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Supreme Court of India

Surinder Singh Nijjar, A.K. Sikri

J.Rajiv Subramaniyan v. Pandiyas

CIVIL APPEAL NO. 3865 OF 2014 (Arising out of S.L.P.(C) No.24915 of 2011), CIVIL APPEAL NO. 3866 OF 2014 (Arising out of S.L.P.(C) No.25448 of 2012)

14.03.2014

Security Interest (Enforcement) Rules, 2002, Rules 8 and 9(1) – Sale through private treaty - Any sale effected without complying with the same would be unconstitutional and, therefore, null and void - There were no terms settled in writing between the parties that the sale can be affected by Private Treaty. In fact, the borrowers – Borrowers were not even called to the joint meeting between the Bank – and the auction purchaser - Therefore, there was a clear violation of the aforesaid Rules rendering the sale illegal - SARFAESI Act, 2002. [Para 14, 16]

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 - Sale - Provisions of the SARFAESI Act, 2002 and the Rules, 2002 have been enacted to ensure that the secured asset is not sold for a song - It is expected that all the banks and financial institutions which resort to the extreme measures under the SARFAESI Act, 2002 for sale of the secured assets to ensure, that such sale of the asset provides maximum benefit to the borrower by the sale of such asset. [Para 17]

JUDGMENT

SURINDER SINGH NIJJAR,J. - Leave granted.

2. These special leave petitions are directed against the final judgment and order dated 14th June, 2011 passed by the Madras High Court (Madurai Bench) in W.A.No.417 of 2011 dismissing the aforesaid Writ Appeal filed by the appellants.

3. We have heard the learned counsel for the parties at length.

4. Mr. Ashok Desai learned senior counsel appearing on behalf of the appellants has submitted that although many issues have been raised in the SLP, he is not pressing the point that the High Court erred in entertaining the writ petition filed by respondent Nos.1 and 2. The point with regard to the maintainability of the writ petition was taken on the basis of a judgment of this Court in the case of United Bank of India vs. Satyawati Tondon & Ors.[2010 (8) SCC 110]. It was urged before the High Court that an alternative remedy being available to respondent Nos.1 and 2 under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI Act, 2002), the writ petition would not be maintainable. The second issue with regard to the maintainability was based on the fact that earlier respondent Nos. 1 and 2 had filed Writ Petition Nos.5027-28 of 2006 challenging the auction sale notice dated 23rd May, 2006. However, these writ petitions were withdrawn on 3rd July, 2006. The High Court did not give any liberty to respondent Nos. 1 and 2 to file fresh writ petition. Mr. Desai very fairly submitted that it is not necessary to examine the issues on maintainability of the writ petition, as the entire issue is before this Court on merits.

5. Mr. Ashok Desai has pointed out that respondent Nos.1 and 2 had taken various loans from respondent No.3-Bank. Upon failure of Respondent Nos. 1 and 2 to repay the loan, the assets of respondent Nos.1 and 2 which had been mortgaged with respondent No.3-Bank were classified as non-performing assets (NPA). Inspite of such action having been taken by respondent No.3-Bank, respondent Nos.1 and 2 failed to regularize the bank account. Therefore, on 8th June, 2005, the bank-respondent No.3 issued notice under Section 13(2) of the SARFAESI Act, 2002 followed by a possession notice on 12th

January, 2006 under Section 13(4) of the said Act. Respondent Nos.1 and 2 challenged the aforesaid two notices by filing Writ Petition Nos. 4174/2006, 4175/2006, 5027/2006 and 5028/2006. In the meantime, auction sale was fixed on 7th July, 2006. But no sale took place as there were no bidders. On 28th August, 2006, respondent Nos. 1 and 2 sought cancellation of the auction notice and sought permission of respondent No.3-Bank to sell the secured assets by private Treaty. It was stated that as on that date the outstanding balance due to the bank was a sum of Rs.1.57 crores. A request was made to break up the aforesaid amount as follows :

(a) Machineries of M/s. Suruthi Fabrics - 0.40 lacs

(b) Land and building of M/s. Suruthi Fabrics - 0.70 lacs

(c) Pandias Garment Factory land and Building - 0.47 lacs And Suruthi Fabrics 5.51 acres Land

6. Permission was sought to sell the assets as stated above within six months. On 11th September, 2006, respondent Nos.1 and 2 made a payment of Rs.42 lacs to respondent No.3-Bank, by selling machinery with the permission of respondent No.3-Bank. A request was also made for an extension of two moths for paying the remaining amount after selling the secured assets. On 8th December, 2006, respondent No.3- Bank gave approval for private sale of the immovable property to the appellants and for issue of sale certificate. On the very same date, the secured assets were sold in favour of the petitioner for a consideration of 123.10 lacs. It is not disputed by Mr. Vikas Singh, learned senior counsel appearing for Respondent No.3, that the sale was affected through Ge-Winn Management Company, Resolution Agents. This is also evident from the proceedings of the meeting held between respondent No.3-Bank and Ge-Winn on 8th December, 2006.

7. We may point out here that the reserve price of the secured assets was fixed at 123 lacs. Sale deed was executed in favour of the appellants by respondent No.3 on 20th December, 2006, as the entire considerations have been paid on 15th December, 2006. On 21st December, 2006, respondent Nos.1 and 2 were informed by respondent No.3-Bank that the secured assets had been sold for more than the amount offered by them in the letter dated 28th August, 2006. At that stage, respondent Nos.1 and 2 filed Writ Petition No.325 of 2007 without disclosing that the earlier Writ Petition Nos.5027-28/2006 challenging the auction notice dated 23rd May, 2006 had been withdrawn without the court giving liberty to respondent Nos. 1 and 2 to file a fresh writ petition.

8. Upon completion of the proceedings inspite of the preliminary objections taken by the appellants, the learned Single Judge allowed the writ petitions. The sale in favour of the petitioner was held to be vitiated on the ground that respondent No.3-Bank failed to follow the mandatory provisions of Rules 8(5), 8(6) and 9(2) of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as 'Rules, 2002'). But a direction was issued to refund the amount paid by the petitioner i.e. Rs.1crore 41 lacs with interest at 9% per annum from April, 2007.

9. Aggrieved by the aforesaid order, the appellants filed Writ Appeal No.4127/2011 in the High Court, which has also been dismissed.

10. Mr. Ashok Desai submits that the petitioner is a bona fide purchaser and has paid the full consideration. Sale deed has been duly executed. Possession of the property is with the appellants since 2006. Therefore, respondent Nos.1 and 2 should not be permitted at this stage to claim that the sale is vitiated on the ground that it has been affected through an agent of respondent No.3-Bank, namely, Ge- Winn. Mr. Desai submitted that the Single Judge as well as the Division Bench have wrongly held that there has been violation of Rules 8(5), 8(6), 8(8) and 9(2) of the Rules, 2002. Mr. Desai further submitted that it would be equitable to permit the petitioner to keep the plot which is adjacent to the property of the petitioner. Respondent Nos.1 and 2 can be permitted to take the other plots.

11. Mr. Dhruv Mehta, learned senior counsel appearing on behalf of the respondent Nos. 1 and

2 relying on the judgment of this Court in Mathew Varghese Vs. M.Amritha Kumar & Ors. in C.A.No.1927-1929 of 2014 decided on 10th February, 2014 submits that the Rules, 2002 are mandatory in nature. In the present case, the sale has been effected in violation of the aforesaid rules. Both the learned Single Judge as well as the Division Bench have come to the conclusion that the provisions of the aforesaid rules have not been followed. It is not disputed by any of the parties that there is no agreement between respondent Nos. 1 and 2 and respondent No.3-Bank, in writing, to affect the sale by Private Treaty. Mr. Vikas Singh, learned senior counsel appearing for respondent No.3-Bank, however, pointed out that the respondent Nos.1 and 2 had filed a review petition in which it was averred that they may be permitted to sell the secured assets by Private Treaty. Therefore, according to Mr. Vikas Singh, respondent Nos. 1 and 2 cannot now be heard to say that they had not given their consent to affect the sale by Private Treaty. We are unable to accept the submission made by Mr. Vikas Singh that there is no violation of the Rules, 2002. In our opinion, the findings recorded by the learned Single Judge as well as the Division Bench of the High Court that there has been a violation of Rules, 2002 are perfectly justified.

12. This Court in the case of Mathew Varghese Vs. M.Amritha Kumar & Ors.[2014 (2) Scale 331] examined the procedure required to be followed by the banks or other financial institutions when the secured assets of the borrowers are sought to be sold for settlement of the dues of the banks/financial institutions. The Court examined in detail the provisions of the SARFAESI Act, 2002. The Court also examined the detailed procedure to be followed by the bank/financial institutions under the Rules, 2002. This Court took notice of Rule 8, which relates to Sale of immovable secured assets and Rule 9 which relates to time of sale, issue of sale certificate and delivery of possession etc. With regard to Section 13(1), this Court observed that Section 13(1) of SARFAESI Act, 2002 gives a free hand to the secured creditor, for the purpose of enforcing the secured interest without the intervention of Court or Tribunal. But such enforcement should be strictly in conformity with the provisions of the SARFAESI Act, 2002. Thereafter, it is observed as follows:-

"A reading of Section13(1), therefore, is clear to the effect that while on the one hand any SECURED CREDITOR may be entitled to enforce the SECURED ASSET created in its favour on its own without resorting to any court proceedings or approaching the Tribunal, such enforcement should be in conformity with the other provisions of the SARFAESI Act."

13. This Court further observed that the provision contained in Section 13(8) of the SARFAESI Act, 2002 is specifically for the protection of the borrowers in as much as, ownership of the secured assets is a constitutional right vested in the borrowers and protected under Article 300A of the Constitution of India. Therefore, the secured creditor as a trustee of the secured asset can not deal with the same in any manner it likes and such an asset can be disposed of only in the manner prescribed in the SARFAESI Act, 2002. Therefore, the creditor should ensure that the borrower was clearly put on notice of the date and time by which either the sale or transfer will be effected in order to provide the required opportunity to the borrower to take all possible steps for retrieving his property. Such a notice is also necessary to ensure that the process of sale will ensure that the secured assets will be sold to provide maximum benefit to the borrowers. The notice is also necessary to ensure that the secured creditor or any one on its behalf is not allowed to exploit the situation by virtue of proceedings initiated under the SARFAESI Act, 2002. Thereafter, in Paragraph 27, this Court observed as follows:-

"27. Therefore, by virtue of the stipulations contained under the provisions of the SARFAESI Act, in particular, Section 13(8), any sale or transfer of a SECURED ASSET, cannot take place without duly informing the borrower of the time and date of such sale or transfer in order to enable the borrower to tender the dues of the SECURED CREDITOR with all costs, charges and expenses and any such sale or transfer effected without complying with the said

statutory requirement would be a constitutional violation and nullify the ultimate sale."

14. As noticed above, this Court also examined Rules 8 and 9 of the Rules, 2002. On a detailed analysis of Rules 8 and 9(1), it has been held that any sale effected without complying with the same would be unconstitutional and, therefore, null and void.

15. In the present case, there is an additional reason for declaring that sale in favour of the appellant was a nullity. Rule 8(8) of the aforesaid Rules is as under:-

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

16. It is not disputed before us that there were no terms settled in writing between the parties that the sale can be affected by Private Treaty. In fact, the borrowers – respondent Nos. 1 and 2 were not even called to the joint meeting between the Bank – Respondent No.3 and Ge-Winn held on 8th December, 2006. Therefore, there was a clear violation of the aforesaid Rules rendering the sale illegal.

17. It must be emphasized that generally proceedings under the SARFAESI Act, 2002 against the borrowers are initiated only when the borrower is in dire-straits. The provisions of the SARFAESI Act, 2002 and the Rules, 2002 have been enacted to ensure that the secured asset is not sold for a song. It is expected that all the banks and financial institutions which resort to the extreme measures under the SARFAESI Act, 2002 for sale of the secured assets to ensure, that such sale of the asset provides maximum benefit to the borrower by the sale of such asset. Therefore, the secured creditors are expected to take bonafide measures to ensure that there is maximum yield from such secured assets for the borrowers. In the present case, Mr. Dhruv Mehta has pointed out that sale consideration is only Rs.10,000/- over the reserve price whereas the property was worth much more. It is not necessary for us to go into this question as, in our opinion, the sale is null and void being in violation of the provision of Section 13 of the SARFAESI Act, 2002 and Rules 8 and 9 of the Rules, 2002.

18. We, therefore, have no hesitation in upholding the judgments of the learned Single Judge and the Division Bench of the High Court to the effect that the sale effected in favour of the appellants on 18th December, 2006 is liable to be set aside.

19. This now brings us to moulding the relief in the peculiar facts and circumstances of this case.

20. As noticed earlier, Mr. Ashok Desai had emphasized on behalf of the appellants that no blame at all can be attributed to them. The bank had decided to sell the immovable properties to the appellants for Rs.1,23,10,000/- against the reserve price of Rs.1,23,00,000. This is evident from the joint meeting of the bank held with Ge-Winn on 10th December, 2006, wherein it is observed as follows:-

"Referring to the above in the presence of the undersigned it has been decided to effect the sale to M/s. Susee Automobiles Pvt. Ltd., Madurai and Smt. Nirmala Jeyablan, W/o Shri Jayabaaalan, No.4, S.V. Nagar, S.S. Colony, Madurai for a consideration of Rs.123.10 lakhs (Rupees one crore twenty three lakhs and ten thousand only) against the reserve price of Rs.123.00 lakhs and issue Sale Certificate for registration under private treaty."

21. Mr. Desai had also pointed out that the borrowers -Respondent No.1 and 2 had evaluated the property at Rs.117 lakhs. The evaluation was acknowledged by Respondent Nos. 1 and 2 in the letter dated 28th August, 2006. Therefore, the reserve price was fixed based upon the aforesaid figures. The appellants bought the property for more than the reserve price. The appellants paid the entire consideration within three days of the sale, i.e., on 15th December, 2006. The Sale Deed was executed in their favour on 20th December, 2006. Possession was admittedly delivered on 20th December, 2006 also. The appellants have also incurred substantial loss as they

have been unnecessarily dragged into litigation. He pointed out that the appellants have in fact incurred losses of Rs.3 crores as they were deprived of using the property in view of the interim orders passed by the High Court and they were forced to take other property on monthly rent of Rs.3 lakhs from January 2007. He, therefore, submitted that the proposal made by the appellants for being permitted to keep the plot adjacent to the property already owned by them, be accepted. In the alternative, learned senior counsel submitted that the High Court has unnecessarily reduced the amount of interest on the amount deposited by the appellants with the bank would bear only 4% interest. He submitted that the appellants are entitled to 18% compound interest since the date the amount was deposited till refund.

22. On the other hand, Mr. Dhruv Mehta pointed out that property of Respondent No.1 has been sold for a ridiculously low price, as the bank is interested only in regularizing the account of the borrower. He has submitted that respondent Nos. 1 and 2 are prepared to compensate the appellants, to a reasonable extent, but not to the extent claimed by Mr. Desai.

23. On the other hand, Mr. Vikas Singh has submitted that in case the sale is to be set aside and the properties have to be returned to the borrowers, the dues of the bank also have to be secured, which are now in the region of Rs.4 crores.

24. We have considered the submissions made by the learned counsel for the parties.

25. Initially on our suggestion, respondent Nos. 1 and 2 had quantified the amount in accordance with the directions issued by the learned Single Judge. The learned Single Judge had ordered refund of Rs.1,41,00,000/-, (Representing Rs.1,23,10,000/- towards Sale Price and Rs.18,90,000/- towards Stamp Duty with interest @9% per annum from April 2007). However, since we had accepted the second alternative (partially) of Mr. Ashok Desai, the appellants and respondents have jointly submitted the following chart:-

|Amount quantified by the |Interest@ 18% |Total |

|Learned Single Judge |from April 2007 | a |

| |to 15.06.2014 | |

|Rs. 1,41,00,000/- |Rs. 1,84,00,500/-|Rs. b 3,25,00,500/- |

|Rs. 1,23,10,000/- Sale Price| | |

c

|Rs. 18,90,000/- (Stamp Duty)| | |

26. Mr. Dhruv Mehta has stated that Respondent Nos. 1 and 2 are prepared to refund the sale amount paid by the appellants as Sale Price together with 18% simple interest from 1st July, 2007 till 15th June, 2014. The total amount spent on Stamp Duty shall also be refunded to the appellants. The total amount shall be paid to the appellants by 15th June, 2014. Mr. Desai had pointed out that the amount deposited with the bank, which is said to be lying in a FDR Bearing 8.25% per annum ought to be refunded by the bank to the appellants. Upon the entire amount being repaid to the appellants, the possession of the property purchased by the appellants will be delivered to the Respondent Nos.1 and 2.

27. Insofar as the submission of Mr. Vikas Singh learned senior counsel is concerned we are unable to accept the same in the facts and circumstances of this case It would be relevant to point out that the learned Single Judge of the High Court after holding that the sale in question was invalid, directed making of payments by respondent Nos. 1 and 2 to respondent No.3 bank with clear direction that on such payment, insofar as the bank is concerned its dues shall stand settled. Not only respondent Nos. 1 and 2 made the payment as directed which was accepted by respondent No.3 bank, insofar as respondent No.3 bank is concerned it even accepted the said judgment and did not file any appeal thereagainst. Only the appellant filed the appeal. Though the order of the learned Single Judge about the validity of the sale had been affirmed, the Division Bench interfered with the other di-

rection of the learned Single Judge which should not have been done as bank had not challenged the order of the learned Single Judge. We are, therefore, of the opinion that in the facts of this case, once the payment is made to the appellant by respondent Nos.1 and 2 in the manner stated hereinafter, the possession of the property shall be delivered to the respondent Nos.1 and 2 with no further liability towards the bank

28. In view of the aforesaid, we hold that the sale in favour of the appellants dated 18th December, 2006 and the subsequent delivery of possession to the appellants is null and void. The sale is accordingly set aside. The appellants are directed to deliver the possession of the property purchased by them under the Sale Deed dated 20th December, 2006 to Respondent Nos. 1 and 2 immediately upon receiving the entire amount as directed hereunder:-

(i) The State Bank of India – Respondent No.3 directed to refund the entire proceeds of the FDR in which the sale consideration was deposited together with accrued interest forthwith.

(ii) The Respondent Nos. 1 and 2 will ensure that the entire amount due to the appellants is paid on or before 15th June, 2014.

(iii) Upon receipt of the entire amount, the possession shall be delivered to Respondent Nos. 1 and 2.

29. With these observations, the appeals are disposed of with no order as to costs.

Before the Madurai Bench of Madras High Court

By, THE HONOURABLE MS. JUSTICE K. SUGUNA & THE HONOURABLE MR. JUSTICE A. ARUMUGHASWAMY

J. Rajiv Subramanian v. Pandiyas Represented by its Proprietor T. Rajapandian & Others

W.A. (MD) No.417 of 2011 & M.P. (MD) No.1 of 2011

14 June 2011

For the Petitioners: Ram Mohan, Sr. Counsel for Y. Prakash, Advocate. For the Respondents: R1 & R2 - M.S. Krishnan, Sr. Counsel for M.V. Venkataseshan, R3 - N. Murugesan, Advocates.

Judgment Text

(Judgment of the Court was delivered by A. ARUMUGHASWAMY, J.)

1. The present writ appeal is filed against the order dated 21.02.2011 passed by a learned Single Judge in W.P. (MD) No.325 of 2007. The private respondents in the writ petition are the appellants herein.

2The above said writ petition was filed seeking a writ of declaration that the sale certificate issued by the third respondent bank is null and void and to restore the petitioners' properties to them.

3The writ petitioners are the owners of M/s.Suruthi Fabrics and Pandias Garment Factory extending over 5.51 acres of land which have been pledged in favour of R3-bank authorities to obtain Working Capital Loan and Export Bill Discounting. The appellants herein/R1 and R2 in the writ petition are the purchasers of the mortgaged property under private treaty.

4The admitted facts which are necessary for deciding this case are as under:

The writ petitioners mortgaged their property with the third respondent bank as security for the loan obtained by them. However, they committed default in repayment of the loan. To recover that amount, on 08.06.2005, a notice under Section 13(2) of the SARFAESI Act was issued by the third respondent bank and subsequently on 12.01.2006, possession notice under Section 13(4) of the SARFAESI Act was issued by the third respondent bank against the writ petitioners. Four writ petitions, viz., W.P. Nos.4174 of 2006, 4175 of 2006, 5027 of 2006 and 5028 of 2006 as against issuance of 13(2) notice, were also filed by the writ petitioners challenging the proceedings initiated by the third respondent bank under 13(4) of the SARFAESI Act against them. Originally, the sale was fixed on 07.07.2006. But, no sale had taken place since nobody was available to participate in the sale proceedings. At that stage and during the pendency of the writ petitions, it appears that the writ petitioners had also filed O.A. No.58 of 2006 before the Debts Recovery Tribunal, Coimbatore and on 29.06.2006, an interim order was also obtained by the writ petitioners. Subsequently, all the four writ petitions and O.A. No.58 of 2006 were withdrawn by the writ petitioners in order to make an attempt of compromise before the bank authorities. Thereafter the writ petitioners approached the bank and gave a letter dated 28.08.2006 for private negotiation by giving split-up figure for the value of the property, viz. Machineries for M/s.Suruthi Fabrics-Rs.0.40 lacs, Land and Building of M/s.Suruthi Fabrics-Rs.0.50 lacs, and Pandias Garment Factory land and building and Suruthi Fabrics 5.51 acres land-Rs.0.47 lacs. As per the letter, they have sold the machineries of Rs.42 lakhs under private negotiation and paid the said entire amount to the bank, which is also not in

dispute. Thereafter, the bank authorities had sold the property under the guise of Treaty for Rs.1,23,10,000/- to the appellants herein. On 08.12.2006, an agreement was arrived at and thereafter it was sold on 15.12.2006. Thereafter, the sale certificate has also been issued. Questioning these, the debtors filed the writ petition before this Court. This Court directed the petitioners to pay the amount with 9% interest from April 2007 onwards and in turn, the respondents 2 and 3 are bound to receive the amount. The first respondent bank was also directed not to auction the property. With these observations, the writ petition was allowed.

5The grievance of the writ petitioners is that even though they met the bank authorities on 08.12.2006, R3-bank authorities did not inform about the private sale under the "Treaty" agreement. According to the appellants, under the private negotiation, they have agreed to purchase the property on 08.12.2006 and in pursuance of the agreement, they have paid the sale amount on 15.12.2006. Thereafter, they obtained the sale certificate. Therefore, the issuance of Sale Certificate is in accordance with law.

6 The writ petitioners have sent a letter dated 11.12.2006 to the third respondent bank seeking time to make payment and the relevant portion of the said order reads as under:

"REQUISITION FOR GRANT OF TIME PERMISSION FOR SIX MONTHS

Please refer to my letter dated 11 Sep 2006. with due regards I express my gratitude for having been considered my all request as per the above quoted letter.

As committed by me and with you due concurrence, I have sold the machineries of M/s. Suruthi Fabrices for a cost of Rs.41 lakhs and the Bus and furnitures for a cost of Rs.1 laks. In total the sale proceeds of both a sum of Rs.42 laksh been remitted by me to you on 11 Sep 2006. The Balance dues towards the immovable assets of M/s. Suruthi Fabrics and M/s. Pandiays remains Rs.69 Lakhs and Rs.46 Lakhs respectably.

However, as committed above the sale activities of immovable assets could not been completed in time due to unavoidable Circumstances. The same is expected to be completed by end of June 2007 for M/s. Suruthi Fabrics account amount Rs.69 Lakhs and Pandiyas account amount Rs.46 Lakhs expected on June 2007 Separately.

I therefore, request you to kindly grant me permission to sell the foresaid assets and remit the balance dues as per the above durations. Please pardon me for he delay.

. . "

From the above, it could be seen that on 11.09.2006, writ petitioners have paid a sum of Rs.42 lakhs and sought time to make the balance payment. Subsequently also, some correspondence had admittedly taken place.

7 According to the writ petitioners, they met the third respondent bank authorities on 08.12.2006 and prayed for time. Under this juncture, the alleged agreement entered into in between the appellants and R3 would not have been a genuine one. To prove the fact the writ petitioners relied on a letter written by the third respondent bank to them. On 21.12.2006 the respondent bank had written a letter to the writ petitioners. From this, it is seen that the loan became an NPA (Non Performing Asset) from 30.09.2002 and further, at paragraph no.(iv), it has been indicated that the writ petitioners had met the respondent bank officials on 08.12.2006 and sought time but the bank is not willing to grant since the petitioners are not having any

proposal on their hands. Thereafter, on 21.12.2006 at 2.00 p.m., the sale certificate had been issued by the respondent bank in favour of the appellants herein and the operative portion of the order dated 21.12.2006 reads thus:

"iv You had a discussion with the AGM and other officials on 08.12.2006 when admitted that you did not have any proposals in hand.

v It is in the interest of yours since you were not able to keep up the promises right from the time the account went bad that the bank had to put up . . .

vi Even after adjusting the sale proceeds to the outstanding in your accounts, there will be amount still due from you."

8 Besides, the relevant crucial portion of the order dated 08.12.2006 that has been issued by the third respondent bank indicating the venue and time of the joint meeting as "Branch Premises at AGM's cabin at 2.00 p.m." is useful to be extracted below:-

"Proceedings of the joint meeting held on 08.12.2006 for the sale of the Assets of M/s. Suruthi Fabrics & M/s. Pandyas through Resolution Agents M/s. Ge-Winn Management, Chennai under SARFAESI Act, 2002, Rule of 13.

VENUE Branch Premises at AGM's cabin @ 2.00 p.m.

..

Referring to the above in the presence of the undersigned it has been decided to effect the sale to M/s. Susee Auutomobiles Pvt. Ltd., Madurai and Smt. Nirmala Jeyabalan, W/o. Shri Jayabalan, No.4, S.V. Nagar, S.S. Colony, Madurai for a consideration of Rs.123.10 lakhs (Rupees one crore twenty three lakhs and ten thousand only) against the reserve price of Rs.123 lakhs and issue Sale Certificate for registration under private treaty."

Consequent to issuance of the sale certificate forceful possession had also been taken.

9 Under such circumstances, the writ petitioners had filed the writ petition seeking to set aside the sale certificate issued by the third respondent bank and the writ petition has been allowed holding that the writ petitioners shall return the amount of Rs.1.41 crores to the appellants with interest at 9% per annum from April 2007 and that on such payment being made, the sales effected in favour of the appellants will be set aside. It was further held by the learned Single Judge that in the event of the appellants refusing to receive the same, the writ petitioners shall deposit the said amount with the third respondent bank. As against the said order passed by the learned Single Judge, this writ appeal has been filed.

10. The auction purchasers are the appellants before this Court. The first and foremost contention of the learned Senior Counsel for the appellants/auction purchasers is that the writ petitioners cannot invoke Article 226 of the Constitution of India inasmuch as an alternative forum is available. The next contention of the learned Senior Counsel for the appellants is that the writ petitioners themselves have given a consent letter for the private sale and on that basis, the bank authorities have proceeded with the sale proceedings in which the appellants have lawfully purchased the properties and also got possession of the property and hence, on this ground, the order passed by the Writ Court has to be set aside.

11 The contention of the learned Senior Counsel for the writ petitioners / debtors / R1 and R2, is that though an alternative forum is available, this Court can very well exercise its extra-ordinary jurisdiction and it is empowered to interfere with the order impugned in the writ petition by exercising its jurisdiction once it is demonstrated that the third respondent bank has not acted in accordance with law and has issued the impugned sale certificate on its own. Further, it was contended that this plea is not open to him since it was not raised before the writ Court. Based on these arguments, the learned Senior Counsel for the writ petitioners / R1 and R2 has submitted that the order passed by the Writ Court is very much sustainable and the writ appeal has to suffer dismissal.

12 The learned counsel appearing for the third respondent bank had submitted that the respondent bank has adopted the procedure as per law and that the bank is bound by the order of the writ Court since he has not filed any appeal against the WP order.

13. In the light of the submissions of the learned Senior Counsel appearing for the appellants and the respondents the following points arise for consideration are:-

1) Whether this Court is not entitled to exercise its jurisdiction under Article 226 of the Constitution of India?

2) Whether the consent letter given by the petitioners would tantamount to consent or authorisation in favour of the bank authorities to go for private negotiation without knowledge of the writ petitioners?

3) Whether the writ petitioners were duly represented by GE-WINN MANAGEMENT & CO. and the SARFAESI Rules 8(5) and 8(8) have been followed?

14Coming to the first point as to whether the writ petitioners can invoke Article 226 of the Constitution of India, learned Senior Counsel for the appellants contended that the debtors / the writ petitioners herein have straight away invoked the Extraordinary Jurisdiction under Article 226 of the Constitution of India by way of writ, however the SARFAESI Act itself provides a rule to file an application before the competent forum. Hence he prayed that it has to be held that this Court has no jurisdiction to entertain the matter and sought for dismissal of the writ petition.

15Learned Senior Counsel for the writ petitioners / R1 and R2 herein contended that the impugned order came to be passed by way of a reasoned order in the writ petition filed by the writ petitioners noting that there was gross violation of the principles of natural justice and the authority, the third respondent herein, has not adopted the procedures as contemplated under the SARFAESI Act. So contending, he prayed that this Court is competent enough to entertain such a matter which warrants invocation of the writ jurisdiction under Article 226 of the Constitution of India. He further contended that even otherwise, the writ was pending for quite a long period and at this juncture, it cannot be summarily dismissed for want of jurisdiction.

16Learned Senior Counsel for the appellants relied on the decision of this Court reported in IV (2010) BC 128 (DB) in the case of V.Noble Kumar v. Standard Chartered Bank Auto & Mortgage Constructions, wherein it has been held as under:-

'16. Even after the order under Section 14 is passed for the purpose of taking possession, the Authorised Officer should comply with Rule 8 through the Advocate Commissioner appointed under Section 14, as otherwise there will be a dichotomy resulting in a peculiar situation when a

secured Creditor exercises power under Section 13(4) and when such a power is exercised under Section 14. To elaborate, we may add that in the event of Section 13(4) is invoked, the procedure contemplated under that provision read with Rule 8 must necessarily be followed by the secured creditor while taking possession of immovable property....'

'19..... As there is no reference to the compliance or the provisions by the secured creditor, it must be presumed that no materials were placed before the Chief Judicial Magistrate by the secured creditor in respect of the compliance. Further, the affidavit filed by the Bank in support of the petition seeking for vacating interim order, nothing has been stated as to the compliance of the provisions of Sections 13(2)/13(4) and particularly Rule 8. It does not also state that even after the Advocate Commissioner was directed to take possession, the above procedures have been followed. In that view of the matter, the impugned proceedings are sustainable in the eye of law, as it would amount to arbitrary exercise of the powers conferred under Section 14.'

17Learned Senior Counsel for the appellants contended that the writ petitioners had not mentioned the filing of the first batch of writ petitions, in the second case and hence it is clear that the impugned order was passed in a case filed by the writ petitioners, who are guilty of suppression of facts. He relied on the judgment of the Hon'ble Supreme Court reported in (2010) 2 Supreme Court Cases 114 (Dalip Singh v. State of Uttar Pradesh and others), wherein it has been held as under:-

'20.We have heard the learned counsel for the parties and scrutinised the record. In our opinion, the appeal is liable to be dismissed only on the ground that the tenure-holder Shri Praveen Singh did not state correct facts in the application filed by him on 8-7-1976 before the prescribed authority for setting aside the ex parte order and the appellant did not approach the High Court with clean hands inasmuch as, by making a misleading statement in Para 3 of the writ petition, an impression was created that the tenure-holder did not know of the proceedings initiated by the prescribed authority.'

18Learned Senior Counsel for the appellants relied on the judgment of the Hon'ble Supreme Court reported in AIR 1999 SUPREME COURT 22 (Whirlpool Corporation v. Registrar of Trade Marks, Mumbai), wherein it has been held as under:-

'20. Much water has since flown beneath the bridge, but there has been no corrosive effect on these decisions which though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, in spite of the alternative statutory remedies is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation.'

19In this case also, the present writ petitioners have filed two batches of writ petitions as stated earlier seeking to quash 13(2) and 13(4) notices under SARFAESI Act. In the second batch of writ petitions, they have not stated about the earlier petitions filed. But this writ petition arises out of a different aspect. Further all the above writ petitions have not been pressed by the petitioners even after obtaining the orders from this Court. The present writ petition is filed for quashing the 'treaty'. Therefore, the above said rulings will not be in any way helpful to the appellants.

20Learned Senior Counsel for the writ petitioners/ R1 and R2 in the appeal, contended that the writ petition is maintainable and he relied on the decision of the Hon'ble Supreme Court in the case of State of West Bengal v. The Committee for Protection of Democratic Rights (2010(2) CTC 84), wherein it has been held that no Act of Par-

liament can exclude or curtail powers of Constitutional Courts with regard to enforcement of fundamental rights. In the above case, the entrustment of investigation of the case by CBI was made without obtaining the consent of the State Government. While deciding the question in that case the Hon'ble Supreme Court has incidentally referred that there cannot be any restriction or curtailment of powers against the Constitutional Courts with regard to enforcement of the fundamental rules. The above said case arises only out of the entrustment of the criminal case in the hands of CBI investigation. Therefore, we are of the view that the stand taken by the learned Senior Counsel for the appellants that the writ petition is not maintainable, is not sustainable.

21The second judgment that has been relied on by the learned Senior Counsel for R1 and R2 is that of the Hon'ble Supreme Court in the case of L.K.Verma v. HMT Limited ((2006) 2 Supreme Court Cases 269). The above said case arises out of an incident in which a worker used filthy language against the employer. He was placed under suspension and after due enquiry, dismissal was followed. Even though an alternative remedy was available, without availing the same, the employer filed a petition before the High Court under Article 226 of the Constitution of India. It has been held that in cases of such nature, alternative remedy will not be a bar to maintainability, and availing of the writ jurisdiction can be entertained. It has been further held that once a writ petition is entertained and determined on merits by High Court, the appellate Court would not, except in rare cases, interfere therewith on the ground of existence of alternative remedy. Even though it has been held that this Court can exercise its jurisdiction / discretion under Article 226 of the Constitution of India, it had arisen under different circumstances. Anyhow, this principle will not be applicable for the present facts of the case.

22The third judgment that has been relied on by the learned Senior Counsel for R1 and R2 is the one rendered by this Court reported in (2005) 4 M.L.J. 262 (MSS Wakf Board College, Madurai v. Haji M.Mohamed Ali Jinnah). In this judgment it has been held that when the plea of alternative remedy was not taken before the writ court, the party cannot subsequently urge this ground before the writ Appellate Court. In this case also there is no reference that the appellants have raised the jurisdiction aspect before the writ Court. Therefore, we are also of the view that before this Court also, the appellants are not entitled to raise this objection for the first time.

23The fourth judgment that has been relied on by the learned Senior Counsel for R1 and R2 is the judgment of this Court in the case of K.Raamaselvam v. Indian Overseas Bank, reported in 2009(5) CTC 385, wherein it has been held that the Authorised Officer can confirm the sale if the sale price is secured higher than the reserve price; that if it is a lesser price, then, without the consent of the borrower, the sale cannot be confirmed, and that if it is confirmed, the confirmation of sale can be quashed.

24The fifth judgment that has been relied on by the learned Senior Counsel for R1 and R2 is the Full Bench decision of this Court in the case of Tamil Manila Thozhilalar Sangam v. Chairman, TNEB (FB), reported in 1998 (III) CTC 1. In that judgment, it has been held that though the alternative remedy before the Adjudicating authority under the Industrial Disputes Act is available, the writ petition cannot be dismissed on the ground of availability of alternative remedy when facts are admitted and the question of law is governed by the decision of the Supreme Court, and that the pendency of the writ petition for a long time is another ground for not driving parties to avail the alternative remedy. In this case also, the writ petition has been taken up for disposal only after four years. Till then, both the parties have not made any attempt to bring it to the knowledge of the Court that an alternative remedy is available. Therefore, this citation will be applicable to the facts of the present case.

25The sixth judgment that has been relied on by the learned Senior Counsel for R1 and R2 is the judgment of this Court in the case of Sheeba Philominal Merlin v. The Repatriates Co-op. Finance & Development Bank Limited (DB) (2010 (5) CTC 449). In that judgment it has been held that if the property is mortgaged without sending any notice to the borrower or the representatives of the borrower and if sale takes place, it has to be set aside. In this case also there is no such document to show that as per SARFAESI Rule, 8(8) notice has been served to the respective parties.

26The seventh judgment that has been relied on by the learned counsel for R1 and R2 is the decision of the Hon'ble Supreme Court in the case of Harbanslal Sahnia and another v. Indian Oil Corporation Limited ((2003) 2 Supreme Court Cases 107), wherein it has been held that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is only discretionary and it is the discretion of the Court to exercise its powers and not by compulsion.

27Therefore, from these judicial pronouncements, it is clear that depending upon the facts and circumstances of each case, one has to apply the point of law. In the present set of facts of the case, the writ petition has been filed without going before the DRT. However it is the emphatic case of the writ petitioners that there is a gross violation of the principles of natural justice citing non-compliance of the Rule and such aspect has also been demonstrated before this Court. Further it is pertinent to note that the earlier batch of writ petitions filed by the parties, subsequently, has been not pressed and those issues in the writ petitions are not the subject matter of the present writ petition.

28On an earlier occasion, two writ petitions had been filed on the ground of quashing 13(2) notices. Thereafter, the writ petitioners have filed two W.Ps. questioning 13(4) notices. Later, they have filed an O.A. before DRT and obtained interim orders. The writ petitioners have thought it fit to sell their property, privately and they have approached the Bank and submitted the estimated value for the machineries out of the two items of the properties. After receiving the portion of the debt amount, i.e. sale machinery amount of Rs.42 lakhs, the third respondent Bank has sold the properties under Treaty as per 8(5) of SARFAESI Rules 2003. Questioning the issuance of the sale certificate, the present W.P. had been filed by the writ petitioners.

29Admittedly, the writ petitioners have given a consent letter on their own for the sale of their property in a private sale. But, the bank authorities, after receiving the letter and receiving a portion of the mortgage amount, have issued the sale certificate in favour of the appellants on 08.12.2006 mentioning as if the sale has been concluded at 2.00 p.m. under Treaty. On a perusal of the records, one can easily say that on 08.12.2006, the writ petitioners met the officials of the third respondent bank and this cannot be disputed in view of the above said document which was issued by the third respondent-Bank itself. As such, the presence of the writ petitioners on 08.12.2006 before the bank authorities has been proved and therefore, if at all, the sale has been concluded really by 2.00 p.m., it must be without the consent of the writ petitioners.

30 The next incidental question arising for consideration is whether the third respondent bank has adopted the proper procedure at the time of negotiating private sale by invoking S.8(8) of the SARFAESI Rules.

31In this connection, it would be worthwhile to refer to Rule 8 of the Security Interest (Enforcement) Rules, 2002, which deals with sale of immovable secured assets and sub-rule (8) of Rule 8 which stipulates that sale by any method other than public auction or public tender, shall

be on such terms as may be settled between the parties in writing.

32 Now, it has to be seen whether the order dated 08.12.2006 passed by the third respondent bank is in order. The relevant portion of the said order, reads as under:

"Referring to the above in the presence of the undersigned it has been decided to effect the sale to M/s. Susee Automobiles Pvt. Ltd., Madurai and Smt. Nirmala Jeyabalan, W/o. Shri Jayabalan, No.4, S.V. Nagar, S.S. Colony, Madurai for a consideration of Rs.123.10 lakhs (Rupees one crore twenty three lakhs and ten thousand only) against the reserve price of Rs.123 lakhs and issue Sale Certificate for registration under private treaty."

itis seen that as per the private treaty only, the sale certificate has been issued and the properties of the writ petitioners have been declared in favour of the appellants.

33The first question for our consideration is as to what are the formalities to be adopted when invoking private treaty and effecting a sale on that basis. In this connection, it would be worthwhile to refer to Rule 8(5) of the Security Interest (Enforcement) Rules, 2000 which reads thus:

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

a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or

b) by inviting tenders from the public;

c) by holding public auction; or

d) by private treaty."

As per the private treaty, other than public auction or public tender, it can be settled between the parties invoking as per Rule 8(8) of the Security Interest (Enforcement) Rules, 2002. The sale of properties by private treaty is also permissible in law. The only condition is that it shall be on such terms as settled between all the parties in writing. From this, it is clear that the presence of debtor and his willingness in writing are essential. But, in this case, availability of such a document is neither forthcoming nor produced before this Court by the appellants or bank officials. Therefore, from this, it could be safely concluded that the procedure as contemplated under the Security Interest (Enforcement) Rules, 2002, has neither been followed nor been attempted to be followed. Also, in this case, incidentally, they have mentioned as if the writ petitioners have been represented by their agents viz., GE-WINN MANAGEMENT & CO. and it is one of the partner's signature also has been affixed. Even though the said document carries the signature of one GE-WINN MANAGEMENT & CO., he is neither connected with the case nor with the writ petitioners. The bank authorities have miserably failed to prove as to how GE-WINN MANAGEMENT & CO. is connected with the debtors / writ petitioners. From the document produced by the bank authorities, it is seen that on 08.12.2006, the writ petitioners themselves had appeared before the bank authorities. After mentioning so in that letter by the third respondent-bank itself, we are at a loss to understand as to how and why the bank authorities have relied on GE-WINN MANAGEMENT & CO. to represent the writ petitioners and this has also not been properly explained either by the appellants or by the third respondent bank. Further this aspect is silent in

the counter statement also. Even the writ petitioners are represented through their agent, it is not valid in the eye of the law. Therefore, we are of the considered view that in this regard, proper procedure has not been followed by the third respondent bank and this deviation from the procedure, undoubtedly, goes to the root of the matter. It is very painful to note that the writ petitioners have given a letter for private negotiation. Under such circumstance, a Nationalised Bank sold one's property under the guise of treaty without any written treaty from the debtors. It is also not known under what authority the Bank Manager has sold the mortgaged property just for Rs.10,000/- higher than the upset price to satisfy Section 9(2) of the Act believing that this Court will not generally interfere in the DRT cases. The Bank Manager has exceeded his authority for the reasons best known to him. Hence, in this case, the third respondent bank, a quasi judicial authority, has miserably failed to exercise the powers as contemplated under the SARFAESI Act as expected by the law. When such is the case, the Writ Court has every jurisdiction to exercise its power under Article 226 of the Constitution of India. In such view of that matter, we are of the considered view that the Writ Court has the power to deal with this matter and the same has been rightly exercised by learned Single Judge. Hence, we have no hesitation to hold that the ground agitated by the learned Senior Counsel for the appellants that the writ petitioners cannot invoke Article 226 of the Constitution of India challenging the sale certificate inasmuch as there is an alternative remedy available, has no force and accordingly, this contention of the learned Senior Counsel for the appellants/Auction Purchasers is rejected.

34 The next contention of the learned Senior Counsel for the appellants before this Court is that the appellants had parted away the amount and they have been prevented from enjoying the properties, further he contended that no such undertaking was given by the second appellant's husband before the Writ Court of law and therefore, the writ appeal has to be allowed. But, the learned counsel for the writ petitioners / R1 and R2 herein, has contended otherwise.

35 From a perusal of the impugned order passed by the learned Single Judge, it is seen that the learned Single Judge, in the impugned order, has held that as per the order dated 21.03.2007 passed in M.P. No.3 of 2007, there was no such condition that the amount must be paid on or before 21.03.2007 and that this Court had passed the following order on 24.03.2007:

"Mr. B. Saravanan, learned counsel appearing on behalf the petitioners, Mr. N. Murugesan, learned counsel appearing on behalf of the first respondent Bank and Mr. K.P. Thiagarajan, learned counsel appearing on behalf of the second and third respondents have admitted the fact that it was agreed before this Court that the petitioners shall pay the amount of Rupees One Crore and Forty One Lakhs to the second and third respondents and on receipt of which the second and third respondents would vacate the property, which is the subject matter in the present writ petition."

In short, from a reading of the above, it is quite evident that the appellants have agreed to receive a sum of Rs.141 lakhs as full quit before the Writ Court. A date has been mentioned in that order, but, at the same time, the writ petitioners have also not paid that amount and this is quite clear from the order. Therefore, the learned Single Judge, based on the principle of estoppel, had concluded that the appellants are not entitled to go back from the undertaking and that they are bound by the said undertaking and hence, ordered for payment of amount of Rs.141 lakhs by the writ petitioners to the appellants with interest at the rate of 9% per annum from April 2007.

36 As discussed earlier, the bank authorities have not properly exercised their jurisdiction and not followed the procedure contemplated under

Rule 8(5) and Rule 8(8) of the Security Interest (Enforcement) Amendment Rules, 2007. We are really at a loss to understand as to how on 08.12.2006, all of a sudden, the appellants have come forward with the money and paid the same and gone away with the auction property for just Rs.10,000/- over and above the upset price, to satisfy the requirement of Section 9(2) of the SARFAESI Act. Therefore, this aspect would certainly give room to suspect the bona fides of the bank authorities and to hold that they have not properly and fairly exercised their jurisdiction. If really on 08.12.2006, the bank officials were not inclined to grant time for the writ petitioners to make payment, the next option open to the bank authorities is only to hold a public auction or to obtain quotations from persons dealing with similar secured assets or otherwise interested in buying such assets or by private treaty. But, as already discussed, we are of the considered opinion that it is not established before this Court that the properties have been sold by private treaty as contemplated under Rule 8(5) of the Security Interest (Enforcement) Rules, 2002. If at all, in the event of failure on the part of the writ petitioners to make payment, it is open to the bank authorities to resort to any one of the methods contemplated under Section 8 of the Security Interest (Enforcement) Rules, 2002 and not in the method resorted to by them. Anyhow, the writ petitioners also had not paid the amount. Though an option was given by the Court on 21.04.2007, on that day also, the writ petitioners have not made payment.

37 Thus, the amount due to the third respondent bank from the writ petitioners is Rs.123 lakhs with interest. Since the writ petitioners had deposited the amount together with interest before the Court, the matter is remitted back to the third respondent bank to realise the amount from the writ petitioners. 38 Since the appellants have already paid the amount, the appellants are entitled to get back the amount of Rs.1,23,10,000/- with the current rate of interest from 15.12.2006 from the banks own account and in view of the order passed in this writ appeal, the bank is directed to refund the amount deposited, to the appellants with the current rate of interest with effect from 15.12.2006 within a period of one month from the date of receipt of a copy of this order.

39 According to the learned Senior Counsel appearing for the writ petitioners/R1 and R2 herein, the writ petitioners had deposited the entire amount. Taking note of this, it is left open to the bank to decide the further course of action. In the event of the bank coming to the conclusion that further action has to be initiated, the bank is at liberty to proceed in accordance with the concerned rules and regulations and to pass further orders and are at liberty to invoke the Rules 8(a) to (c).

40 Further, according to the learned Senior Counsel appearing for the writ petitioners/R1 and R2 herein, the possession of the property in question is with the auction purchaser. In view of our order passed in this writ appeal, the auction purchaser, on receipt of amount from the bank as indicated above, is directed to hand over possession to the bank, within a period of one week thereafter.

41In fine, the order of the learned Single Judge is modified to the extent indicated above and in other aspects, the order of the learned Single Judge is confirmed. The Writ appeal is disposed of accordingly. No costs. Consequently, connected Miscellaneous Petition is closed