

HIGH COURT FOR THE STATE OF TELANGANA

WRIT PETITION NOs.21511 of 2020 AND 13330 OF 2021

WRIT PETITION No.21511 of 2020:

Between:

Smt. K.Sahaja Rao w/o. K.Satyanarayana Rao,
r/o.Plot 752, Road No.38, Jubilee Hills,
Hyderabad.

..... Petitioner

and

The Assistant General Manager,
State Bank of India, SARB, Koti,
Hyderabad and two others.

.....Respondents

DATE OF JUDGMENT PRONOUNCED : **10.01.2023**

HON'BLE SRI JUSTICE P.NAVEEN RAO
&
HON'BLE SRI JUSTICE J.SREENIVAS RAO

1. Whether Reporters of Local Newspapers : No
may be allowed to see the Judgments ?
2. Whether the copies of judgment may be : **Yes**
marked to Law Reporters/Journals
3. Whether Their Lordship wish to : No
see the fair copy of the Judgment ?

*** HON'BLE SRI JUSTICE P.NAVEEN RAO
&
HON'BLE SRI JUSTICE J.SREENIVAS RAO**

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.....Respondents

!Counsel for the petitioners :

Sri S.Ravi appearing for Sri V.Murali Manohar for petitioner (the borrower) in
W.P.No.21511 of 2020;
Sri Manoj Reddy Keshi Reddy for petitioner (the auction purchaser) in
W.P.No.13330 of 2021;

Counsel for the Respondents :

Sri M.Narender Reddy leaned senior counsel appearing for Sri M.Srikanth Reddy
for respondent-SBI in W.P.No.21511 of 2020;
Mr. M.Narender Reddy appearing for Sri M.Srikanth Reddy for respondent No.1
(Bank);
Mr. S.Ravi learned senior counsel appearing for sri V.Murali Manohar for
respondent no.2 (the borrower) in W.P.No.13330 of 2021

<Gist :

>Head Note:

? Cases referred:

MANU/DA/0001/2016; 2015 SCC Online Hyd 273; (1991) 3 SCC 273; (2020) 10 SCC 659; (2006) 4
SCC 476; 1995 SCC Supp (4) 275; AIR 1989 MP 177; MANU/DE/0149/2021; AIR 2016 SC 3814;
(2022) 6 SCC 401; ILR 2019 KAR 4089; (2012) 11 SCC 511; (1969) 3 SCC 537; MANU/PH/0841/2022;
MANU/PH/1689/2020; MANU/PH/0402/2022; MANU/PH/0719/2022; MANU/SC/1258/2021;
MANU/SC/0209/1977; 2022 SCC Online SC 1522; (2009) 8 SCC 257.

HONOURABLE SRI JUSTICE P.NAVEEN RAO
&
HONOURABLE SRI JUSTICE J.SREENIVAS RAO

WRIT PETITION NOS.21511 of 2020 and 13330 OF 2021

COMMON ORDER: *(per Hon'ble Sri Justice P.Naveen Rao)*

Heard learned senior counsel Sri S.Ravi appearing for Sri V.Murali Manohar for petitioner (the borrower), and learned senior counsel Sri M.Narender Reddy appearing for Sri M.Srikanth Reddy for respondent-SBI (the bank) in W.P.No.21511 of 2020; learned senior counsel Sri Vivek Reddy appearing for Sri Manoj Reddy Keshi Reddy for petitioner (the auction purchaser), learned senior counsel M.Narender Reddy appearing for Sri M.Srikanth Reddy for respondent No.1 (the bank) and learned senior counsel Sri S.Ravi appearing for Sri V.Murali Manohar for respondent no.2 (the borrower) in W.P.No.13330 of 2021.

2. These two Writ Petitions concerns various measures taken by the State Bank of India to recover the loan amount from the borrower. As the Bank, the borrower and the auction purchaser are same, both Writ Petitions are heard together and decided by common order. For convenience, parties are referred to as borrower, the Bank and the auction purchaser respectively. The borrower is petitioner in W.P.No.21511 of 2020 and the auction purchaser is petitioner in W.P.No.13330 of 2021.

3. Borrower availed ₹ 3.40 crores from the Bank. Borrower defaulted in repayment of loan. On 29.03.2011 loan account was declared as Non-Performing Asset (NPA). On 19.04.2011 the Bank issued demand notice under Section 13(2) for recovery of ₹ 2,79,31,113/-. On 05.07.2011 possession notice under Section 13(4) of the Act was issued and on 11.02.2012, physical possession of the mortgaged property was taken. On 29.02.2012, 02.05.2012 and 26.02.2017, respondent-Bank issued three e-auction notices fixing the auction dates. The borrower challenged all the e-auction notices before the Debts Recovery Tribunal. The Debts Recovery Tribunal granted conditional interim order. The borrower failed to comply with the conditional orders passed by the Debts Recovery Tribunal by failing to make the payment. The three auction proceedings were unsuccessful.

4. On 04.06.2017, the Bank issued a fourth e-auction notice fixing auction on 23.06.2017 for the sale of secured asset. The notice requires bidders to pay: i) the EMD of 10% of the reserved price on or before 21.06.2017; ii) 25% of the bid amount on the date of auction i.e., 23.06.2017 including 10% EMD; and iii) 75% of the bid amount within 15 days from the date of auction i.e., 08.07.2017. On 21.06.2019 auction purchaser deposited ₹ 87,20,000/- towards EMD i.e., 10% of fixed reserved price through cheque of the Bank and the Bank issued receipt of acknowledgement. The cheque was also

encashed and the amount was transferred to concerned account of the Bank. In the e-auction held on 23.06.2017, the auction purchaser was declared as the highest bidder for INR 10.55 Cr. His bid exceeded the reserve price of ₹ 8.72 crore. Immediately after the e-auction, auction purchaser deposited 15% of the bid amount on the date of auction through an SBI cheque dated 23.06.2017. The cheque was not encashed immediately as the bank was waiting for orders of the Debts Recovery Appellate Tribunal (DRAT). Four days ahead of the deadline auction purchaser deposited the balance 75% of the bid amount by way of an SBI cheque. On 05.07.2017, the Bank issued sale certificate in favour of auction purchaser after verifying that the account of the auction purchaser had sufficient balance.

5. Since borrower was filing several interlocutory applications to delay proceedings before the Debts Recovery Tribunal, the auction purchaser filed W.P.No.35953 of 2018. This Hon'ble Court in its order in the writ petition observed that borrower has carried out a tirade and directed Debts Recovery Tribunal not to entertain any further interlocutory applications, at the instance of borrower, in S.A.No.447 of 2017.

6. However, borrower filed I.A.No.1866 of 2019 seeking for setting aside the fourth e-auction sale dated 23.06.2017 that was concluded

in favour of auction purchaser. On 23.05.2019, Debts Recovery Tribunal passed order setting aside fourth e-auction sale dated 23.06.2017. DRAT confirmed Debts Recovery Tribunal order dated 23.05.2019. On 18.06.2019, Bank refunded the auction purchaser's bid amount credited directly to his account without payment of interest. Challenging the order of Debts Recovery Tribunal, as affirmed by DRAT, the auction purchaser filed W.P.No.13330 of 2021.

7. In the meanwhile, the Bank has published a scheme called SBI scheme for One Time Settlement of NPAs and AUCA (SBI OTS-2020) covering the loan accounts with outstanding of above ₹ 20.00 lakhs and upto ₹ 50.00 crores as on 31.03.2020. The scheme was non-discretionary and non-discriminatory and was applicable to all NPAs as on 31.03.2020. As per the said scheme, the Bank waves interest from the date of NPA and the scheme made applicable to even accounts which had cases pending before the Courts/DRTs. The scheme also gave an incentive up to 15% for early payment. The last date of receipt of application under the SBI OTS 2020 scheme was 23.11.2020 and the last day of conveying sanction was 30.11.2020. An application made under the scheme was to be considered within 7 days. The respondent no.1 had to accord and convey the sanction within 7 days from the date of receipt of the application.

8. The borrower has made an application under the rules of the scheme vide representation dated 19.10.2020 along with a Demand Draft for an amount of ₹ 5,46,683/-. Vide letter dated 21.10.2020 the bank returned the DD and intimated that as the OTS claim on borrower loan account was linked to legal matters, they were in the process of referring the same to legal department for guidance and she would be advised accordingly on receipt of clarification from legal department. However, until 11.11.2020 the Bank failed to respond or act in accordance with the borrower's request the scheme was ending on 30.11.2020. Aggrieved by the inaction of the respondent-Bank, the borrower had deposited the entire amount payable under the scheme in the Bank's 'No-lien Account' and requested the Bank to appropriate the same towards the liability under the SBI OTS-2020 scheme and issue a loan closure certificate.

9. Further, in response to the borrower's OTS request dated 06.11.2020, Bank replied on 11.11.2020 rejecting the OTS proposal informing her that '*Your account could not be considered for settlement under SBI OTS 2020 scheme in view of the pending appeal filed by the auction purchaser before the Appellate Tribunal, where you are also impleaded as party*'. It was also pointed out that remitting the amount was without their consent, the said amount would be remitted back on furnishing the Bank details. Challenging the said decisions of the bank, borrower filed W.P. No. 21511 of 2020.

W.P.No.13330 of 2021:

10. The prayer in the writ petition reads as under:

“... to issue an appropriate Writ Direction or Order particularly one in the nature of Writ of Certiorari, (a) Calling for records and setting aside the Impugned Order dated 09/04/2021 passed by the Honourable Debt Recovery Appellate Tribunal, Kolkata in Appeal No.68 of 2019; (b) direct the Respondent No.1 to take back the bid amount of ₹ 10.55 Crores which is refunded to the Petitioner; (c) direct the Respondent No.1 to deliver the physical possession to the petitioner and pass such other order(s) as this Hon'ble Court deems fit and proper in the extraordinary circumstances of the case in the interests of justice.”

Submissions:

Submissions of learned senior counsel for auction purchaser:

11.1. The present writ is maintainable. Refund of bid amount by SBI pursuant to DRT order cannot affect petitioner's right to challenge setting aside of auction sale.

11.2. It is settled law that borrower can only raise objections on the recovery of price. Borrower cannot raise objections on the mode of payment. Mode of payment in auction sale is a matter between the secured creditor and the auction purchaser and only the secured creditor can raise objections.

11.3. Terms and conditions of auction are silent on the mode of payment of 15% and 75% of bid amount, only EMD is required to be paid through DD/NEFT/RTGS. Auction purchaser is permitted under Rule 9(3) and (4) of the Security Interest (Enforcement) Rules, 2002 (for short, 'Rules 2002') to make payment by cheque. Rule 9(3) and (4) only use the phrase pay/paid. Mode of payment is not specified.

The Supreme Court, Delhi High Court and Karnataka High Court have consistently held that cheque is a valid form of payment. Cheque payment from same branch is like a pay order and is a valid mode of payment.

11.4. He would submit that consequent to issuing sale certificate, a valuable right is vested in the auction purchaser and the same cannot be nullified on any minor irregularity even assuming there was one.

11.5. In any case, an auction sale cannot be set aside unless there are material irregularities that cause substantial injury to the bank/borrower. Variation from the prescribed mode of payment is not a material irregularity when the bank is not aggrieved.

11.6. An auction may be set aside if a prejudice was caused to Bank or the borrower. The Bank has not pleaded prejudice. On the contrary, it has accepted the payments made by the auction purchaser through cheque mode and credited the money to the auction sale account. Further, in the affidavit filed before the DRAT the bank asserted that while accepting payment of 10% EMD by cheque bank had knowledge of availability of sufficient funds in the account of auction purchaser. It has further asserted that though sufficient funds were available and when auction purchaser furnished cheque for payment of balance 75% of sale consideration in

anticipation of orders from the DRAT money was not transferred from auction purchaser account. He would therefore submit that for the delay in transferring the money by the bank, auction purchaser cannot be blamed. The borrower has not even pleaded any prejudice caused to her on account of payment by cheque. The DRT and DRAT grossly erred in not considering whether substantial prejudice was caused to nullify the sale.

11.7. The DRT and DRAT grossly erred in holding mode of payment of 10% EMD. 15% of initial sale price and balance 75% of sale consideration by cheque as unapproved mode.

11.8. Borrower has already frustrated three rounds of auction of secured asset by the Bank. Borrower was once again raising trivial and hyper technical grounds in order to frustrate the fourth round of auction. The borrower has every incentive to delay the auction sale for as long as possible.

11.9. Impugned DRAT order and the DRT order are contrary to this High Court's order dated 01.03.2019 in W.P.No.35953 of 2018.

11.10. Learned senior counsel relied on following decisions:

- 1) **Shashikala Sharma Vs. Allahabad Bank and others**¹;

¹ MANU/DA/0001/2016

2) **M/s.Knovus Steels and Infrastructure Limited, Hyderabad rep.by its Managing director v. State Bank of India, Stressed Assets Management Branch, Khairatabad, Hyderabad and others²;**

3) **Poddar Steel Corporation vs. Ganesh Engineering Works and others³;**

4) **L&T Housing Finance Limited vs. Trishul Developers and another⁴;**

5) **Saheb Khan vs. Mohd.Yousufuddin and others⁵;**

Submissions of learned senior counsel for SBI:

12. Learned senior counsel has drawn the attention of the Court to the averments on the affidavit filed by the Bank before DRAT. He would submit that as verified by the Bank, there was enough amounts available in the account of the auction purchaser to meet 100% payment of sale consideration and Bank was satisfied with the arrangement.

12.1. However, the auction purchaser filed I.A.No.1226 of 2018 prying to refund the amount paid by him, but he later withdrew the I.A. Further, the Bank has returned the entire money on 15/18-06-2019 after the order of DRAT affirming the decision of DRT nullifying the sale confirmed in favour of auction purchaser.

² 2015 SCC Online Hyd 273

³ (1991) 3 SCC 273

⁴ (2020) 10 SCC 659

⁵ (2006) 4 SCC 476

Submissions of learned senior counsel Sri S.Ravi for borrower:

13.1. Learned senior counsel would submit that allowing the auction purchaser to participate in the auction was *ex facie* illegal. The auction conditions and Rules 8 & 9 of Rules 2020 clearly stipulate that participant in the auction must deposit 10% of the minimum bid amount by RTGS/DD, but not by cheque. Whereas auction purchaser has paid the margin money by cheque and the amount was not realized as on the date of auction. It is thus deemed that auction purchaser has not paid the EMD. Therefore, his participation in the auction and confirmation of sale to auction purchaser was *ex facie* illegal.

13.2. In the bidders list, name of auction purchaser was not found. Therefore, it is not known how he was permitted to participate in the auction, more so, when his EMD was not realized.

13.3. As can be seen from Rules 8 and 9, the rules do not envisage payment of EMD by cheque. To participate in the auction, amount was to be remitted by 21/6/2017 but that was not done. On the day of auction, auction purchaser has to deposit 25% of the sale consideration after excluding 10% EMD already paid, but auction purchaser has not deposited on the day of the auction. He would further submit that it was not possible to issue sale certificate on 05.07.2017 when amount was credited on 06.07.2017. It would

obviously mean the sale certificate was antedated to overcome the orders passed by DRAT remanding the matter to DRT. There was no money in the account of auction purchaser on all three days, i.e, before the day of the auction, on auction day and on 05.07.2017 when sale certificate was issued.

13.4. By the time the borrower preferred appeal before DRAT 50% of the amount due was paid.

13.5. He would submit that after the DRAT order the entire money paid by the auction purchaser was returned to him by the Bank on 15/18-06-2019 and same was accepted by the auction purchaser. It would thus mean that auction purchaser has given up the cause. In fact he filed I.A., before DRT praying to refund his money. Therefore, it is no more open to Bank to seek confirmation of sale at this stage.

13.6. After the entire money was received by the petitioner, he has no *locus standi* to challenge the order of DRAT.

13.7. Further, right of redemption stands extinguished only after the sale certificate is registered whereas in this case the entire sale process is declared illegal by DRT, confirmed by DRAT.

13.8. Learned senior counsel relied on following decisions:

7) **Rao Mahmood Ahmed Khan through their LR, vs. Shri Ranbir Singh and others**⁶;

8) Decision of Supreme Court in **Manilal Mohanlal Shah and others vs. Sardar Sayed Ahmed Sayed Mahmud and another** dated 14.04.1954;

9) **Progressive Industrial ... vs. Bank of Baroda and others**⁷;

10) **Lalit Mohan Aggarwal and others vs. Andhra Bank and others**⁸.

14. It is not in dispute that in the fourth auction, the auction purchaser became the successful bidder. His offer to buy secured asset was ₹ 10.55 crores. It is not in dispute that the auction purchaser paid full sale consideration and sale certificate was issued to him. However, the auction process is held illegal by Debts Recovery Tribunal.

15. Learned Debts Recovery Tribunal held that payment of EMD by the auction purchaser by way of cheque was not valid. In the terms and conditions of e-auction sale notice, the mode of payment of EMD was specified as RTGS/Demand Draft and not by cheque. It is further held that the cheque presented on 21.06.2017 was encashed on 23.06.2017. Unless EMD was paid on 21.06.2017, the auction purchaser was not entitled to participate in the auction. It is also held that payment of 25% towards sale amount was not on the same

⁶ 1995 SCC Supp (4) 275

⁷ AIR 1989 MP 177

⁸ MANU/DE/0149/2021

day or next working day of the auction date as required. The Tribunal held that the payment of EMD and balance 25% sale price was in contraventions of terms and conditions of e-auction sale notice and provisions of Rule 9(3) and (4) of the 2002 Rules. The DRAT concurred with the view expressed by DRT.

16. To appreciate respective submissions and to test the correctness of the decisions of DRT and DRAT, it is necessary to consider the terms and conditions of e-auction and Rule 9(3) and (4) of the Rules 2002. Clauses 3, 5 and 9 of e-auction notice and Rule 9(3) and (4) of the Rules, 2002, read as under:

“Clause 3. The intending purchaser (s)/bidder(s) is/are required to deposit EMD amount either through NEFT/RTGS in the Account No.34349336975, Name of A/c. SARB e-AUCTION A/C, Name of the Beneficiary: State Bank of India (SARB, IFSC Code: SBIN0005894) or by way of Demand Draft drawn in favour of State Bank of India, SARB, Hyderabad drawn on any Nationalized or Scheduled Bank.

Clause.5. The intending bidder(s) should submit the evidence for EMD deposit like UR number along with Request Letter for participation in the e-Auction, self-attested copies of (1) proof of identification (KYC) viz., Voter ID Card/Driving License/Passport etc. (ii) Current address-proof for communication (iii) PAN card of the bidder (iv) valid e-mail ID (v) contact number (Mobile/Landline) of the bidder etc, to the Authorized Officer, State Bank of India, SARB, 2nd Floor, above APSRTC Building, Computer’s Amenity Center, Koti, Hyderabad -500095 by 5.00 p.m., on 21 June 17. Scanned copies of the original of these documents can also be submitted to e-mail ID of Authorized Officer.

Clause.9. The Earnest Money Deposit (EMD) of the successful bidder shall be retained towards part sale consideration and the EMD(s) of unsuccessful bidder(s) shall be returned. The Earnest Money Deposit shall not bear any interest. The successful bidder shall have to deposit 25% of the sale price, immediately on acceptance of bid price by the Authorized Officer and the balance of the sale price on or before 15th day of sale or within such extended period as agreed upon in writing and solely at the discretion of the authorized officer. Default in deposit of amount by the successful bidder would entail forfeiture of the whole money, already deposited

and property shall be put re-auction and the defaulting bidder shall have no claim/right in respect of property/amount.

Rule.9. Time of sale, issues of sale certificate and delivery of possession, etc.—

(1) & (2) xxx

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

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

17. From the text and texture of sub-rules (3) and (4) of Rule 9, it is noticed that Rule 9 is silent on mode of payment of EMD and 25% of sale price. It only prescribes timeline for payment of 25% sale price and balance 75% of sale price.

18. Clause-3 of e-auction notice requires payment of EMD through NEFT/RTGS or by Demand Draft. As per clause-5, the bidder should enclose proof of EMD deposit along with request letter for participation in the e-auction. Clause-9 only talks of deposit of 25% sale price immediately on acceptance of bid of participant in the e-auction and balance 75% on or before 15 days of confirmation of sale or within extended period as the case may be.

19. From the facts on record, it is apparent that on 21.06.2017, auction purchaser deposited EMD in the form of cheque drawn on his account in the same Bank. This cheque was encashed on

23.06.2017. The question for consideration is having regard to tender condition clause No.3 whether the bank was right in accepting the EMD payment through cheque.

20. At this stage, it is necessary to note how this aspect is considered in various decisions:

(i) In **Poddar Steel Corporation**, clause-6 of the tender notice required the prospective bidder to deposit 5% of tender value as earnest money either by cash or Demand Draft drawn on the State Bank of India. Whereas the appellant furnished the said amount in the form of cheque of the Union Bank of India drawn on its own branch. Hon'ble Supreme Court held as under:

"6. It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank clause 6 of the tender notice was not obeyed literally, but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories — those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. This aspect was examined by this Court in C.J. Fernandez v. State of Karnataka [(1990) 2 SCC 488] a case dealing with tenders. Although not in an entirely identical situation as the present one, the observations in the judgment support our view. The High Court has, in the impugned decision, relied upon Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489] but has failed to appreciate that the reported case belonged to the first category where the strict compliance of the condition could be insisted upon. The authority in that case, by not insisting upon the requirement in the tender notice which was an essential condition of eligibility, bestowed a favour on one of the bidders, which amounted

to illegal discrimination. The judgment indicates that the court closely examined the nature of the condition which had been relaxed and its impact before answering the question whether it could have validly condoned the shortcoming in the tender in question. This part of the judgment demonstrates the difference between the two categories of the conditions discussed above. However it remains to be seen as to which of the two clauses, the present case belongs.

(7) xxxxx

8. In the present case the certified cheque of the Union Bank of India drawn on its own branch must be treated as sufficient for the purpose of achieving the object of the condition and the Tender Committee took the abundant caution by a further verification from the bank. In this situation it is not correct to hold that the Diesel Locomotive Works had no authority to waive the technical literal compliance of clause 6, specially when it was in its interest not to reject the said bid which was the highest. We, therefore, set aside the impugned judgment and dismiss the writ petition of respondent 1 filed before the High Court. The appeal is accordingly allowed with costs throughout.”
(emphasis supplied)

(ii) In **Central Coalfields Limited and others vs. SLL-SML (Joint Venture Consortium) and others**⁹, Hon^{ble} Supreme Court held,

“48. Therefore, whether a term of NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in *Ramana Dayaram Shetty [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489]*. However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot.

49. Again, looked at from the point of view of the employer if the courts take over the decision-making function of the employer and make a distinction between essential and non-essential terms contrary to the intention of the employer and thereby rewrite the arrangement, it could lead to all sorts of problems including the one that we are grappling with. For example, the GTC that we are concerned with specifically states in Clause 15.2 that “Any bid not accompanied by an acceptable Bid Security/EMD shall be rejected by the employer as non-responsive”. Surely, CCL ex facie intended this term to be mandatory, yet the High Court held that the bank

⁹ AIR 2016 SC 3814

guarantee in a format not prescribed by it ought to be accepted since that requirement was a non-essential term of the GTC. From the point of view of CCL, the GTC has been impermissibly rewritten by the High Court.

(iii) In **National High Speed Rail Corp. Limited vs. Moncarlo Ltd**¹⁰, Hon'ble Supreme Court reviewed the propositions enunciated in precedent decisions and held:

"29. Thus, from the aforesaid decisions, it can be seen that a court before interfering in a contract matter in exercise of powers of judicial review should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"? And

(ii) Whether the public interest is affected?

If the answers to the above questions are in the negative, then there should be no interference under Article 226."

(iv) In **Ms. Srinidhi Stone Crushers and another vs. The Authorized Officer, the South Indian Bank Ltd., Bangalore and others**¹¹, Hon'ble Karnataka High Court considered somewhat similar issue. We respectfully agree with the view expressed by Karnataka High Court. The Karnataka High Court held,

"14. Even otherwise, we hold that since the purchaser has tendered the cheque for balance sale consideration on 13.11.2012 and 14.11.2012 being a holiday, the realization of cheque on 15.11.2012, was a legal and valid tender in compliance of sub-Rule (4) of Rule 9 of Rules, 2002. We are also of the opinion that even if the cheque was encashed on a subsequent date, after the cheque was presented on 13.11.2012, since sub-Rule (4) provides that such 'period could be extended as may be agreed upon in writing', the act of presentation of

¹⁰ (2022) 6 SCC 401

¹¹ ILR 2019 KAR 4089

the cheque for realization, well within the period stipulated, can be treated as an agreement in writing to extend the period. We say so because, it is possible that even when the purchaser tenders the cheque well within the period, the secured creditor may delay presenting the cheque. If the secured creditor causes the delay, the blame cannot be shifted on the purchaser. Under such circumstances, the act of presentation of cheque should be construed as an agreement in writing to extend the period.”

21. As consistently held by Constitutional Courts, the decision making process of the employer accepting or rejecting the bid of a participant should not be interfered unless the decision making process is *malafide* or intended to favour someone or is arbitrary or irrational. It is also settled that having authored the tender documents, employer is the best person to understand and appreciate its requirements and interpret its documents. Further, whether a term of auction notice is essential or not is a decision taken by the employer which should be respected and soundness of that decision cannot be questioned. Courts cannot make a distinction between essential and non-essential terms.

22. Having regard to the parameters of judicial review, the decision of the Bank to accept payment of EMD and 25% of sale consideration by mode of cheque payment cannot be said as irrational or arbitrary or *malafide*.

23. It is the categorical assertion of the Bank that its decision to accept the cheque did not violate nor barred by the 2002 Act. It asserts that it has knowledge on availability sufficient funds in the

account of auction purchaser as on the date of deposit of cheques. In fact it delayed acceptance of first instalment of sale money with hope of some order from the DRT in the case filed by the borrower.

24. As held by Hon'ble Supreme Court in **Poddar Steel Corporation** that in case of subsidiary or ancillary tender condition it is open to the authority to deviate from and not to insist literal compliance. What is required to be noted is whether EMD was paid. EMD was paid by auction purchaser by way of cheque. The Bank never raised objection on payment of EMD through cheque. It is deemed that the bank waived mode of payment through NEFT/RTGS/DD as mentioned in the auction notice. It is also relevant to note background facts of the case to appreciate the decision of the bank to accept cheque payment. Earlier three attempts to sell the secured asset faced stiff resistance from the borrower and three auction processes were unsuccessful. The auction process in issue was the fourth attempt and the Bank appears to be keen to finalize the sale.

25. Even assuming that the Bank erred in accepting the payment of EMD and towards 25% sale consideration by cheques, some material irregularity is not a ground to interfere and the writ Court need not nullify the auction process unless the borrower satisfies the Court that prejudice/injury caused to him.

26. Further, as rightly contended by the learned senior counsel for auction purchaser, the borrower has neither pleaded nor shown how prejudice was caused to him. In fact, as noticed by this Court in Writ Petition No. 35953 of 2018 borrower was stalling auction process on one pretext or the other. The debtor has no role in the manner of conducting auction. He can raise objection if property put to auction was not properly described and base price determined was far less compared to market price and essential condition of eligibility was violated.

27. In **Saheb Khan**, Hon'ble Supreme Court held there must be a material irregularity or fraud and that must be pleaded and proved to and it must be established that such material irregularity or fraud resulted in substantial injury to the applicant. Paragraph-13 reads as under:

“13. Therefore before the sale can be set aside merely establishing a material irregularity or fraud will not do. The applicant must go further and establish to the satisfaction of the court that the material irregularity or fraud has resulted in substantial injury to the applicant. Conversely even if the applicant has suffered substantial injury by reason of the sale, this would not be sufficient to set the sale aside unless substantial injury has been occasioned by a material irregularity or fraud in publishing or conducting the sale. (See *Dhirendra Nath Gorai v. Sudhir Chandra Ghosh* [(1964) 6 SCR 1001 : AIR 1964 SC 1300] ; *Jaswantlal Natvarlal Thakkar v. Sushilaben Manilal Dangarwala* [1991 Supp (2) SCC 691] and *Kadiyala Rama Rao v. Gutala Kahna Rao* [(2000) 3 SCC 87]).”

28. In **Rama Kishun and others vs. State of Utter Pradesh and others**¹², the Hon'ble Supreme Court relied on view expressed in

¹² (2012) 11 SCC 511

Navalkha & Sons vs. Ramanya Das¹³, wherein it is held that after confirmation of sale Court should not interfere even if it is found that some material irregularity in the conduct of sale was committed.

29. In **L&T Hosing Finance Limited**, the Section 13(2) and 13(4) of the SARFAESI Act notices were challenged before DRT by the borrower. The DRT sets aside the demand notice on the ground that though secured creditor is '*L&T Housing Finance Limited*', on the notices the name of secured creditor was shown as '*L&T Finance Limited*'. The DRAT reversed the decision. In writ petition filed against DRAT order the High court of Karnataka reversed the decision of DRAT. Hence, appeal to Hon'ble Supreme Court. The appellant contended that the both companies use common letterheads and in all other notices '*L&T Housing Finance Limited*' seal was used, but due to mistake, in Section 13(4) notice '*L&T Finance Limited*' seal was affixed. It was also pleaded that by such mistake no prejudice was caused to borrower. Dealing with these submissions, Hon'ble Supreme Court held,

"19. In the facts and circumstances, when the action has been taken by the competent authority as per the procedure prescribed by law and the person affected has a knowledge leaving no ambiguity or confusion in initiating proceedings under the provisions of the SARFAESI Act by the secured creditor, in our considered view, such action taken thereof cannot be held to be bad in law merely on raising a trivial objection which has no legs to stand unless the person is able to show any substantial prejudice being caused on account of the procedural lapse as prescribed under the Act or the

¹³ (1969) 3 SCC 537

Rules framed thereunder still with a caveat that it always depends upon the facts of each case to decipher the nature of the procedural lapse being complained of and the resultant prejudice if any, being caused and there cannot be a straitjacket formula which can be uniformly followed in all the transactions.

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

30. It was vehemently contended by learned senior counsel for borrower that the sale proceeds were repaid to auction purchaser and, therefore, it is no more open to him to claim the property.

31. Against any decision by secured creditor under the Act, 2002, an aggrieved person including the borrower can avail remedy provided by Section 17 of the Act, 2002. Against bank taking measures under the SARFEASI Act, 2022 the borrower filed S.A.No.447 of 2017 before the Debts Recovery Tribunal-II, Hyderabad. Agreeing with the contention of the borrower that EMD was not paid by the auction purchaser as required by Rule 9(3) and (4) of the Rules, 2002 and auction notification, the DRT set aside the entire auction process. Against decision of DRT, Section 18 of the Act, 2002 provides remedy in the form of appeal before the DRAT. Auction purchaser preferred appeal to DRAT. The DRAT rendered the

decision on 09.04.2021. Challenging the validity of the decisions of DRT and DRAT, W.P.No.13330 of 2021 is filed on 14.06.2021.

32. The power of judicial review under Article 226 of the Constitution of India is very wide and a person aggrieved by decision of a statutory Tribunal can challenge the legality of the decision of the Tribunal. Aggrieved by the decision of DRT, affirmed by DRAT, the auction purchaser filed W.P.No.13330 of 2021. Merely because the sale consideration was returned by the Bank soon after DRT passed orders does not take away right of aggrieved person to avail remedy of appeal and to challenge the legality of an order of the Tribunal. Moreover, the amount was refunded when appeal was pending before DRAT. Therefore, returning of full sale consideration by the Bank cannot per se amount to declaring the auction purchaser as non-entity and cannot hold that he has no *locus standi* to challenge the decision of the Tribunals. Therefore, this contention is stated to be rejected.

33. In Writ Petition No.35953 of 2018 filed by the auction purchaser, the Division Bench of this court expressed serious concern on how borrower was abusing the legal process. It is useful to extract paragraphs 19 and 20 of the judgment dated 01.03.2019. They read as under:

“19. The above narration of facts goes to show that the 4th respondent has actually put to shame, even the procedure

prescribed by the Code of Civil Procedure. The Debts Recovery Tribunal (Procedure) Rules, 1993, make it clear that the provisions of the CPC and the Indian Evidence Act, 1872, may not per se apply to the proceedings before the Tribunal and that the Tribunal shall ensure compliance with the principles of natural justice. But, the 4th respondent appears to have exploited every loophole in the law and has successfully warded off auction purchasers by protracting the application pending before the DRT. It is sickening to note that repeated interlocutory applications were filed by the 4th respondent and every order passed by the DRT became the subject-matter of an appeal before the DRAT. At this stage, we do not know whether any auction purchaser will have any hope of the appeal of the 4th respondent getting disposed of at any time.

20. Therefore, taking note of the manner in which the 4th respondent has carried out a tirade, this writ petition is disposed of directing the DRT to dispose of the appeal, S.A. No.447 of 2017 (Old S.A. No.171 of 2012) within a period of two (02) months from the date of receipt of a copy of this order. No further interlocutory applications shall be entertained at the instance of the 4th respondent and the Tribunal, in view of the limited scope of the inquiry to be conducted under Section 17 of the Act, 2002, hear the arguments on the side of the borrower, secured creditor and the auction purchaser, dispose of the application within two (02) months.”

34. These orders of the Division Bench were placed before the Debts Recovery Tribunal-II. In spite of restraint imposed against entertaining Interlocutory Application, the I.A.Nos.1866 of 2019 and 1867 of 2019 were entertained by the Debts Recovery Tribunal-II. In I.A.No.1866 of 2019 borrower prayed to set aside the auction held on 23.06.2017. In paragraph-15 of the order, the Tribunal records filing of copy of order in W.P.no.35953 of 2018, but seeks to ignore on the ground that the I.As were filed earlier to filing of Memo by the auction purchaser and that copy of the order was not communicated by the High Court.

35. To the extent relevant order of Debts Recovery Tribunal-II reads as under:

“15. The 2nd respondent placed on record the copy of order passed in Writ Petition No.35953 of 2018 on 01.03.2019 along with memo dated 06.05.2019. Prior to filing memo applicant filed the above referred IA Nos.1866/2019 and 1867/2019. However, as on this day no copy of order passed in WP No.35953 of 2018 is communicated to this Tribunal. Therefore, these two interlocutory application Nos.1866/2019 and 1867/2019 are taken up along with the SA.”

16. In view of the amendment questioning the subsequent e-auction sale notice dated 04.06.2017, the relief sought for questioning the first e-auction sale notice dated 28/29.02.2012 has become redundant. Keeping in view of the facts stated supra, let me consider the rival contentions advanced by the learned counsel appearing for the parties.

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25. In the result, SA along with IA No.1866/2019 is allowed setting aside the e-auction sale held on 23.06.2017 while dismissing the IA No.1867/2019. However, this order does not preclude the 1st respondent Bank to initiate measures afresh for e-auction sale of SA schedule property strictly in accordance with the provisions of SARFAESI Act, 2002 and rules framed there under for realization of secured debt.”

36. If the Tribunal entertained doubt on copy of High Court Order filed by auction purchaser, it ought to have waited till certified copy was furnished. Further, when this Court directed not to entertain interlocutory applications from the borrower, the Tribunal could not have entertained I.A.No.1866 of 2019. Holding that two applications were filed earlier to filing of memos by the auction purchaser cannot be a ground to entertain the I.As., and decide the validity of auction held on 23.06.2017. Both reasons are *ex facie* not valid and amounts deliberate violation of the orders of the Court.

37. In view of clear restraint imposed by the Division Bench, the decision of Debts Recovery Tribunal-II to entertain I.A.No.1866 of 2019 and setting aside auction held on 23.06.2017 is *ex facie* illegal and unsustainable.

38. For all the aforesaid reasons the order of Debt Recovery Tribunal-II, Hyderabad dated 23.05.2019 in S.A.No.447 of 2017 as affirmed by the Debts Recovery Appellate Tribunal by order dated 9.4.2021 in Appeal No.68 of 2019 is set aside and W.P.No.13330 of 2021 is allowed. The auction purchaser shall deposit entire sale consideration within 4 (four) weeks from the date of receipt of copy of this order. He shall also pay interest at the rate of 9% per annum from the date of refund of money by the bank till date of deposit to be paid along with the principal amount. On such payment of full sale consideration with interest, if any, all consequential steps shall be taken by the Bank.

W.P.No.21511 of 2020:

39. Prayer in the writ petition reads as under:

“... to issue a Writ of Mandamus declaring the action of the Respondent Bank in refusing to clear the outstanding liability in the Petitioner’s SME loan account no.30482911975 by accepting ₹ 93,13,612/- deposited by the Petitioner under the non-discretionary and non-discriminatory SBI OTS 2020 on the ground that an Application No.68 of 2019 (diary no.164 of 2019) filed by the auction purchaser is pending before the Hon’ble Debts Recovery Appellate Tribunal as illegal, arbitrary, highhanded, violative of Banking norms, violative of the provisions and intention of the SARFAESI Act and the Security Interest Enforcement Rules there under, violative of Section 60 of the Transfer of Property Act, violative of guidelines issued by the Reserve Bank of India, violative of the terms and conditions under the SBI OTS 2020 and violative of rights guaranteed

under Article 14 of the Constitution of India, with a consequential prayer to set aside the Banks letter dated 11/11/2020 and direct the Bank to accept and appropriate the money deposited by the Petitioner in Banks No-Lien account under the OTS Scheme 2020 and discharge the total outstanding liability in the SME loan account bearing No.30482911975 and issue a loan closure certificate and pass such other order or orders as this Hon'ble court may deem fit and proper in the circumstances of the case."

40. Submissions of learned senior counsel Sri S.Ravi for the borrower:

40.1. The OTS scheme launched on 12.10.2020 is a non-discretionary and non-discriminatory scheme. Though petitioner applied under OTS and paid the total money payable if OTS is extended to him, the said application is rejected on erroneous ground that the appeal filed by the auction purchaser before DRAT was pending when as per OTS pending legal issues is not a bar to extend OTS. It envisages settlement of accounts even when litigation is pending. It is irrational and would amount to rejection in an arbitrary and discriminatory manner.

40.2. Litigation is pursued by a third party. Therefore, that would not have been a ground for rejection of the application. That the auction conducted on 23.06.2017 was declared as illegal by DRT and, therefore, the secured asset continues to be with the bank. The fact that DRAT affirmed the decision of DRT in nullifying the auction shows that the sale was not properly conducted by the Bank. After the decision of DRAT, the entire money paid by the auction purchaser was returned to him. The auction purchaser accepted the same. It

clearly shows that in an arbitrary manner, the application for settlement was rejected.

40.3. By placing reliance on several judgments of Punjab and Haryana High Court, he would submit that rejection of OTS request was erroneous and that in the facts of this the principle laid down by the Hon'ble Supreme Court in **Sardar** (supra) applies and in terms thereof, this Court can test the legality of rejection for settlement and issue mandamus.

40.4. Learned senior counsel relied on following decisions:

1) **R.S. Rice Mills and others vs. Debts Recovery Tribunal-I and others**¹⁴;

2) **Anu Bhalla and others vs. District Magistrate, Pathankot and others**¹⁵;

3) **Arvindra Electronics Pvt.Ltd., Vs. State Bank of India**¹⁶;

4) **Samarth Woollen Mills and others vs. Indian Bank (Erstwhile Allahabad Bank)**¹⁷;

5) **The Bijnor Urban Cooperative Bank Limited, Bijnor and others vs. Meenal Agarwal and others**¹⁸;

41. **Submissions of learned senior counsel for the Bank:**

41.1. The secured asset was sold to auction purchaser. However, the DRT declared the sale as illegal on the ground of violation of Rule

¹⁴ MANU/PH/0841/2022

¹⁵ MANU/PH/1689/2020

¹⁶ MANU/PH/0402/2022

¹⁷ MANU/PH/0719/2022

¹⁸ MANU/SC/1258/2021

9 of the Rules. Aggrieved thereby, the auction purchaser filed appeal before DRAT and said appeal was pending when the application of borrower was rejected.

41.2. In addition to ground of rejection, the Bank also noticed that the borrower submitted fabricated sanctioned plan from GHMC during subsequent inspection. The borrower first obtained building plan to construct a residential building. Whereas she has produced building plan as if she had obtained permission to construct commercial building to secure the funds from the Bank. The bank sanctioned loan by referring to building plan to construct commercial complex. The controllers of the Bank declared the account of the petitioner as fraud account on 13.11.2020 and informed vide Circle Office letter dated 19.11.2020. The said fact was also reported to RBI and RBI recorded the same in fraud folder. He would therefore submit that in view of fraud played by the borrower, OTS application was not accepted. He would further submit that the RBI guidelines clearly state that fraud cases are not eligible for OTS.

41.3. The borrower claimed that as the building permission applied to GHMC to construct commercial complex was not rejected, it is deemed as granted, but in view of the fraud played by the borrower in securing a building permission for a residential building and later

claiming deemed to have secured building permission for commercial building fraudulently, no deemed permission can be assumed.

41.4. Once an account is shown in fraud folder of RBI, unless the same is deleted, the Bank cannot sanction OTS.

41.5. When fraud is apparent the borrower cannot seek application of OTS and no illegality committed by the Bank in taking note of the issue of fraud to hold that borrower is not entitled to OTS.

42. **Reply by learned senior counsel for borrower:**

42.1. The decision in ***Bijnor*** is not applicable to the facts of this case and the decision in ***Sardar*** alone applies.

42.2. The reason assigned in the impugned decision is only on the ground that appeal filed by the auction purchaser was pending. In the counter-affidavit, Bank has invented theory of fraud to scuttle the prospects of One Time Settlement of borrower account. No new plea or a new reason can be urged/stated in the form of counter-affidavit. The reason assigned to reject the OTS in the order impugned alone has to be considered. In support of said contention learned senior counsel relied on the decision of Hon'ble Supreme Court in ***Mohinder***

Singh Gill and others vs. The Chief Election Commissioner, New Delhi and others¹⁹;

42.3. Section 17 of the Indian Contract Act defines fraud. The parameters to hold a person guilty of playing fraud as enshrined in Section 17 are not attracted to the case on hand.

42.4. Both building permissions were placed before the Bank. Both permissions are valid. No fraud was committed by borrower. There was no misrepresentation.

ONE TIME SETTLEMENT (OTS):

43. The bank refuses to extend the SBI-OTS-2020 to the borrower for two reasons. Firstly, on the ground that litigation was pending on the secured asset and secondly, the loan account is classified as fraud account. The second reason was not the ground to reject the OTS application impugned in W.P.No.21511 of 2020 but is projected in the counter affidavit.

44. Three clauses of SBI-OTS-2020 are relevant for consideration. They are clauses (iii) and (iv) under the heading **COVERAGE** and clause (i) in paragraph 2.1, with heading as '**cases not eligible to be covered under the scheme**'. They read as under:

¹⁹ MANU/SC/0209/1977

“Coverage:

Clauses (i) & (ii) xxxx

Clause iii. Cases pending before Courts/DRTs will be eligible. However, consent terms with default clause will have to be filed before presiding officer of Court/DRT for obtaining consent decree.

Clause iv. Cases where Bank has issued notice u/S.13(2) or taken action u/S.13(4) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI-2002) will be eligible. However, branches are advised to defer conducting auctions under SARFAESI from the date of issue of notice about the scheme to the borrower till the last date for receipt of applications. No auctions should be conducted if any application is received and it is under process. Branch may also defer any auctions for the accounts under OTS 2020 till the dues are received or the OTS is treated as failed.

2.1. Cases not eligible to be covered under the scheme:

(i). Cases reported as fraud to RBI will not be eligible.”

45. As per clause (iii) even when cases are pending in a Court/ Debts Recovery Tribunal, the concerned loan account can be processed under the scheme. As per clause (iv) once a notice is issued to the borrower about the scheme, bank should not conduct auction of secured asset.

46. According to learned senior counsel for borrower, merely because appeal preferred by the auction purchaser was pending not a ground to reject the OTS as per SBI-OTS-2020 scheme to borrower and it is contrary to the scheme.

47. In **Bijnor** (supra), Hon’ble Supreme Court held that it is ultimately for the Bank to take a conscious decision in its own interest and to secure/recover the outstanding debt. No Bank can be

compelled to accept a lesser amount under the OTS Scheme despite the fact that the Bank is able to able to recover the entire loan amount by auctioning the secured property/mortgaged property. When the loan is disbursed by the bank and the outstanding amount is due and payable to the Bank, it will always take a conscious decision in the interest of the Bank and in its commercial wisdom. Hon'ble Supreme Court further held,

“10. If a prayer is entertained on the part of the defaulting unit/person to compel or direct the financial corporation/bank to enter into a one-time settlement on the terms proposed by it/him, then every defaulting unit/person which/who is capable of paying its/his dues as per the terms of the agreement entered into by it/him would like to get one tie settlement in its/his favour. Who would not like to get his liability reduced and pay lesser amount than the amount he/she is liable to pay under the loan account? In the present case, it is noted that the original writ petitioner and her husband are making the payments regularly in two other loan accounts and those accounts are regularized. Meaning thereby, they have the capacity to make the payment even with respect to the present loan account and despite the said fact, not a single amount/instalment has been paid in the present loan account for which original petitioner is praying for the benefit under the OTS Scheme.

11. The sum and substance of the aforesaid discussion would be that no writ of mandamus can be issued by the High Court in exercise of powers under Article 226 of the Constitution of India, directing a financial institution/bank to positively grant the benefit of OTS to a borrower. The grant of benefit under the OTS is always subject to the eligibility criteria mentioned under the OTS scheme and the guidelines issued from time to time. If the bank/financial institution is of the opinion that the loanee has the capacity to make the payment and/or that the bank/financial institution is able to recover the entire loan amount even by auctioning the mortgaged property/secured property, either from the loanee and/or guarantor, the bank would be justified in refusing to grant the benefit under the OTS Scheme. Ultimately, such a decision should be left to the commercial wisdom of the bank whose amount is involved and it is always to be presumed that the financial institution/bank shall take a prudent decision whether to grant the benefit or not under the OTS Scheme, having regard to the public interest involved and having regard to the factors which are narrated hereinabove.”

48. In **State Bank of India vs. Arvindra Electronics Private Limited**²⁰, before the Punjab and Haryana High Court, reliance was placed on judgment rendered in **Sardar Associates vs. Punjab & Sind Bank and others**²¹. Though decision of **Bijnor** was brought to the notice of the Hon'ble High Court, High Court followed the decision in **Sardar Associates**. Dealing with this aspect, Hon'ble Supreme Court held as under:

“31. Though the decision of this Court in the case of *Bijnor Urban Cooperative Bank Limited* (supra) was specifically pressed in service on behalf of the Bank and was pointed out to the High Court, the High Court instead following the binding decision of this Court in the case of *Bijnor Urban Cooperative Bank Limited* (supra) has not followed the same by observing that the earlier decision of this Court in the case of *Sardar Associates* (supra) is more elaborate. We do not approve such an observation by the High Court and not following the subsequent binding decision of this Court which as such was on the point. Being a subsequent decision on the point/issue, the High Court was bound to follow the same.”

49. To test the legality of justification to reject OTS application due to pending litigation, a brief recapitulation of history of litigation is necessary.

50. To recover the loan amount, the bank decided to conduct sale of secured asset. The bank was unsuccessful on three occasions as on one ground or the other the borrower was stalling auction process. On the fourth attempt in the auction conducted on 23.06.2017 sale was finalized and confirmed in favour of auction purchaser and he

²⁰ 2022 SCC Online SC 1522

²¹ (2009) 8 SCC 257

was issued sale certificate. The fourth auction process culminating in confirming the sale in favour of auction purchaser was also interfered by the Tribunal in SA No.447 of 2017 along with I.A.No.1866 of 2019 on the ground that mode of payment by cheque towards EMD was not as per tender condition and balance amount towards 25% sale consideration was not paid on the day of auction or on the next day and said payment by cheque was also not valid. Aggrieved thereby, the auction purchaser filed Appeal No.68 of 2019 before the Debts Recovery Appellate Tribunal.

51. By the time SBI-OTS-2020 was introduced, Appeal No.68 of 2019 was pending in Debts Recovery Appellate Tribunal. Since secured asset was sold and appeal was pending in Debts Recovery Appellate Tribunal against decision of DRT setting aside the sale, it cannot be said that the decision of the bank not to accept OTS request as amounting to a perverse decision, wholly untenable and arbitrary for this Court to commend the Bank to accept the OTS request. Having regard to the litigation the Bank has exercised sound discretion and do not call for interference. It is apt to note that Bank is entitled to recover the entire amount standing in the loan account. In order to close existing loan account, Bank may extend some incentive to the borrower or take recourse to settlement of account by mutually agreed terms so that account can be closed. It is entirely for the secured creditor how to negotiate such closure or

refuse to negotiate for any settlement and proceed to enforce payment of entire loan amount. With reference to OTS, the scope of judicial review and interference by this Court is very narrow. No right, much less vested right is available to a borrower to compel the Bank to agree for OTS. In the facts of this case, the decision to reject the OTS application of borrower is neither whimsical nor perverse or wholly arbitrary. It was based on sound reasoning.

52. Even otherwise, on detailed consideration of the issue, we have opined that the Debts Recovery Tribunal grossly erred in setting aside the auction sale and allowed W.P.No.13330 of 2021.

INCLUDING LOAN ACCOUNT IN FRAUD FOLDER MAINTAINED BY RBI:

53. As per clause (i) of paragraph 2.1, if a case is reported to RBI that in loan account fraud is committed the account is not eligible to apply under the scheme.

54. In the counter affidavit deposed on 23.2.2021, the Bank asserts that the borrower submitted fabricated sanctioned plan of Greater Hyderabad Municipal Corporation (GHMC) to procure the loan. According to the bank the borrower actually secured building permission to construct residential house but produced a bogus building permission to construct commercial building. Having come to know of the same, the account of petitioner was declared as fraud

account on 13.11.2020. The said fact was reported to RBI and RBI has recorded the borrower account in Fraud Folder. It is therefore asserted that as per clause 2.1 of SBI OTS-2020, when an account is declared as fraud account, the scheme benefits cannot be extended.

55. Learned senior counsel for the borrower contended that the issue of fraud account was not the reason to reject the OTS proposal of the petitioner and, therefore, it is not open to the Bank to raise the plea to support the order impugned. Further, behind the back of borrower allegation of fraud cannot be levelled. As allegation of fraud has severe adverse consequences, due process has to be followed before holding so.

56. It is true that the initial rejection not to accept the request of borrower for OTS was not on the ground of fraud. In the counter-affidavit, for the first time, plea of inclusion of the borrower account in fraud folder by RBI was taken to support decision to reject OTS.

57. From the material on record, it is apparent that no prior notice or opportunity was afforded to borrower before declaring his account vitiated by fraud.

58. Allegation of fraud is a serious issue. Once a person is alleged to have committed fraud in dealing with financial matters, it will have severe adverse civil and evil consequences. The borrower cannot raise

finances from any financial institution. It would impact his social status and affect his reputation. Therefore, before alleging that a person committed fraud elementary principle is that person must be told of reasons to allege fraud, give opportunity of hearing and on due consideration of the explanation offered, to pass orders assigning reasons in support of the decision. In the case on hand, Bank holds that borrower committed fraud to secure loan by producing bogus building permission to construct a commercial complex, whereas, actual permission was granted to construct residential building only. Before coming to such conclusion the Bank did not afford opportunity to put-forth the borrower's version. It appears the borrower has sufficient explanation to offer on the allegation.

59. According to borrower, two building permissions were granted by GHMC and both plans are valid. These aspects ought to have been looked into before holding that borrower has played fraud. Therefore, the unilateral decision of the bank holding that the borrower has committed fraud and reporting to RBI is *ex facie* illegal and not sustainable. Further, as initial rejection of OTS application, impugned in the writ petition, was not on the ground of fraud that cannot be a ground to support the decision to reject OTS proposal of borrower in the form of a counter-affidavit.

RIGHT OF REDEMPTION:

60. One other issue requires consideration is whether the borrower is entitled to exercise right of redemption as envisaged in Section 13(8) of the Act. Though Section 13(8) of the Act envisages exercise of right of redemption before the date of publication of notice for public auction or inviting quotations or tender from public or private treaty for transfer by way of lease, assignment or sale of the secured assets, by relying on Section 60 of Transfer of Property act, 1882, the Hon'ble Supreme Court in **Mathew Varghese** has held that the right of redemption is available till sale certificate is registered in favour of auction purchaser. Thus, a borrower can apply right of redemption before sale certificate is registered.

61. This being the position in law, the question for consideration is in the peculiar facts of the case, whether the borrower is qualified to exercise the right of redemption and whether this Court in exercise of equity jurisdiction should permit the borrower. To consider this aspect, it is necessary to dwell into history of litigation and chronology of events and directions issued by this Court in W.P.No.35953 of 2018.

62. As borrower defaulted in repayment of loan, the bank classified the loan account as NPA and took measures to recover the debts. On 29.02.2012, the bank issued 1st E-auction notice scheduled on

30.03.2012. Borrower filed S.A.No.171 of 2012 [later renumbered as S.A.No.447 of 2017]. On 22.03.2012, DRT passed conditional order of stay of auction. Borrower failed to comply the condition. However, auction could not be held. The Bank issued 2nd E-auction notice on 02.05.2012, proposing to conduct E-auction on 04.06.2012. Borrower filed I.A.No.624 of 2012 in S.A.No.171 of 2012 on 31.05.2012. DRT ordered to proceed with sale but not to confirm sale for 30 days. Borrower was granted liberty to make payment. No payment was made but filed application to extend the time. This was refused by the DRT. Aggrieved thereby, Appeal was filed before DRAT. The DRAT has not granted relief. There on Writ Petition No.24733 of 2012 was filed before the Madras High Court. It was dismissed as infructuous as auction purchaser took back the money.

63. On 26.02.2017, the Bank issued the third E-auction notice to conduct E-auction on 30.03.2017. Borrower filed Interlocutory Application No.786 of 2017 seeking stay of auction notice dated 26.02.2017. The DRT passed order on 28.03.2017 granting liberty to bank to conduct sale but also ordered not to issue sale certificate if the borrower pays 50% of the outstanding amount. The amount was not paid. Borrower sought extension of time, but the same was dismissed. However, the sale did not materialize as auction purchaser sought refund. Challenging the dismissal of the

application for extension of time and challenging the action of the Bank in refunding the amount to the auction purchaser, 4th respondent filed W.P.No.12835 of 2017 and W.P.No.12836 of 2017 but withdrew them on 24.07.2017.

64. On 04.06.2017, bank issued 4th E-auction notice to conduct e-auction on 23.06.2017. On 22.06.2017, borrower filed Interlocutory Application No.1756 of 2017 before DRT seeking stay of auction. The DRT passed interim order authorizing the bank to proceed with e-auction but directed not to issue sale certificate if petitioner deposits 50 % of the total outstanding dues in two equal instalments. In the Appeal No.356 of 2017, DRAT ordered Bank not to issue sale certificate.

65. The 4th respondent moved two Miscellaneous Applications, one for advancing the hearing of the appeal and another for amendment. The application for amendment was allowed, but the application for stay was disposed of permitting the bank to proceed with the sale but not to issue the sale certificate.

66. As against the said order, the 4th respondent filed Appeal before the DRAT. The DRAT allowed the Appeal on 06.07.2017 with a direction to the DRT to dispose of the application in S.A.No.447 of 2017 within a period of three (03) months. The bank proceeded with

the conduct of auction on 23.06.2017 and issued sale certificate to the successful bidder on 05.07.2017.

67. Thereafter, the 4th respondent moved a few interlocutory applications, praying to implead the auction purchaser, for carrying out amendment and for furnishing the list of documents. The DRT allowed the applications for impleadment and amendment, but dismissed the application for furnishing the list of documents.

68. As against the said order, the 4th respondent moved Appeal before the DRAT. The DRAT disposed of the same by order dated 09.11.2017 with certain directions. Pursuant to those directions, the 4th respondent again moved certain applications, which were dismissed by the DRT. As against the dismissal of those applications, a fresh appeal was filed before the DRAT and the DRAT disposed of the same with certain directions.

69. Frustrated at the repeated filing of interlocutory applications and challenging the orders passed on those applications by DRT before the DRAT, the person, who secured the sale certificate in the auction held on 23.06.2017, has filed W.P.No.35953 of 2018 seeking a mandamus to direct the DRT to dispose of S.A.No.447 of 2017 within a time frame.

70. The chronology of events and facts noted above clearly disclose that petitioner had enough opportunities to exercise right of redemption, but failed to avail the opportunity. On the contrary, whenever auction notices were issued, she has filed applications to ensure that sale is aborted. Though DRT passed conditional orders, she has not complied with the directions of DRT.

71. At this stage, it is apt to note the directions of this Court in W.P.No.35953 of 2018.

“20. Therefore, taking note of the manner in which the 4th respondent has carried out a tirade, this writ petition is disposed of directing the DRT to dispose of the appeal, S.A.No.447 of 2017 (Old S.A.No.171 of 2012) within a period of two (02) months from the date of receipt of a copy of this order. No further interlocutory applications shall be entertained at the instance of the 4th respondent and the Tribunal, in view of the limited scope of the inquiry to be conducted under Section 17 of the Act, 2002, hear the arguments on the side of the borrower, secured creditor and the auction purchaser, dispose of the application within two (02) months.”

72. Contrary to these orders, interlocutory applications were allowed and DRT nullified the sale, which is the subject matter of W.P.No.13330 of 2021. Even now, borrower is not offering to pay the entire amount due to the Bank, but has been insisting for one time settlement. In W.P.No.21511 of 2020, the borrower is praying to declare the action of the respondent in refusing to clear the outstanding liability of the borrower's loan account by accepting 93,13,612/- deposited by the borrower under SBI-OTS-2020 scheme and not accepting the said proposal merely on the ground that Appeal No.68 of 2019 is pending is contrary to mandate of Section 60 of the Transfer of Property Act, violative of guidelines

issued by the Reserve Bank of India, and violative of the terms and conditions under the SBI-OTS-2020. Thus, even now borrower is not showing inclination to clear the entire loan amount.

73. It is settled principle of law that writ Court need not grant relief merely because petitioner has made out a case, but Court in exercise of equity jurisdiction may deny the relief, if the conduct of petitioner disentitles him. If directions of this Court in W.P.No.35953 of 2018 were complied in true letter and spirit by the DRT, this litigation could have been avoided, the loan account closed and property would have vested in the auction purchaser long ago. The borrower can not take advantage of grave illegality committed by the DRT and not appreciated by DRAT. It is but proper to give quietus to the litigation. Having regard to the conduct of petitioner, she is disentitled to secure equitable relief.

74. There is one more aspect needs consideration. After the decision of DRT nullifying the auction held on 23.06.2017, the entire sale consideration was returned to the auction purchaser. The bank now holds the borrower as defaulter and the loan account is not closed. With addition of penal interest for this period, the loan account may have swelled further. We have allowed W.P.No.13330 of 2021. In terms thereof, the Bank gets ₹ 10.55 crores. We have also granted 9% interest from the date of refund till date of repayment to

be paid by auction purchaser. Though, the loan account is not closed, we are not informed about the total outstanding in the loan account as of now.

75. The Bank should credit ₹ 10.55 crores and interest paid by the auction purchaser as per the directions in this order to the loan account. After crediting the amount, if the Bank assumes that some more amount is due from borrower, the Bank should notify to the borrower the account statement. It is to be noted that the borrower is not solely responsible for this fiasco and Bank has also contributed to a great extent. Having regard to the history of litigation, we are of the opinion that the Bank cannot levy penal interest from the date of refund of sale proceeds. The interest amount paid by the auction purchaser should be adjusted towards interest component of loan of borrower. That course is just and equitable. If after such adjustment the Bank holds that borrower has to still pay some more amount, it is open to Bank and the borrower to resort to OTS. The Writ Petition is accordingly disposed of.

CONCLUSIONS:

76. We record our conclusions in the two Writ Petitions as under:

(1) Order of Debts Recovery Tribunal in S.A.No.447 of 2017, and the order of the Debts Recovery Appellate Tribunal in Appeal No.68 of 2019, affirming the order of Debts Recovery Tribunal, are set

aside. The sale confirmed in favour of auction purchaser is held valid.

(2) The auction purchaser shall deposit ₹ 10.55 crores along with interest @ 9% per annum from the date of remittance of said money by the Bank till the date of deposit by the auction purchaser in terms of this order.

(3) ₹ 10.55 crores paid by the auction purchaser along with interest shall be adjusted to the loan account of the borrower.

(4) The Bank shall not charge additional interest over and above interest amount paid by the auction purchaser from the date of conformation of sale till date of adjustment to loan account of 4th respondent.

(5) If the Bank holds that borrower has to still pay some more amount, it is open to Bank and the borrower to resort to OTS.

(6) W.P.No.13330 of 2021 is allowed. W.P.No.21511 of 2020 is disposed of.

Pending miscellaneous applications if any shall stand closed.

P.NAVEEN RAO, J

J.SREENIVAS RAO, J

Date: 10.01.2023
Kkm/tvk

HONOURABLE SRI JUSTICE P.NAVEEN RAO
&
HONOURABLE SRI JUSTICE J.SREENIVAS RAO

WRIT PETITION NOs.21511 of 2020 & 13330 OF 2021

Date:10.01.2023

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