) or (4) of the Rules, 2002 - Rather, this shows the readiness of the auction purchaser to deposit the sale consideration, well in time - Therefore, this could not be an argument to cancel the sale. [Para 30]

(iii) Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (?? of 2002) Section 17(1) - Limitation to challenge the sale would be 45 days from the date of auction as provided for in terms of Section 17 of the Act, 2002 - Since, the petitioners were aware of the auction notice and the date of auction, giving the maximum leeway, the limitation may be permitted to reckon from the date of auction or confirmation of sale, being a measure taken under the Act, 2002. [Para 37]

(iv) Security Interest (Enforcement) Rules, 2002 Rule 9(1) -Inspite rule being mandatory the act of the petitioners of first having opted to redeem the property and then having remained unsuccessful, the Courts can always deny the equitable and discretionary relief under Article 226 of the Constitution of

India.

[Para 48]

(v) Judgment - Judgment of a Court interpreting a provision of law does not lay down a new principle of law, rather clarifies the legal position as to what it intended to mean. *General Manager Uttarakhand Jal Sansthan v. Laxmi Devi* 2009 (7) SCC 205, relied. [Para 23]

Cases referred to:-

1. 2014(5) SCC 610, *Mathew Varghese v. M. Amritha Kumar*.
2. CWP No.15851 of 2007, decided on 11.10.2007, *M/s Morion Chemicals Limited v. United Commercial Bank Limited, Chandigarh*.
3. 1994(1) SCC 1, *S.P. Changalvaraya Naidu (dead) by L.Rs. v. Jagannath (dead)*.
4. (2022-1)205 PLR 432 (SC) (SN) = 2022 PLRonline 2702, *Sesh Nath Singh v. Baidyabati Sheoraphuli Cooperative Bank Ltd.*
5. 2013 (10) SCC 83, *GM, Sri Siddeshwara Co-operative Bank Ltd. v. Sri Ikbai*
6. (2018-2)190 PLR 583 (SC), *ITC Limited v. Blue Coast Hotel*.

S/Sh. Manish Kumar & Yash Pal Gupta, for the petitioners. *Mr. Anupam Gupta*, Senior Advocate, assisted by *S/Sh. Sanjiv Gupta (KKR)*, *Gautam Pathania*, and *Sukhpal Singh*, for respondent Nos. 1 to 3-UCO Bank. *Mr. Manish Jain*, for respondent No. 4. *Mr. Alok Ja gga*, for respondent No. 6 (Auction Purchaser). [through video conferencing]

Jaswant Singh, J. - (5th October, 2021) - Petitioner No. 1 is a defaulter borrower Company and is aggrieved of the order dated 04.06.2013 (Annexure P-9) passed by Debts Recovery Appellate Tribunal (in short "DRAT") under Section 18 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "Act, 2002"), vide which its Appeal No. 33 of 2012 has been dismissed, while the Appeal No. 437 of 2011 filed by respondent No.6 (Auction Purchaser) and Appeal No. 438 of 2011 filed by respondent No. 1 to 3 (secured creditors and its officers) has been allowed and the order of the Debts Recovery Tribunal (in short "DRT") dated 15.12.2011 (Annexure P-7) passed in SA No. 31 of 2008, filed by the petitioners (defaulting borrowers) has been set aside. As a result of thereof, sale conducted by respondent No. 1 (secured creditor) in favour of the auction purchaser (respondent No. 5) has been upheld, which was set aside by the DRT vide its order dated 15.12.2011 (P-7).

[2] Briefly, the undisputed facts of the instant case are that petitioner No. 1 is a borrower Company, whereas petitioner Nos. 2 & 3 are its Directors. It had availed credit facilities from respondent No.1-UCO Bank (Secured Creditor). In order to secure the same, two properties were mortgaged i.e. Industrial Property No. B-4+5, Industrial Focal Point, Dera

Bassi, owned by petitioner No.1-Borrower Company (property in question) and SCO No.44, Sector-30-C, Chandigarh owned by guarantors, namely, Smt. Achal & Yogesh Bansal. Since, petitioner No.1 was unable to repay the credit facilities, its loan account was declared Non-Performing Asset (NPA) on 31.03.2006 by UCO Bank (R-1). On 19.08.2006, respondent No.1 issued Notice Under Section 13 (2) of the Act, 2002, claiming an amount of Rs 3,52,62,965.60 as on 31.03.2006. On 29.11.2006, notice under Section 13 (4) of the Act, 2002, was issued by respondent No.1, vide which symbolic possession was taken of both the mortgaged properties.

[3] On 26.12.2006, a representation was submitted by petitioner No.1-Company to respondent No.1 (Annexure R-1/7), wherein petitioner No.1-Company sought 3 months' time period to resolve the financial stress and regularize the account and further stated that in case if the petitioner No.1 fails to do so, the Bank may initiate further steps to recover the debt of the Company.

[4] Aggrieved of notice dated 29.11.2006 issued by respondent No.1-Bank under Section 13(4) of the Act, 2002, Securitisation Application (SA) No.3 of 2007 came to be filed under Section 17 of the Act, 2002 by the guarantors (other than petitioners), i.e. Smt. Achal Bansal and Yogesh Bansal, before DRT, Chandigarh, challenging steps taken by respondent No.1 qua the second mortgaged property i.e. SCO No.44, Sector-30-C, Chandigarh. Petitioner No.1, which is the owner/mortgagor of the Industrial property at Derabassi (subject property), chose not to file any S.A. at that stage.

[5] On 23.05.2007, the petitioners herein, who were respondents in S.A. No.3 of 2007 filed by guarantors, instead of filing their own SA, devised a novel method and intended to challenge action of respondent No.1/Secured Creditor under Section 13 (4) of the Act, 2002 qua the industrial property, Derabassi, by filing an application bearing I.A. No.140 of 2007 in S.A. No. 3 of 2007, filed by the guarantors namely Smt. Achal Bansal and Yogesh Bansal. The said application was dismissed on 23.05.2007 by D.R.T.-I, Chandigarh (Annexure R-1/2), being not maintainable. Aggrieved against the above, the petitioners filed appeal before Debts Recovery Appellate Tribunal (DRAT), Delhi under Section 18 of the Act, 2002, which also was dismissed on 19.09.2007. Still aggrieved, the petitioners approached this Court by filing CWP No.15851 of 2007 titled as *M/s Morion Chemicals Limited v. United Commercial Bank Limited, Chandigarh*, which was also dismissed by a Division Bench of this Court on 11.10.2007.

[6] On 24.08.2007, respondent No.1-Secured Creditor took over physical possession of Industrial premises at Dera Bassi owned by petitioner No.1. After obtaining two valuation reports dated 08.09.2007 and 12.09.2007, respondent No 1 – Bank fixed the reserve price of the property in question and issued sale notice in The Tribune (English), Amar Ujala (Hindi), Jagbani (Punjabi) and Economic Times (English) newspapers on 21.09.2007 vide which sale of Industrial Property at Derabassi (subject property) was fixed for 22.10.2007. The said sale notice was also published on the website of the Bank on 21.09.2007. As per the said sale notice, reserve price of factory, land and building was fixed at Rs.334.39 lakhs whereas the reserve price of machinery was fixed at Rs.151.03 lakhs, sum totalling to Rs. 485.42 Lakhs.

[7] On 18.10.2007, the petitioners preferred Review Application No. 247 of 2007 in CWP No.15851 of 2007 (which had been dismissed on 11.10.2007), wherein the above sale notice published on 21.09.2007 was sought to be negated and the same was attached as Annexure P-18. The said Review Application was dismissed by a Division Bench of this Court on 19.10.2007 (Annexure R-1/6).

[8] By the date of auction i.e. 22.10.2007, respondent No. 1 – Bank received a bid from respondent No.6 – M/s Essex Biosciences Limited, intending to purchase both the lots for Rs. 486 lakhs. The said bid was accepted and consequent upon deposit of the entire sale consideration on the same date, sale certificate dated 22.10.2007 was issued by respondent No.1 separately for factory, land and building and machinery. Physical possession of the entire factory premises alongwith the machinery was also handed over to respondent No. 6.

[9] On 25.10.2007, a resolution (Annexure R-1/1) was passed by the Board of Directors of Petitioner No.1 Company, wherein it is noticed that the Bank has sold the property for Rs. 486 lakhs and it has been unanimously resolved by the Company that Shri Jai Bhagwan Bansal, Director of petitioner No. 1-Company, is authorized to take steps to challenge the proceedings under the Act, 2002. In the meanwhile, on 05.11.2007 (Annexure P-6), respondent No.1-Bank intimated the petitioner as regards the sale having been concluded in favour of respondent No.6 pursuant to the sale held on 22.10.2010, which led to clearance of the entire loan account and there has been unclaimed excess amount lying with the bank. This letter, is stated to have been received by the petitioner on 15.11.2007.

[10] On 20.12.2007, the petitioners filed S.A. No.31 of 2008 before Debts Recovery Tribunal-I, Chandigarh under Section 17 of the Act, 2002 in order to lay challenge to the Securitisation action initiated by the Bank as also to the sale conducted by the Bank pursuant to the sale notice dated 20.09.2007. During the pendency of the said S.A., vide order dated 15.09.2011 (Annexure R-5/3), DRT noticed that the counsel for applicant (petitioner herein) stated that they were willing to redeem the property and consequently directed the applicant that as undertaken it should deposit Rs.460 Lakhs within 30 days with the Registrar of the Tribunal. The matter was adjourned to 17.10.2011, but the aforesaid amount was neither deposited on the said date nor was ever deposited during the entire proceedings before the DRT.

[11] In the meanwhile, I.A. No.660 of 2011 was filed by the Respondent – Bank, seeking dismissal of the S.A. on the ground of limitation. Respondent – Bank contended that the sale was conducted on 22.10.2007, whereas the instant S.A. has been filed much beyond the expiry of 45 days which is the prescribed period of limitation under Section 17 of the Act, 2002 and hence, the S.A. is time barred. Vide order dated 17.10.2011, DRT ordered the said I.A. to be decided with the main case.

[12] Vide order dated 15.12.2011 (Annexure P-7), S.A. No.31 of 2008 preferred by the petitioners, was finally allowed by DRT-I, Chandigarh. As a result thereof, sale in favour of respondent No. 6 was set aside and directions were issued to restore the physical possession back to the Bank. As regards the preliminary objection taken by the

respondents with respect to limitation, it was held that the S.A. was filed within limitation as DRT reckoned limitation from 15.11.2007 i.e. the date on which petitioners/S.A. applicants had received letter dated 05.11.2007 (P-6) from the bank informing them about the sale. As regards the issue regarding the validity of the sale is concerned, the Tribunal noticed in Para No.17 that since Respondent No.1 did not separately serve sale notice upon the petitioners, it amounted to violation of Rule 8 (6) & (7) and Rule 9(1) of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as the "Rules, 2002") and hence, the sale was illegal. The learned Tribunal also held that the property has been sold at a grossly low price because a Memorandum of Understanding (MOU) dated 16.07.2007 was entered into between the petitioners and respondent No.5-M/s Indswift Laboratories Limited which is stated to have common Directors with the auction purchaser-respondent No.6, seeking to transfer petitioner No.1-Company for Rs.765 lakhs (sic : though the MOU reads amount as Rs.565 lakhs), whereas the auction has been conducted for Rs.486 lakhs. It further held that the sale was conducted in haste which is evident from the fact that the entire sale consideration was deposited the same day by the auction purchaser. One FIR No.154 dated 16.08.2007 was registered under Section 406, 420, 467, 468, 120-B against Directors of the petitioner No. 1-Company and officers of the Bank with regard to alleged misappropriation of the funds of the Company and therefore, the Bank could not have initiated securitisation process, till the culmination of proceedings in the said FIR and proceeded to quash notice under Section 13(2) of the Securitisation Act, 2002.

[13] Aggrieved against the aforesaid order, respondent No.6 (auction purchaser) preferred Appeal No.437 of 2011, respondent Nos. 1 to 3 (Bank and its officers) preferred Appeal No.438 of 2011 and petitioners herein preferred Appeal No.33 of 2012 before Debts Recovery Appellate Tribunal, Delhi under Section 18 of the Act, 2002 laying challenge to the order dated 15.12.2011 passed by the Tribunal under Section 17 of the Act, 2002.

[14] The DRAT, vide order dated 04.06.2013 (Annexure P-9), allowed the appeal No.437 of 2011 filed by respondent No.6 (auction purchaser) and Appeal No.438 of 2011 filed by respondent No.1 to 3 (Bank) and dismissed Appeal No.33 of 2012 filed by the petitioners herein (borrowers). As regards the issue of limitation is concerned, learned DRAT held that the DRT erred in reckoning limitation from 15.11.2007 i.e. the date when it received letter dated 05.11.2007 intimating the sale, because petitioner was already aware of the sale on 25.10.2007 itself, as a resolution was passed by the Board of Directors of petitioner No. 1, authorizing one of the Directors to challenge the sale conducted by the bank. In spite of the same, the S.A. was filed on 12.12.2007 i.e. much beyond the period of limitation which is 45 days from the date, when measures for sale were taken by the bank under the Act, 2002. Therefore, it held that the S.A. was time barred. As regards the validity of the sale is concerned, it held that nonservice of the sale notice upon the petitioners, was an irregularity. As a result thereof, the DRAT, vide its order dated 04.06.2013 (P-9), allowed the appeals preferred by bank and the auction purchaser, dismissed the appeal of the petitioners and set aside the order dated 15.12.2011 (P-7), passed by DRT. Consequently, sale certificate 22.10.2007 in favour of the auction purchaser was upheld.

[15] The petitioners are, therefore, aggrieved of the aforesaid order dated 04.06.2013 (P-9) passed by the DRAT and have filed the present petition.

[16] It requires to be noticed that the instant matter was heard on 09.01.2014 at the motion stage by a coordinate bench of this Court and framed two issues. The first issue was with regard to the legality of the sale in absence of having served notice upon the borrower in terms of Rule 8(6) of the Rules, 2002. The second issue was whether Section 5 of the Limitation Act, 1963 would be applicable to an application filed under Section 17 or 18 of the Securitisation Act, 2002.

Having heard the parties at length and after perusing the record we find that though the first issue would be relevant to the controversy involved but the second issue, would not arise for consideration in the present case. This is because right from inception, the case of the petitioners before the DRT and DRAT was that the SA was filed within limitation and hence there is no requirement for an application seeking condonation of delay under Section 5 of the Limitation Act, 1963. It is not the case of the petitioners that they were or intending to seek condonation of delay in filing the SA which has been denied by the Tribunal by holding that provisions of the Limitation Act, 1963 would not be applicable. This is evident from a bare perusal of Para 11 of the order dated 15.12.2011 passed by DRT-I, Chandigarh in SA No. 31 of 2008. The relevant portion of para 11 is extracted as under :-

“11. On the other hand, it was argued by the learned counsel for the applicants that the present application has been field within 45 days of the letter dated 05.11.2007 which was received by the applicants on 15.11.2007, hence there is no delay. I (sic) was submitted that since there is no delay in filing the present application, question of condonation of delay does not arise....”.

[Emphasis supplied]

Thus, it is clear that the applicability of Section 5 of the Limitation Act, 1963 to the proceedings under Section 17 of the Securitisation Act, 2002 was never an issue involved at any stage of the proceedings rather, the issue which would arise for consideration is as to whether the Securitisation Application No. 31 of 2008 filed by the petitioner is time barred or not.

[17] In view of above, after hearing the learned counsels for the parties and having considered the entire record of the instant case, we find that the following issues would arise for consideration of this Court:-

(i) Whether it is mandatory for the Secured Creditor/Bank to effect personal service of the sale notice, apart from publication as provided under Rule 8 & 9 of the Security Interest (Enforcement) Rules, 2002?

(ii) Whether the secured asset was sold at a low price?

(iii) Whether the Securitisation Application filed by the petitioners, was time barred having been filed beyond the prescribed period of limitation as provided for under Section 17(1) of the Securitisation Act, 2002?

(iv) Relief to which the petitioners would be entitled to?

ISSUE No. (i)

[18] Learned counsel for the petitioners submits that the Bank issued sale notice dated 21.09.2007, but no personal service had been effected upon the petitioners and hence the sale is bad in law. He refers to the unamended Rule 9 (1) of the Rules, 2002 (since the sale was conducted on 22.10.2007 i.e. prior to the amendment which came into effect from 04.11.2016) to contend that it is mandatory to serve the sale notice issued under Rule 8(6) by all the three modes separately i.e. by publication, pasting and personal service. In case, if the sale notice is not personally served upon the borrowers, the sale would be bad in law, even though the bank may have published and pasted the sale notice. Further, the word “or” used in Rule 9(1) has been interpreted to mean “and” by the Hon’ble Supreme Court in *Mathew Varghese v. M. Amritha Kumar*, ¹ 2014(5) SCC 610 and hence, sale without service of sale notice to the borrower is not valid and is squarely covered by the said judgment.

[19] He further submits that the impugned order passed by DRAT dated 04.06.2013 is liable to be set aside on the ground that it erroneously held that non-service of the sale notice is mere an irregularity whereas in view of the law laid down by the Hon’ble Supreme Court in the case of *Mathew Varghese* (supra) it has been held that non service of sale notice renders the sale unsustainable.

[20] On the other hand, learned Senior Counsel for the respondent-Bank does not dispute the ratio decidendi of the law laid down in the case of *Mathew Verghese* (supra). He also graciously concedes that the declaration of law in the case of *Mathew Verghese* (supra) qua personal service would be applicable to the sales conducted and under challenge, before the date of pronouncement of the said judgment. He further submits that the effect of other modes of service coupled with the conduct of the parties, balance of equities, efflux of time etc. would be relevant to consider exercising the equitable writ jurisdiction in a given case.

[21] Learned counsel for respondent No. 6 – auction purchaser has argued that Rule 9(1) of the Rules, 2002 was interpreted by the Hon’ble Supreme Court in the judgment of *Mathew Verghese* (supra) which was delivered on 10.02.2014 wherein while interpreting word “or” as “and” as used in Rule 9(1), personal service was held to be mandatory. However, the sale in the present case, was conducted much before the pronouncement of the said judgment i.e. on 2.10.2007 when such interpretation was not in existence. Hence, the position of law was changed only after the pronouncement of the aforesaid judgment which should be treated to be prospective in operation. Consequently, sale conducted prior in time, cannot be claimed to be illegal on the basis of the said judgment which was not in existence at the time of sale. Further, as per the legal position which existed on the date of sale, it was not mandatory to serve the sale notice upon the borrower if the sale notice had otherwise been served by the other two modes i.e. publication and pasting. The petitioner has not raised any dispute regarding the validity of such other mode of service of notice i.e. publication and pasting.

[22] We have heard the learned counsels for the respective parties. The primary contention of the petitioner is that it was mandatory to personally serve the 30 days sale notice upon the borrowers and guarantors before carrying out such sale. The petitioners have not

argued any other defect regarding pasting or publication. Therefore, we shall proceed to examine the relevant provisions governing the aspect of personal service of sale notice upon the borrowers/guarantors. Rule 9 (1) of the Rules, 2002 was, in fact, amended w.e.f. 04.11.2016. The sale in the present case, was conducted on 22.10.2007. Therefore, Rule 9(1) as it existed prior to the amendment i.e. on the date of sale, would be required to be considered which reads as under :-

Rule 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. Hon'ble Supreme Court in the case of *Mathew Verghese* (supra), interpreted the aforesaid provision in Para 28 of the judgment which reads as under :-

"28. 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 affected 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 Subrule (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.*"

[Emphasis supplied]

There have been various subsequent judgments reiterating the same view as laid down in the aforesaid judgment and we do not deem it necessary to burden the instant judgment with all such subsequent pronouncements. Suffice it to mention, that the consistent view is that the personal service of sale notice is the requirement in law, apart from publication in terms of Rule 9(1) of the Rules, 2002, to which we also agree. We find that the service of sale notice is required to be effected by all three modes i.e. pasting of notice on the conspicuous portion of the property in terms of Rule 8(7), publication in two newspapers

out of which one should be in vernacular newspaper and personal service in terms of Rule 9(1) of the Rules, 2002. In view of the aforesaid clear position of law, it is held that it is mandatory for the creditor to serve the sale notice to the borrower by all means of service i.e. publication, pasting and personal service as required under Rule 8 and 9.

[23] However, we are unable to subscribe to the contention raised by the learned counsel for the auction purchaser that the aforesaid judgment would not apply to the sale notice which was issued prior to the pronouncement of the aforesaid judgment. On the contrary, we express our agreement with the contention of Sh. Anupam Gupta, learned Senior Counsel, for respondent No. 1, who has submitted that judicial pronouncements are always retrospective in operation unless specifically held to be prospective. It is well settled that a judgment of a Court interpreting a provision of law does not lay down a new principle of law, rather clarifies the legal position as to what it intended to mean. Mr. Gupta's reliance upon Hon'ble Supreme Court in *General Manager Uttaranchal Jal Sansthan v. Laxmi Devi* 2009 (7) SCC 205 is well placed. In the cited judgment it has been held as under :-

"29. Submission of the learned counsel for the respondents is that the said decision is not applicable:

- a) as it was rendered in 2006 whereas the cause of action for filing the writ petition arose in 2002; and
- b) a distinction must be made between the appointment on ad hoc basis and appointment on compassionate ground.

As to the first submission above, it is worth mentioning that judicial decisions unless otherwise specified are retrospective. They would only be prospective in nature if it has been provided therein. Such is clearly not the case in Umadevi (supra). Accordingly, even though the cause of action would have arisen in 2002 but the decision of Umadevi (supra) would squarely be applicable to the facts and circumstances of the case. Secondly, before a person can claim a status of a Government servant not only his appointment must be made in terms of the recruitment rules, he must otherwise fulfill the criterion therefor.

Appointment made in violation of the constitutional scheme is a nullity. Rendition of service for a long time, it is well known, does not confer permanency. It is furthermore not a mode of appointment. [Emphasis supplied]

Nowhere has it been mentioned in the judgment of *Mathew Verghese* (supra), that the same would be prospective in operation. It explains and lays down the correct interpretation of Rule 9(1) of the Rules, 2002. Thus, it would apply to the sale in question as well, even though it may have been conducted prior to the pronouncement of the cited judgment in the case of *Mathew Verghese* (supra). In this view of the matter, Issue No. (i) is decided in favour of the petitioners and it is held that it is mandatory for the Secured Creditor/Bank to effect personal service of the sale notice, apart from publication and pasting as provided under Rule 8 & 9 of the Security Interest (Enforcement) Rules, 2002.

ISSUE NO. (ii)

[24] Learned counsel for the petitioners have argued that the respondent No. 1 bank had sold the property at a throw away price of Rs.486 Lakhs whereas DRT in its order dated 05.12.2011 (P-7) has rightly held in para 20 that a Memorandum of Understanding (MOU) dated 16.07.2007 (page 142 of the paper book) had been executed between the petitioners and a sister concern of respondent No. 6 i.e. respondent No. 5 for Rs.765 Lakhs. This reflects vast difference between the sale price and the agreed price of the same property and establishes that the sale has been conducted at a low price. DRT therefore, rightly concluded that the sale conducted on 22.10.2007, was at a low price keeping in view substantial difference in the value of the assets as contained in MOU and the sale price in the sale conducted by the bank.

[25] On the other hand, learned Senior Counsel for Bank (respondent Nos. 1 and 3) and learned counsel for auction purchaser (respondent No. 6) have contended that infact that the aforesaid observation of DRT suffers from a factual error. As per MOU dated 16.07.2007, the total acquisition price is Rs.565 Lakhs and not Rs.765 Lakhs as erroneously observed by the DRT. Moreover, the said agreement was for acquisition of the entire company excluding the liabilities by virtue of which entire company would have been transferred and not the assets alone. On the other hand, what has been sold in the sale conducted by the bank are only the assets thereof and not the entire company. Further, as per Rule 8(5) of the Rules, 2002, reserve price is to be fixed after obtaining valuation report from the valuer. In the present case, the bank had obtained valuation report dated 08.09.2007 (Annexure R-6/3) of the immovable assets which depicted the distress value to be Rs.334.39 Lakhs. Another valuation report was obtained on 12.09.2007 (Page 311 of the paper book), as per which distress value of the machinery was assessed to be Rs.151.03 Lakhs. Based on these two values, the bank had fixed the reserve price as Rs.485.42 Lakhs. Thus, the bank had fixed the reserve price after obtaining the valuation reports, in terms of Rule 8 (5) of the Rules 2002.

[26] Having heard learned counsels from both the sides, we do not find merit in the aforesaid argument, as raised by the petitioners. The reserve price, fixed by the bank in the sale notice dated 20.09.2007, is on the basis of the two valuation reports dated 08.09.2007 and 12.09.2007, depicting the assessed value of the immovable and movable assets to be Rs.334.39 Lakhs and Rs.151.03 lakhs, respectively. The reserve price of Rs.485.42 Lakhs has been fixed based on the aforesaid assessed value of the secured assets. The petitioner has not disputed these valuation reports either in pleadings or during the course of arguments. Obtaining of valuation report by the secured creditor in order to fix the eventual reserve price in the sale notice, is in consonance with Rule 8 (5) of the Rules, 2002 and hence cannot be faulted with.

[27] Further, our attention has been drawn to an order dated 15.09.2011 (Annexure R-5/3), passed by DRT, whereby the petitioners themselves offered to redeem the property and further offered to deposit Rs.4.60 Crore. The said option of redemption was exercised by the petitioners after almost 4 years of auction. Accordingly, the applicant was directed to deposit Rs. 4.60 Crore with the Registrar of the Tribunal by way of demand draft within 30 days. The relevant extract of the said order dated 15.09.2011 passed by DRT, reads as under:-

“ xxxxxxxx

IA No. 568

Copy of IA No. 568 has been supplied to the opposite counsel. Notice accepted. Reply be filed within 2 weeks with advance copy to the opposite counsel, who may file replication if any within one week thereafter.

The learned counsel for the applicant stated that the applicant is willing to redeem the property and ready to deposit consideration amount of Rs. 4.60 Crores for which the properties of the applicant were sold to the auction purchaser by the respondent bank. The learned counsel for the applicant further stated that in order to establish its bonafide, the applicant will deposit the said amount with the Registrar of this Tribunal. Accordingly, the applicant is directed to deposit Rs. 4.60 Crores with the Registrar of this Tribunal by way of Demand Draft within 30 days.

Be listed on 17.10.2011 for further consideration.

Copy of this order will be placed in all connected matters.”

[Emphasis supplied]

We were informed during the course of hearing that undisputedly the petitioners, inspite of having availed the opportunity to redeem the property, failed to deposit the requisite amount before the Tribunal. Not only this, the petitioners did not even file any application for extension of time nor deposited the undertaken amount at any subsequent point of time during the pendency of the SA. This reveals that even the petitioners themselves did not deem it appropriate and worthy enough, to have deposited Rs.4.60 Crore to redeem the property in question. This is moreso, when the applicants got this opportunity after 4 years of the sale i.e. 22.10.2007, when the auction purchaser had deposited Rs. 486 Lacs. Having failed to do so, we feel that the conduct of the petitioners also disentitles them to raise this issue in law. In these circumstances, the petitioners cannot be permitted to now contend that the sale was conducted at a presumably low price.

[28] That apart, we find merit in the contention of the respondents that not once did any person file a Securitisation Application before the Tribunal to contend that it was ready to offer a higher bid as it could not initially participate in the auction fixed by the Bank or to contend that the sale price was grossly low. Respondent though has made an illustrative argument, but we find that the legal position is otherwise. It is well settled that in absence of any defect in publication of the sale notice, a marginally higher price offered after the confirmation of sale, would not be a valid ground to set aside a confirmed sale [see para No. 30 and 31 of the judgment of Hon'ble Supreme Court in *Valji Khimji v. Official Liquidator* 2008(9) SCC 299]. Be that as it may, it is a matter of fact, that none ever appeared before the Tribunal to contend that it was interested to purchase the property for a higher price nor deposited any amount for the said purpose including the petitioners/defaulting borrowers itself even after 4 years of sale at the time of having exercised the right of redemption. This also would indicate that the sale was not conducted at a low price.

[29] The petitioners also faintly argued that the sale price was deposited by the respondent No. 6 on the same date of auction i.e. on 22.10.2007 which led to the issuance of the sale certificate and therefore the sale was conducted in a hasty manner.

[30] We cannot accept this submission of the petitioners as well. As per Rule 9 (3) of the Rules, 2002 the sale amount is required to be deposited within 15 days of the sale, which means that it is not required for an auction purchaser to wait till the expiry of 15 days to deposit the sale amount. Depositing the entire amount on the same date of sale, does not seem to be in contravention of Rule 9 (3) or (4) of the Rules, 2002. Rather, this shows the readiness of the auction purchaser to deposit the sale consideration, well in time. Therefore, this could not be an argument to cancel the sale. The findings of the DRAT on this issue are upheld.

[31] In view of the aforesaid discussion, we decide this issue against the petitioners and in favour of the respondents by holding that the sale was not conducted at a low price and does not require any interference in the impugned order.

ISSUE NO. (iii)

[32] Learned counsel for the petitioners next submits that the S.A. was filed well within limitation period. Since sale notice was not served upon the petitioners, therefore, no cause of action would arise for the limitation to reckon for the purposes of filing of Securitisation Application. It could not be presumed that the petitioners should have filed the S.A. within 45 days from the date of sale notice or date the auction, when no sale notice has been served upon the petitioners. The sale notice was issued by the bank on 20.09.2007 which led to the conducting of auction on 22.10.2007. However, the measure taken by the secured creditor i.e. the sale, was intimated to the petitioners only vide letter dated 05.11.2007 which was received only on 15.11.2007. Therefore, it is only on 15.11.2007 that the cause of action accrued to the petitioners to file the S.A pursuant to which they filed the S.A. on 20.12.2007 i.e. well within the period of 45 days as provided under Section 17 of the Act, 2002 reckoned from 15.11.2007 as held by the DRT. It is further submitted that date of knowledge cannot be taken as a basis to determine whether the SA filed by the petitioners was within limitation or not, in absence of the sale notice itself, not having been served upon the petitioners.

[33] On the other hand Ld. Senior Counsel for respondent Nos.1 to 3 – Secured Creditor and learned counsel for respondent No. 6 – Auction Purchaser, have argued in the same voice, that as per Section 17(1) of the Act, 2002, limitation to file SA commences from the date when measures as prescribed under Section 13 or 14 of the Act, 2002 are taken by the secured creditor. Both the learned counsels have extensively relied upon the aforesaid provision. It is submitted that at each step when a measure is taken by the secured creditor under the Act, 2002 a fresh cause and limitation would be available to the applicant to challenge the same within 45 days from such statutory measure. In the present case, Respondent No. 1 – secured creditor took physical possession of the Industrial Property in question, on 24.08.2007. Though, it gave a cause to challenge the same by filing of SA under Section 17 of the Act, 2002 before the DRT, however, petitioners chose not to

challenge the said measure. The next statutory measure was issuance of sale notice dated 20.09.2007 and consequent sale conducted by it in favour of Respondent No 6 on 22.10.2007. The SA ought to have been filed within 45 days thereof. Sale notice was duly published in newspapers including one in English and another in vernacular apart from being posted on the website of the bank. Moreover, even if assuming that petitioners were not aware of the issuance of sale notice, then limitation would reckon from the date of knowledge. In the present case, petitioners were aware of the sale notice dated 20.09.2007 before the date of sale, because they filed Review Application 247 of 2007 in CWP No. 15851 of 2007, on 18.10.2007 before this Court, in which sale notice is sought to be negated. The sale notice was appended with the Review Application as Annexure P-18. The said Review Application was dismissed on 19.10.2007. Thus, the petitioners did have notice of the sale, and a copy of sale notice was available with them even before the date of sale, and now to say that cause did not arise to challenge the sale notice till 15.11.2007, as sale notice was not served by the bank prior thereto, is not correct. If they could challenge the sale notice in Review application they could have very well challenged it before the DRT moreso when the Review Application stood dismissed on 19.10.2007 by this Court.

[34] Previously also a Division Bench of this Court vide order dated 11.10.2007 did not agree to the aforesaid submission of the petitioners, while dismissing CWP No.15851 of 2007 titled as *M/s Morion Chemicals Limited v. United Commercial Bank Limited, Chandigarh*,² wherein also, it was held by this Court that it is not possible to hold that the petitioner did not have any notice of publication and if it has led the limitation to lapse which has been done at its own risk and responsibilities, therefore the petitioner cannot be granted any benefit of the same.

[35] Having scrutinised the arguments of learned counsel for the parties, we find that the period of limitation, in order to lay challenge to a measure initiated by Secured Creditor under the Act, 2002 is provided Under Section 17 (1) of the Act, 2002, which reads as under:-

“ 17. *[Application against measures to recover secured debts.]* – (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 measures 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 this sub-section.]

[Emphasis supplied]

[36] A bare perusal of the aforesaid provision would reveal that the petitioners, could have challenged the sale notice dated 20.09.2007 and the consequent sale which took place on 22.10.2007 by filing of Securitisation Application under Section 17 (1) of the Act, 2002 within 45 days from the date on which such measures had been taken. The impugned sale took place on 22.10.2007. It is evident that the petitioners were aware of the sale sought to be conducted on 22.10.2007 by the Secured Creditor, because the sale notice was appended as Annexure P-18 alongwith Review Application No. 247 of 2007 in CWP No. 15851 of 2007 dated 18.10.2007, which was dismissed by this Court vide order dated 19.10.2007. In order to verify the aforesaid fact, we had called for the records of CWP No. 15851 of 2007 from the registry, and found that the sale notice was appended with the review application and in para No. 1 (A) of the same, the petitioners had sought to negate the sale notice by laying challenge to the same. The petitioners have stated in the Review application that that the bank had issued the sale notice in The Tribune Chandigarh on 20.09.2007. This shows that the petitioners were in possession of the sale notice and the sale which took place on 22.10.2007 was well within the knowledge of the petitioners.

[37] As noticed above, limitation to challenge the sale would be 45 days from the date of auction as provided for in terms of Section 17 of the Act, 2002. Since, the petitioners were aware of the auction notice and the date of auction, giving the maximum leeway, the limitation may be permitted to reckon from the date of auction or confirmation of sale, being a measure taken under the Act, 2002. In the present case, the sale and confirmation of sale both took place on 22.10.2007. The SA was therefore required to be filed within 45 days commencing from the date of auction/confirmation of sale i.e. 22.10.2007, which period expired on 08.12.2007. The petitioner on the other hand preferred to file the SA only on 20.12.2007 which was beyond the period of limitation and too without any application for condonation of delay. Thus, we have no hesitation in holding that SA No. 31 of 2008 filed by the petitioner before DRT-I, Chandigarh on 20.12.2007 was time barred and beyond the stipulated period of limitation of 45 days from the date of sale, as rightly held by DRAT in the impugned appellate order.

[38] Argument of the petitioners that limitation will not reckon from the date of knowledge and is to be reckoned from the accruing of cause, which took place on 15.11.2007 when it received letter dated 05.11.2007 (P-6) issued by the bank intimating about the sale, is equally unimpressive. Firstly, letter dated 05.11.2007 (P-6) is not a statutory sale notice nor is any statutory notice which was required by law, to have been issued to the petitioners. It is a notice informing the petitioners, that consequent upon sale which had taken place on 22.10.2007 (wrongly mentioned as 22.10.2010 in the copy of notice dated 05.11.2007 as placed on record) the entire loan account stood cleared on receipt of the bid and sale amount of Rs.486 Lakhs by respondent No. 6 and there is an excess amount is lying undisbursed with the bank. This is not a sale notice as provided for under Rule 8(6) or Rule 9(1) of the Rules, 2002. Thus, this cannot be treated to be a trigger point for commencement of limitation.

[39] Secondly, the petitioners already had a copy of the sale notice even before the date of sale. It was appended with the Review Application dated 18.10.2007 filed by the petitioners, which was dismissed by this Court on 19.10.2007. Thus, the petitioners cannot

be permitted to contend that in absence of sale notice they were unable to challenge the sale before the DRT. It is surprising to note, that the petitioner though could challenge the sale notice by filing Review Application before this Court, but makes an argument that it could not have challenged the sale before DRT in absence of sale notice. It is clearly established on record, that the petitioners did have a copy of the sale notice, on the date of sale itself. The argument that cause of action did not accrue till 15.11.2007, when the bank intimated to collect the excess amount, is totally misconceived.

[40] Thirdly, petitioner No. 1 – Company, passed a board resolution on 25.10.2007, which is appended as Annexure R-1/1 alongwith the written statement dated 22.11.2013 filed on behalf of respondent No. 1 and 3. As per this resolution, the petitioner-company had agreed to challenge the sale proceedings before DRT, but failed to do so within 45 days thereof, which period also expired on 10.12.2007, but the SA was not filed. The board resolution dated 25.10.2007 further reveals that the petitioners were aware of the sale conducted by the bank. The petitioners while filing replication to the written statement of respondent No. 1 and 3 did not dispute the factum and the validity of the aforesaid resolution having been passed by petitioner No. 1 – Company.

[41] In our considered view, we find that the instant plea taken by the petitioners that the cause only arose on 15.11.2007, when they received letter dated 05.11.2007 to challenge the sale and thereby reckoning limitation therefrom, is a completely misplaced and a self defeating argument. The petitioners were aware of the sale notice much prior to the date of auction which took place on 22.10.2007. The petitioners were aware that they had unsuccessfully challenged the said sale notice before this Court by filing Review Application No. 247 of 2007 in CWP No. 15851 of 2007 on 18.10.2007 which was dismissed on 19.10.2007. As noticed above, the sale notice was even appended with the review application. In spite of this, the petitioners have taken a plea that they were not aware of the sale till 15.11.2007. This aspect was concealed by the petitioners from the DRT. We find that the submission of the petitioners is nothing but a clear attempt on the part of the petitioners to conceal material facts. It is the solemn duty of each and every litigant to project complete and true facts before the Court. Concealing material facts which goes to the root of the matter, clearly shows that the petitioners have not approached the Court with clean hands. Hon'ble Supreme Court in *S.P. Changalvaraya Naidu (dead) by L.Rs. v. Jagannath (dead)*, ³ 1994 (1) SCC 1 has held that such litigants, do not deserve any hearing on merits rather such litigations should be rejected at the threshold. However, in spite of above, since the petitioners have already travelled through the two tribunals below, we did not dismiss the petition on this short ground rather uninfluenced by the conduct of the petitioners dealt with the submissions on merits.

[42] That apart, this argument of the petitioners proved to be a self-defeating and virtually went on to dig its own grave. Having taken this plea, the petitioners did not file an application under Section 5 of the Limitation Act, 1963, seeking condonation of delay in filing the Securitisation Application. Having chosen to argue that the SA was within limitation, the petitioners could not have taken self-contradictory arguments as it could not, on one hand contended the SA to be within limitation and on the other seek condonation of delay. Precisely for this reason the Securitisation Application preferred by the petitioners,

did not even contain any averment, which could have otherwise given a reason for examining the delay, even if there was no application to that effect. Hon'ble Supreme Court in *Sesh Nath Singh v. Baidyabati Sheoraphuli Cooperative Bank Ltd.* ⁴ (2022-1)205 PLR 432 (SC) (SN) = 2022 SCeJ 0216 = 2022 PLRonline 2702, (Civil Appeal No. 9198 of 2019 decided on 22.03.2021) has held that in absence of an application for condonation of delay, if pleadings otherwise would justify condonation of delay the Courts could condone the delay. In the present case, there are no reasons compelling the Court to examine the delay. Rather, as noticed above, the delay was on the part of the petitioners, which remained unexplained. For the aforesaid reason, no benefit could have been derived by the petitioners of the said judgment as well, although even while arguing before this Court no attempt was made, by the petitioners to argue on these lines. The petitioners rather felt satisfied to continue to stick on their argument that their SA was within limitation.

[43] In view of above, we have no hesitation to hold that the SA No. 31 of 2008 filed by the petitioners on 20.12.2007 before DRT-I, Chandigarh was clearly time barred and was filed beyond the prescribed period of limitation of 45 days as provided Under Section 17 (1) of the Act, 2002. The said issue is decided in favour of the respondents and against the petitioners and the findings of DRAT on this aspect are upheld.

ISSUE NO. (iv)

[44] Having examined the aforesaid issues, now it is to be seen as to what relief the petitioners would be entitled to even though we have held that the sale notice dated 20.09.2007 was not served upon the petitioners, which amounts to violation of Rule 9 (1) of the Rules, 2002 as interpreted by the Hon'ble Supreme Court in *Mathew Varghese* (supra), still we are not inclined to set aside the sale, for the reasons which are explained hereinafter.

[45] Firstly, as held by us while deciding issue No. 3, SA No. 31 of 2008 was time barred and was filed much after 45 days from the date of sale. There was no application for condonation of delay, rather a misconceived argument was adopted that the SA was within limitation. Since the SA was beyond limitation, no relief on merits of the case, could have been granted.

[46] Secondly, we have noticed that the petitioners by its conduct have found to have waived off their right to challenge the sale. The petitioners have relied upon para 28 of the judgment of Hon'ble Supreme Court in the case of *Mathew Varghese* (supra) but did not consider the import of para 30 of the same judgment which has been heavily relied upon by learned counsel for respondent No. 6, which reads as under:-

"30. Such a detailed procedure while resorting to a sale of an immovable SECURED ASSET is prescribed under Rules 8 and 9(1). In our considered opinion, it has got a twin objective to be achieved. 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. 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. *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."*

[Emphasis supplied]

A perusal of the above would reveal that Hon'ble Supreme Court has held that the purpose of serving the borrower with the sale notice is to ensure that right of redemption is made available to him which as per Section 13 (8) as it existed prior to the amendment which took place by amending Act 44 of 2016 (w.e.f 01.09.2016), was up till the Secured Assets is not sold or transferred by the Secured Creditor. In the peculiar facts of the instant case, the petitioners in their wisdom, apparently opted to exercise right of redemption during the pendency of the SA. The Tribunal vide order dated 15.09.2011 (on record as Annexure R-5/3 and reproduced in para No. 27 hereabove) (supra) granted an opportunity to petitioner to redeem his property and directed the petitioner to deposit Rs.4.60 Crore within 30 days i.e. the time period which otherwise would have been available to the petitioners in case if sale notice would have been served upon the petitioners. The petitioners, failed to deposit the aforesaid amount before the Tribunal. Not only this, as noticed above even during the pendency of SA the petitioners never thereafter made a request for extending the time so granted on 15.09.2011 to deposit the said amount. The petitioners in their wisdom, having chosen to opt for redemption, after the sale and during the pendency of SA and having remained unsuccessful, have waived off their right to now contend any prejudice to have been suffered on account of nonservice of the sale notice.

[47] There is no doubt that Rule 9 (1) is mandatory and is for the benefit of the borrower. This benefit has been waived off by the petitioners by their aforesaid act which they demonstrated vide order dated 15.09.2011 passed by the Tribunal. It is well settled that even a mandatory provision of law, which is meant for the benefit of the borrower can be waived off. Reliance can be placed upon the judgment of Hon'ble Supreme Court in *GM, Sri Siddeshwara Co-operative Bank Ltd. v. Sri Ikbai* 2013 (10) SCC 83, of which Para 22 and 23 reads as under:-

" 22. Two things clearly emerge from the above letter. First, at the time of auction sale on 11.01.2006 the borrower was present. He did not object to the auction being held before

expiry of 30 days from the date on which the public notice of sale was published. He also agreed that bid given by the auction purchaser for 8,50,000/- which was highest bid be accepted as the auction purchaser happened to be his known person. Second, and equally important, the borrower expressly gave consent in writing that the balance sale price may be accepted from the auction purchaser now and sale certificate be issued to him. The above letter sent by the borrower to the Bank has been accepted by the Bank. Thus, there is a written agreement between the borrower and the Bank for extension of time up to 13.11.2006. The auction purchaser made the payment of the balance purchase price forthwith on that day, i.e., 13.11.2006. This indicates that he was impliedly a party to the written agreement between the Bank and the borrower. In the circumstances, there is no reason why the condition in Rule 9(4) viz. "such extended period as may be agreed upon in writing between the parties" be not treated as substantially satisfied. The learned Single Judge was clearly in error in holding that the letter dated 13.11.2006 written by the borrower to the Bank cannot be construed as written agreement falling under Rule 9(4).

23. There is no doubt that Rule 9(1) is mandatory but this provision is definitely for the benefit of the borrower. Similarly, Rule 9(3) and Rule 9(4) are for the benefit of the secured creditor (or in any case for the benefit of the borrower). It is settled position in law that even if a provision is mandatory, it can always be waived by a party (or parties) for whose benefit such provision has been made. The provision in Rule 9(1) being for the benefit of the borrower and the provisions contained in Rule 9(3) and Rule 9(4) being for the benefit of the secured creditor (or for that matter for the benefit of the borrower), the secured creditor and the borrower can lawfully waive their right. These provisions neither expressly nor contextually indicate otherwise. Obviously, the question whether there is waiver or not depends on facts of each case and no hard and fast rule can be laid down in this regard."

[Emphasis supplied]

[48] Thirdly, inspite of having held that Rule 9 (1) of the Rules, 2002 is mandatory, the aforesaid act of the petitioners of first having opted to redeem the property and then having remained unsuccessful, the Courts can always deny the equitable and discretionary relief under Article 226 of the Constitution of India. In a somewhat identical situation, Hon'ble Supreme Court in *ITC Limited v. Blue Coast Hotel* ⁵ (2018-2)190 PLR 583 (SC), , 2018 AIR SC 3063, considered a case where the petitioner therein submitted its representation under Section 13 (3A) of the Act, 2002 pursuant to a demand notice issued by the Secured Creditor. The Secured Creditor without deciding the said representation, proceeded to issue notice under Section 13 (4) of the Act, 2002 and thereafter conducted the sale. A question arose as to whether Section 13 (3A) of the Act, 2002 is mandatory or not and whether failure to comply with the same would render the consequent sale as nugatory. Hon'ble Supreme Court while noticing the conduct of the petitioners to have submitted various objections previously, as also repeated unfulfilled undertakings to pay off the debt, held that even though Section 13 (3A) of the Act, 2002 is mandatory, but keeping in view the peculiar facts of the instant case, failure to furnish a reply to the representation is not of much significance. While examining the previous conduct of the borrower, the Court was satisfied that the creditors have undoubtedly considered the earlier representations and granted sufficient time to fulfill the earlier proposals for repayment and hence purpose and object of Section 13(3-A), of the Act, 2002 had been sufficiently

complied with. Consequently, the discretionary and equitable relief under Article 226 of the Constitution of India was declined. Certain paras from the said judgment which are relevant to the present controversy in hand, are reproduced as under:-

“28. We find the language of sub-section (3A) to be clearly impulsive. It states that the secured creditor “shall consider such representation or objection and further, if such representation or objection is not acceptable or tenable, he shall communicate the reasons for nonacceptance” thereof. We see no reason to marginalize or dilute the impact of the use of the imperative ‘shall’ by reading it as ‘may’. The word ‘shall’ invariably raises a presumption that the particular provision is imperative *State of U.P. v. Manbodhan Lal Shrivastava*, AIR 1957 SC 912, p. 917.

29. There is nothing in the legislative scheme of Section 13(3A) which requires the Court to consider whether or not, the word ‘shall’ is to be treated as directory in the provision. As the Section stood originally, there was no provision for the above mentioned requirement of a debtor to make a representation or raise any objection to the notice issued by the creditor under Section 13(2). As it was introduced via sub-section (3A), it could not be the intention of the Parliament for the provision to be futile and for the discretion to ignore the objection/representation and proceed to take measures, be left with the creditor. There is a clear intendment to provide for a locus poenitentiae which requires an active consideration by the creditor and a reasoned order as to why the debtor’s representation has not been accepted.

30. Moreover, this provision provides for communication of the reasons for not accepting the representation/objection and the requirement to furnish reasons for the same. A provision which requires reasons to be furnished must be considered as mandatory. Such a provision is an integral part of the duty to act fairly and reasonably and not fancifully. We are not prepared in such circumstances to interpret the silence of the Parliament in not providing for any consequence for noncompliance with a duty to furnish reasons. The provision must nonetheless be treated as ‘mandatory’.

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33. From the above, it is clear that the creditor was induced by the debtor not to take action against them through assurances and promises. The creditor appeared to have entered into negotiations for the settlement of the dues and even accepted cheques in repayment much after the notice[32] under Section 13(2) and after the debtor’s letter of representation[33]. Many opportunities were granted by the creditor to the debtor to repay the debt which were all met by proposals for extension of time. Eventually, the debtor even executed “A Letter of Undertaking [34]” acknowledging the right of IFCI to sell the assets in the case of default.

[32] Dated 26.03.2013. [33] Dated 27.05.2013. [34] On 25.11.2013.

34. *In these circumstances, we have no doubt that the failure to furnish a reply to the representation is not of much significance since we are satisfied that the creditor has undoubtedly considered the representation and the proposal for repayment made therein*

and has in fact granted sufficient opportunity and time to the debtor to repay the debt without any avail. Therefore, in the fact and circumstances of this case, we are of the view that the debtor is not entitled to the discretionary relief under Article 226 of the Constitution which is indeed an equitable relief."

[Emphasis supplied]

[49] In this view of the matter, since the petitioner on its own, opted for redemption and having remained unsuccessful, we therefore hold that even though Rule 9 (1) of the Rules, 2002 is mandatory, but in the peculiar facts and circumstances of the case, failure to serve the sale notice cannot lead to setting aside of the sale. It would have been a different issue altogether, in case if the petitioners would not have opted to redeem the property, but having elected to do so and having remained unsuccessful, it clearly reflects that the petitioners were only trying to take a chance before a Court of Law without any intent to actually redeem the property. Therefore, keeping in view the peculiar facts and circumstances of the instant case the sale cannot be set aside.

[50] Fourthly, the sale was conducted 14 years back i.e. in the year 2007. Respondent No. 6 – auction purchaser has vehemently argued that during all this 14 years, it has set up a place of work and livelihood upon the property in question and has made various improvements. There are lot many workers which are working at the plant in question and their livelihoods are dependent upon the said unit itself. Further, in case if the petitioners/defaulting borrowers would have deposited the amount required for redemption of property, as opted by them and granted by the Tribunal vide 15.09.2011 (Annexure R-5/3), the matter would have been closed in the year 2011 itself. It is purely due to the fault and inability to redeem the property, after itself having chosen to do so, in the year 2011 that the auction purchaser has continued its activities over the plant in question and has now set up a pharmaceutical unit. It would cause immense hardship to now shift to a new location which is not possible without causing extensive damage to the existing set up of plant & machinery and would entail extremely high expenses. Moreover, the real estate prices have now escalated to such an extent that even if sale consideration is to be refunded alongwith interest, it may not be able to purchase an identical premises for its self. Moreover, the petitioners cannot now take premium of its own fault and lead to immense prejudice to the auction purchaser / respondent No. 6 and also to bank. It is with the amount deposited by auction purchaser/respondent No. 6, that the entire loan account stood cleared rather an excess amount was left with the bank and obviously release of the collateral security of the guarantors. If the amount due towards the outstanding liabilities of the defaulting borrowers/petitioners, would be calculated as per the contractual rate of interest, it would be more than Rs.29 Crore payable by the petitioners to the secured creditor / Bank (respondent No. 1). Per contra, learned counsel for the petitioners has argued that in case if sale is conducted in violation of Rule 9(1) as interpreted the Hon'ble Supreme Court in *Mathew Verghese* (supra), such considerations as canvassed by the auction purchaser- respondent No. 6 cannot provide sufficient basis for negating the mandate of law as laid down by the Hon'ble Supreme Court.

[51] Having considered the above submission, we find for the aforesaid reasons noticed hereinabove in Issue No. (iv), it would be highly inequitable to set aside the sale after a

passage of 14 years. Moreso, when the petitioners itself failed to deposit the amount required to redeem the properties way back in terms of the order of the DRT dated 15.09.2011 (Annexure R-5/3 and reproduced in para No. 27). The petitioners if would have deposited the said amount, we find that the misery of the auction purchaser would have come to an end there and then. Even the interest of the secured creditor/bank also would not have been prejudiced. As noticed above, we also find that the requirement of law, as laid down in the case of *Mathew Verghese* (supra) is also substantially complied with and will not come to rescue of the petitioners in the peculiar facts and circumstances of the present case. Apart from the fact that having availed the right of redemption , and still having failed to do so, real intent and the import of the judgment stands substantially complied with. In these circumstances, we do not deem it appropriate to grant the relief as prayed for by the petitioners in the instant petition.

[52] For the aforesaid reasons, we decline to exercise our equitable and discretionary jurisdiction under Article 226 of the Constitution of India. Accordingly, the instant petition is dismissed. The parties are left to bear their own costs.

Since the main case itself has been decided / dismissed, no orders are required to be passed in the pending applications, and the same stand disposed of.

Sd/- Girish Agnihotri, J.

R.M.S.

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Petition disposed of.