Court No. - 32

Case :- SPECIAL APPEAL No. - 220 of 2023

Appellant :- Sharp Industries
Respondent :- Bank Of Maharashtra And 3 Others
Counsel for Appellant :- Vinayak Mithal,Kumar Kartikeya
Counsel for Respondent :- Gaurav Singh,Shruti Malviya,Vivek Yadav

Hon'ble Ashwani Kumar Mishra,J.
Hon'ble Syed Qamar Hasan Rizvi,J.

1. This intra court appeal by the appellant-borrower is directed against the judgment and order dated 2.3.2023, passed in Writ C No.1595 of 2021, whereby the writ petition has been allowed by the learned Single Judge and the order passed by the Debt Recovery Appellate Tribunal in Regular Appeal No.17 of 2020 dated 15.12.2020 has been set aside. The appellate tribunal had set aside the auction sale held by the bank on 10.9.2018 after quashing the order of Debt Recovery Tribunal dated 31.1.2019, in Securitization Appeal No.59 of 2018. The respondent-bank was also directed by the appellate tribunal to refund the auction money to the auction purchaser after restoring the possession of immovable and movable property from the auction purchaser to the borrower. Liberty was also granted to the bank to proceed further from the stage of issuance of sale notice, in accordance with law. The appellate tribunal had returned a finding that no notice was actually served on the appellant borrower.

2. Learned Single Judge while allowing the writ and setting aside the appellate order of tribunal held that the appellant was aware of the date of auction and, therefore, the auction notice was within the knowledge of the appellant.

3. At the very outset an objection is taken to the

maintainability of this appeal on the ground that the proceedings arose out of an order passed in appeal as such the special appeal itself would not be maintainable.

4. Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952 (hereinafter referred to as 'Rules of 1952') provides for the remedy of filing special appeal which is reproduced hereinafter:-

> "5. Special appeal:- An appeal shall lie to the Court from a judgment (not being a judgment passed in the exercise of appellate jurisdiction) in respect of a decree or order made by a Court subject to the superintendence of the Court and not being an order made in the exercise of revisional jurisdiction or in the exercise of its power of superintendence or in the exercise of criminal jurisdiction 2[or in the exercise of the jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award--(a) of a tribunal, Court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution, or (b) of the Government or any officer or authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act of one Judge."

5. A perusal of Chapter VIII Rule 5 of the Rules of 1952 would indicate that the first part of the rule provides for special appeal to be maintainable from a judgment passed by a Single Judge of this Court. The subsequent part of the rule then provides the circumstances and exigencies in which the appeal would not be maintainable. This aspect of the matter has been considered by a Full Bench of this Court in *Sheet Gupta v. State of U.P. & Ors. AIR 2010 Alld 46 (FB)*. Para 18 of the Full Bench judgment is relevant and is extracted hereinafter:-

> "Having given our anxious consideration to the various plea raised by the learned counsel for the parties, we find that from the perusal of Chapter VIII Rule 5 of the Rules a special appeal shall lie before this Court from the judgment passed by one Judge of the Court. However, such special appeal will not

lie in the following circumstances:

1.The judgment passed by one Judge in the exercise of appellate jurisdiction, in respect of a decree or order made by a Court subject to the Superintendence of the Court;

2.the order made by one Judge in the exercise of revisional jurisdiction;

3.the order made by one Judge in the exercise of the power of Superintendence of the High Court;

4.the order made by one Judge in the exercise of criminal jurisdiction;

5.the order made by one Judge in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution of India in respect of any judgment, order or award by

(i) the tribunal,

(ii) Court or

(iii) statutory arbitrator

made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India;

6.the order made by one Judge in the exercise of jurisdiction conferred by Article 226 or 227 of the Constitution of India in respect of any judgment, order or award of

(i) the Government or

(ii) any officer or

(iii) authority,

made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act, i.e. under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India."

6. The objection raised on behalf of the respondents to the maintainability of the appeal essentially hinges on the submission that the order under challenge before the learned Single Judge was passed in appeal and, therefore, the special appeal would not lie. Learned counsel for the respondents also contends that the appellate forum was constituted in exercise of powers under Entry 9 of List III i.e. concurrent list. Entry 9 is quoted hereinafter:-

"Bankruptcy and Insolvency"

7. Per contra, learned counsel for the appellant submits that the tribunal has been constituted pursuant to exercise of power by the Parliament under Entry 45 of List I as such the decision of the tribunal would not fall in any of the exclusionary clauses indicated in para 18 of the Full Bench judgment of this Court in Sheet Gupta (supra).

8. Perusal of the Chapter VIII Rule 5 of the Rules of 1952, as interpreted by the Full Bench of this Court in Sheeta Gupta (supra), makes it clear that an appeal would lie to a Division Bench from a judgment of Single Judge unless such appeal is excluded by the rule itself. Exigencies constituting exclusion would not include judgments, orders or award by the Government or any officer or authority or a tribunal, court or statutory arbitrator in respect of a Central Act with respect to a matter enumerated in the Union List.

9. Para 18 of the Full Bench judgment in Sheet Gupta (supra) clearly indicates that where the order is passed by a Single Judge in exercise of appellate jurisdiction in respect of a decree or order made by a Court subject to superintendence of the Court a special appeal would not be maintainable; it would also not lie where the order is passed by Single Judge in exercise of revisional jurisdiction; or the order made by one Judge in exercise of power of superintendence of High Court; or in exercise of criminal jurisdiction. The fifth exigency relates to the exercise of jurisdiction by this Court under Article 226 and 227 of the Constitution of India in respect of any judgment, order or award passed by the tribunal or Court or statutory arbitrator made or purported to be made in exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the 7th

Schedule to the Constitution of India.

10. The issue for consideration, therefore, would be as to whether the order of tribunal was passed in respect to any of the matters enumerated in the State List or the Concurrent List in which exigency alone the special appeal would not lie. In the event it is found that the tribunal is constituted in exercise of power by the appropriate legislature referable to an entry in Union List then the bar for filing of a special appeal would not apply.

11. The issue relating to constitution of Debt Recovery Tribunal fell for consideration before the Supreme Court in *Union of India & Anr. v. Delhi High Court Bar Association & Ors.* (2002) 4 SCC 275. After noticing the conflict of decision on the point by different High Courts, the Supreme Court summed up its conclusions on the issue in para 14 of the judgment which is reproduced hereinafter:-

> "14. The Delhi High Court and the Guwahati High Court have held that the source of the power of Parliament to enact a law relating to the establishment of the Debts Recovery Tribunal is Entry 11-A of List III which pertains to "*administration of justice; constitution and organisation of all courts, except the Supreme Court and the High Courts*". In our opinion, Entry 45 of List I would cover the types of legislation now enacted. Entry 45 of List I relates to "banking". Banking operations would, *inter alia*, include accepting of loans and deposits, granting of loans and recovery of the debts due to the bank. There can be little doubt that under Entry 45 of List I, it is Parliament alone which can enact a law with regard to the conduct of business by the banks. Recovery of dues is an essential function of any banking institution. In exercise of its legislative power relating to banking, Parliament can provide the mechanism by which monies due to the banks and financial institutions can be recovered. The Tribunals have been set up in regard to the debts due to the banks. The special machinery of a Tribunal which has been constituted as per the preamble of the Act, "*for expeditious adjudication and recovery of debts due to banks and financial institutions and for matters connected therewith or incidental thereto*" would squarely fall within the ambit of Entry 45 of List I. As none of the items in

> the lists are to be read in a narrow or restricted sense, the term "banking" in Entry 45 would mean legislation regarding all aspects of banking including ancillary or subsidiary matters relating to banking. Setting up of an adjudicatory body like the Banking Tribunal relating to transactions in which banks and financial institutions are concerned would clearly fall under Entry 45 of List I giving Parliament specific power to legislate in relation thereto."

12. Similar view has been taken by a Constitution Bench of the Supreme Court in *Pandurang Ganpati Chaugule v. Vishwasrao Patil Murgud Sahakari Bank Ltd.* (2020) 9 SCC 215. After considering the previous judgments on the issue, the Supreme Court relying upon the previous judgment in Delhi High Court Bar Association (supra) held as under in para 72 and 73 of the judgment:-

> "72. In Delhi High Court Bar Assn. [Union of India v. Delhi High Court Bar Assn., (2002) 4 SCC 275] , this Court in the context of the RDB Act, 1993 held that Parliament has the legislative competence to enact the Act. "Banking" in List I Entry 45 would comprehend legislation in respect of matters ancillary or subsidiary to it. Parliament can enact a law regarding the conduct of the banking business, which includes recovery of banks' dues, and for that purpose, set up the adjudicatory body like the Banking Tribunal is permissible. Thus, the establishment of the Debts Recovery Tribunal under the RDB Act, 1993, was upheld. The Court opined: (SCC pp. 285-86, para 14)
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> "14. The Delhi High Court [Ed.: The reference appears to be to Delhi High Court Bar Assn. v. Union of India, 1995 SCC OnLine Del 215 : AIR 1995 Del 323.] and the Guwahati High Court have held that the source of the power of Parliament to enact a law relating to the establishment of the Debts Recovery Tribunal is Entry 11-A of List III which pertains to "administration of justice; constitution and organisation of all courts, except the Supreme Court and the High Courts". In our opinion, List I Entry 45 would cover the types of legislation now enacted. List I Entry 45 relates to "banking". Banking operations would, inter alia, include accepting of loans and deposits, granting of loans and recovery of the debts due to the bank. There can be little doubt that under List I Entry 45, it is Parliament alone which can enact a law with regard to the conduct of business by the banks. Recovery of dues is an essential function of any banking institution. In exercise of its legislative power relating to banking, Parliament can provide the mechanism by which monies due to the banks and financial institutions can be recovered. The Tribunals have been set up in regard to the debts due to the banks. The special machinery of a Tribunal

> which has been constituted as per the preamble of the Act, 'for expeditious adjudication and recovery of debts due to banks and financial institutions and for matters connected therewith or incidental thereto' would squarely fall within the ambit of List I Entry 45. As none of the items in the Lists are to be read in a narrow or restricted sense, the term "banking" in Entry 45 would mean legislation regarding all aspects of banking including ancillary or subsidiary matters relating to banking. Setting up of an adjudicatory body like the Banking Tribunal relating to transactions in which banks and financial institutions are concerned would clearly fall under List I Entry 45 giving Parliament specific power to legislate in relation thereto."(emphasis in original)
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> 73. In view of the aforesaid discussion, we are of the opinion that recovery of dues would be an essential function of any banking institution and Parliament can enact a law under List I Entry 45 as the activity of banking done by cooperative banks is within the purview of List I Entry 45. Obviously, it is open to Parliament to provide the remedy for recovery under Section 13 of the SARFAESI Act. Cooperative bank's entire operation and activity of banking are governed by a law enacted under List I Entry 45 i.e. the BR Act, 1949, and the RBI Act under Entry 38 of List I."

13. From the authoritative pronouncement of law by the Supreme Court in the matter in issue it is no longer in doubt that the constitution of Debt Recovery Tribunal is in exercise of powers by the Parliament under entry 45 of list I i.e. 'Banking'. Similar view has been taken by this Court in *Special Appeal No.552 of 2013 (Ballia-Etawah Gramin Bank vs. Dr. Ramji Properties & Hotels P. Ltd.), Special Appeal No.814 of 2009 (U.P.S.I.D.C. vs. Debts Recovery Appellate Tribunal, Allahabad), Special Appeal Defective No.136 of 2019 (Pradeep Tekriwal vs. Debt Recovery Appellate Tribunal)* and *Special Appeal Defective No.735 of 2014 (Oriental Bank of Commerce vs. Debts Recovery Appellate Tribunal)*.

14. Once the tribunal has been constituted in exercise of powers under the Union list, the exclusion clause curtailing entertainment of appeal arising out of orders passed by tribunals constituted under List II or List III would not apply. So far as the contrary opinion of the Division Bench in *Special*

Appeal Defective No.356 of 2022 (Tarun Kumar and another vs. Indian Bank and others) is concerned, we find that the attention of the Court was not invited to the fact that Debts Recovery Appellate Tribunal has been constituted by the Parliament under the union list nor the Supreme Court judgment in the case of Delhi High Court Bar Association (supra) was placed before the Court and, therefore, it cannot be treated as a binding precedent. We, therefore, hold that the present special appeal is maintainable and the objection of the respondents is turned down.

15. Coming to the facts of the case we find that the appellant had availed of loan from the respondent-petitioner i.e. Bank of Maharashtra and had defaulted. It is admitted that notice under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'Act of 2002') were issued to the appellant on 5.4.2016. Steps were initiated by the bank referable to Section 13(4) of the Act of 2002 and twice notices were issued for sale of the property but such attempts ultimately failed. This was so on account of the orders passed by the competent tribunal setting aside the auction proceedings. The bank proceeded to issue notice to the borrower under Rule 8(6) of the Rules framed under the Act of 2002 afresh vide notice dated 16.8.2018. This notice is addressed to Sharp Industries through its proprietor Raju Solanki with the address specified as F-144, Sector 10, Faridabad, Haryana. The other addressee of the notice included the wife of the proprietor Smt. Prabha Solanki whose address was shown as H. No.1731, Sector 9, Faridabad, Haryana. The third addressee was Mrs. Anil Kumari whose address was similar to the second addressee.

16. There is an issue as to whether such notices have actually been served on the addressee or not, which shall be dealt with a little later. It transpires that the bank also proceeded to publish auction notice in newspapers Financial Express and Jansatta on 19.8.2018. The publication contained reference to various properties including the property of the present appellant description whereof is extracted hereinafter:-

48.	1. M/s Sharp Industries/Prop Sh. Raju Solanki Plot No. 225, Sec- 7, SIDCUL, Haridwar, 249402, Uttarakhand 2. Mrs. Anil Kumari w/o Mr. Raj Kumar House No. 17312 Sec-9 Faridabad-121006 3. Mrs. Prabha Solanki w/o Mr. Raju Solanki House No. 1731 Sec-9 Faridabad -121006 Haryana	67	Composite auction of following properites (a) Industrial Unit (Land and Building) in a single storey construction built on a Plot admeasuring 900 Sq. mt. (20m x 45m) (Approx) situated at Plot No 225, Sector- 7, Integrated Industrial estate (SIDCUL), Distt. Haridwar (U.K.). It has coverage of 427 Sq. mt. (Approx). The Unit Consists of one large production hall, office hall, Office area, Guard Room and Open Setbacks covered with temporary structures. (b) Plant and Machinery situated at Plot No 225, Sector-7, Integrated Industrial estate (SIDCUL), Distt. Haridwar (U.K.)	Rs.9.57 Lakh	Rs.95.69 Lakh
				(The property is in our Actual Possession	
				Date of E-Auction	10.09.2018
				Time of E-Auction on that Date	11.00 AM to 01.00 PM (IST) Unlimited extension of 5 Minutes each.
		68	Plant and Machinery situated at Plot No 225, Sector-7, Integrated Industrial estate (SIDCUL), Distt. Haridwar (U.K.)	Rs.2.07 Lakh	Rs.20.69 Lakh
				(The property is in our Actual Possession	
				Date of E-Auction	10.09.2018
				Time of E-Auction on that Date	11.00 AM to 01.00 PM (IST)
				Unlimited extension of 5 Minutes each.	
Outstanding Amount (in Rs.)- 2,32,03,637/- (Rupees Two Crore Thirty Two Lakh Three Thousand Six Hundred Seven Only) PLUS further interest thereon w.e.f.05.04.2016 less recovery if any after 05.04.2016					

17. It appears that the bank proceeded with the auction of the property and ultimately items A and B specified in the auction notice have been put to auction for a consideration of Rs. 95.69 lakhs. According to the appellant, the minimum reserve price of item A i.e. Plant and Building was Rs. 95.69 lakhs while item B i.e. Plant and Machinery was valued at Rs. 20.69 lakhs. Both the properties, however, have been put to auction for a consideration of Rs. 95.65 lakhs. The proceedings of auction were put to challenge before the D.R.T. by the appellant in S.A. No.59 of 2018 which was dismissed on

31.1.2019. An appeal was then instituted by the appellant before the appellate tribunal being Regular Appeal No.17 of 2019 before Debts Recovery Appellate Tribunal (DRAT), Allahabad. The tribunal has allowed the appeal of the appellant vide order dated 15.12.2020 by returning a specific finding in para 16 of the judgment as per which notice required to be served upon the borrower in terms of Rule 8(6) of the Rules of 2002 had not been served. Para 16 of the order passed by the appellate tribunal is reproduced hereinafter:-

> "16. Coming to the issue of service of sale notice, Rule 8(6) of the Rules, 2002 mandates that a 30 days' sale notice is required to be served to the borrower/guarantor before auction in addition to publication of the sale notice in the newspapers and affixation on the premises. On this aspect, the Tribunal below has observed that the Bank has sent the notices through Registered Post and one notice was also sent to the wife of the appellant and accordingly, recorded that the "reasonable opportunity" of service has been provided. But no reasoning for such inference was given. Further, a mere knowledge of the sale is not sufficient, rather compliance of the provisions of the statute is required to be made. This is the bounden duty of the secured creditor to serve a 30 days' notice so as to provide the opportunity to the borrower/guarantors for redemption of the property. In the instant case, the Bank has failed to prove that the notices sent by the Bank were ever served to the appellant or the other guarantors."

18. The appellate tribunal also took note of the fact that though notice were sent to the appellant on the initial address but such service was not found sufficient as the appellant had already intimated change of address to the bank by way of an e-mail dated 13.11.2017. The service of notice on the previous address was thus not found sufficient as the postal report stated that none was found on such address. Facts recited in para 17 of the judgment of the appellate tribunal are also extracted hereinafter:-

> "17. Although the presumption can be drawn under section 27 of the General Clauses Act that the notices sent through Registered Post were served to the addressees, if it is not returned unserved or not rebutted by any evidence by the

> addressees. In the case at hand, the Bank has placed on record the postal receipts demonstrating the dispatch of the notices to Raju Solanki (appellant), Prabha Solanki and Anil Kumar (Guarantors). The said sale notice was sent to the appellant on the address showing as 144, Sector 10 Faridabad, which was old address of the appellant. The appellant had conveyed the new address through e-mail dated 13.11.2017, which was stated to be 1802, Sector-9, Faridabad. Thereafter, the Bank got the summons served on the appellant in the O.A. on the new address. Further, the Bank has sent the reply dated 14.09.2018 to the appellant in response to his e-mail dated 11.09.2018 on the same new address. The Bank has not denied categorically that the new address was not conveyed to the Bank or it was not changed in the Bank's record. Admittedly, no notice was sent on the latest address of the appellant. Thus, the Bank has utterly failed to send the notice on the known address of the appellant."

19. Aggrieved by the order of the appellate tribunal the bank filed the writ petition which has since been allowed by the learned Single Judge vide judgment/order impugned. Learned Single Judge has noticed the fact that the borrower in an e-mail sent on 5.9.2018 had requested the bank not to proceed with the auction and had also referred to the date of auction as being 10.9.2018. Learned Single Judge relying upon the judgment of the Supreme Court in Bank of Baroda vs. M/s Karwa Trading Company & Another, (2022) 5 SCC 168 and L&T Housing Finance vs. Trishul Developers, (2020) 10 SCC 659 proceeded to return a finding that the appellant was in fact aware of the date fixed for auction and, therefore, mere fact that notice did not specify the date of auction had caused no prejudice to the appellant. Aggrieved by the judgment of learned Single Judge, the appellant has filed the present appeal.

20. On behalf of the appellant it is contended that Rule 8(6) of the Rules of 2002 contains a wholesome procedure which adequately protects the right of the borrower. It confers right of redemption on borrower and any failure to comply with such

procedure would invalidate the auction proceedings. Learned counsel for the appellant has placed reliance upon a judgment of the Supreme Court in Mathew Verghese vs. M Amritha Kumar & others, (2014) 5 SCC 610. wherein the Supreme Court has observed as under in para 53:-

> "53. We, therefore, hold that unless and until a clear 30 days' notice is given to the borrower, no sale or transfer can be resorted to by a secured creditor. In the event of any such sale properly notified after giving 30 days' clear notice to the borrower did not take place as scheduled for reasons which cannot be solely attributable to the borrower, the secured creditor cannot effect the sale or transfer of the secured asset on any subsequent date by relying upon the notification issued earlier. In other words, once the sale does not take place pursuant to a notice issued under Rules 8 and 9, read along with Section 13(8) for which the entire blame cannot be thrown on the borrower, it is imperative that for effecting the sale, the procedure prescribed above will have to be followed afresh, as the notice issued earlier would lapse. In that respect, the only other provision to be noted is sub-rule (8) of Rule 8 as per which sale by any method other than public auction or public tender can be on such terms as may be settled between the parties in writing. As far as sub-rule (8) is concerned, the parties referred to can only relate to the secured creditor and the borrower. It is, therefore, imperative that for the sale to be effected under Section 13(8), the procedure prescribed under Rule 8 read along with Rule 9(1) has to be necessarily followed, inasmuch as that is the prescription of the law for effecting the sale as has been explained in detail by us in the earlier paragraphs by referring to Sections 13(1), 13(8) and 37, read along with Section 29 and Rule 15. In our considered view any other construction will be doing violence to the provisions of the SARFAESI Act, in particular Sections 13(1) and (8) of the said Act."

21. The appellant also places reliance upon a recent judgment of the Supreme Court in Celir LLP vs. Bafna Motors (Mumbai) Pvt. Ltd. and others being Civil Appeal No.5542-5543 of 2023 decided on 21.9.2023. The Supreme Court in Celir LLP (supra) has considered the scheme contained in Section 13 of the Act of 2002 with reference to the right of redemption available to a borrower in law. The amendment incorporated in Section 13(8) of the Act of 2002 w.e.f. on 1.9.2016, as well as its import has been noticed with reference to the law laid down in various

judgments of the Supreme Court. The Court in Celir LLP (supra) referred to the judgments rendered by Andhra Pradesh High Court in Sri Sai Annadhatha Polymers & another vs. Canara Bank rep. by its Branch Manager, Mandhapalle reported in 2018 SCC Online Hyd 178 as well as judgment of the High Court of Telangana in the case of K.V.V. Prasad Rao Gupta vs. State Bank of India reported in 2021 SCC OnLine TS 328. Para 51 & 52 of the judgment of the Supreme Court in Celir LLP (supra) are reproduced hereinafter:-

> "51. The true purport and scope of the amended Section 13(8) of the SARFAESI Act was looked into by the Andhra Pradesh High Court in Sri. Sai Annadhatha Polymers & Anr. v. Canara Bank rep. by its Branch Manager, Mandanapalle reported in 2018 SCC OnLine Hyd 178. The court took the view that in accordance with the unamended Section 13(8) of the SARFAESI Act, the right of the borrower to redeem the secured asset was available till the sale or transfer of such secured asset. The court went on to say that the amended provisions of Section 13(8) of the SARFAESI Act brought in a radical change inasmuch as the right of the borrower to redeem the secured asset would stand extinguished thereunder on the very date of publication of the notice for public auction under Rule 9(1) of the Rules of 2002. It is pertinent to note that the High Court has referred to and relied upon the decision of this Court in Mathew Varghese (supra). The relevant observations made by the High Court are reproduced hereinbelow:
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> "6. In terms of the amended provisions of Section 13(8) of the SARFAESI Act, the right of redemption given to the borrower would expire upon publication of such a notice. However, Rule 8(6) of the Rules of 2002, as interpreted by the Supreme Court in Mathew Varghese v. M. Amritha Kumar [(2014) 5 SCC 610], stipulates that the thirty day notice period mentioned therein is for the purpose of enabling the borrower to redeem his property. Significantly, this provision remains unaltered. Therefore, this statutory notice period of thirty days is sacrosanct and deviation therefrom would curtail the statutory right of redemption available to the borrower. However, in terms of the amended Section 13(8) of the SARFAESI Act, once the notice under Rule 9 of the Rules of 2002 is published, the said right stands extinguished.
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> xxx xxx xxx
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> 20. In the light of the aforestated changes in the statutory scheme, certain crucial aspects may be noted. As per the unamended Section 13(8) of the SARFAESI Act, the right of the borrower to redeem the secured asset was available till the sale or transfer of such secured asset. Case law consistently

held to the effect that a sale or transfer is not completed until all the formalities are completed and there is an effective transfer of the asset sold. In consequence, the borrower's right of redemption did not stand terminated on the date of the auction sale of the secured asset itself and remained alive till the transfer was completed in favour of the auction purchaser, by registration of the sale certificate and delivery of possession of the secured asset. The recent judgment of the Supreme Court in ITC LIMITED v. BLUE COAST HOTELS LIMITED also affirmed this legal position.

21. However, the amended provisions of Section 13(8) of the SARFAESI Act bring in a radical change, inasmuch as the right of the borrower to redeem the secured asset stands extinguished thereunder on the very date of publication of the notice for public auction under Rule 9(1) of the Rules of 2002. In effect, the right of redemption available to the borrower under the present statutory regime stands drastically curtailed and would be available only till the date of publication of the notice under Rule 9(1) of the Rules of 2002 and not till completion of the sale or transfer of the secured asset in favour of the auction purchaser.

… xxx xxx xxx

23. Therefore, even after the amendment of Section 13(8) of the SARFAESI Act, a secured creditor is bound to afford to the borrower a clear thirty day notice period under Rule 8(6) to enable him to exercise his right of redemption. In consequence, a notice under Rule 9(1) of the Rules of 2002 cannot be published prior to expiry of this thirty day period in the new scenario, post- amendment of Section 13(8) of the SARFAESI Act, as such right of redemption would stand terminated immediately upon publication of the sale notice under Rule 9(1) of the Rules of 2002. The judgment of the Supreme Court in CANARA BANK v. M. AMARENDER REDDY, which was rendered in the context of the unamended provisions, would therefore have no application to the post-amendment scenario in the light of the change brought about in Section 13(8). To sum up, the post-amendment scenario inevitably requires a clear thirty day notice period being maintained between issuance of the sale notice under Rule 8(6) of the Rules of 2002 and the publication of the sale notice under Rule 9(1) thereof, as the right of redemption available to the borrower in terms of Rule 8(6) of the Rules of 2002, as pointed out in MATHEW VARGHESE, stands extinguished upon publication of the sale notice under Rule 9(1).” (Emphasis supplied)

52. The amended Section 13(8) of the SARFAESI Act was also looked into by the High Court of Telangana in the case of K.V.V. Prasad Rao Gupta v. State Bank of India reported in 2021 SCC OnLine TS 328 and relying on the decision of the Andhra Pradesh High Court in the case of Sri. Sai Annadhatha Polymers (supra), the court observed in para 21 as under:

“21. Thus from the above judgments it is clear that under Rule 8(6) of the Rules of 2002, the petitioners are entitled for a thirty day notice period enabling them to clear the loan and to

redeem the property as envisaged under Section 13(8) of the SARFAESI Act, and that if they fail to repay the amount within the stipulated period, after expiry of said period of 30 days, the secured creditor is entitled to issue publication of sale notice under Rule 9(1), and that on publication of such notice, the right of the borrower to redeem the property stands extinguished." (Emphasis supplied) "

22. After elaborate consideration of the scheme the position in law has been summarised by the Supreme Court in para 105 of the judgment in Celir LLP (supra), which is reproduced hereinafter:-

"105. We summarise our final conclusion as under:

(i) The High Court was not justified in exercising its writ jurisdiction under Article 226 of the Constitution more particularly when the borrowers had already availed the alternative remedy available to them under Section 17 of the SARFAESI Act.

(ii) The confirmation of sale by the Bank under Rule 9(2) of the Rules of 2002 invests the successful auction purchaser with a vested right to obtain a certificate of sale of the immovable property in form given in appendix (V) to the Rules i.e., in accordance with Rule 9(6) of the SARFAESI.

(iii) In accordance with the unamended Section 13(8) of the SARFAESI Act, the right of the borrower to redeem the secured asset was available till the sale or transfer of such secured asset. In other words, the borrower's right of redemption did not stand terminated on the date of the auction sale of the secured asset itself and remained alive till the transfer was completed in favour of the auction purchaser, by registration of the sale certificate and delivery of possession of the secured asset. However, the amended provisions of Section 13(8) of the SARFAESI Act, make it clear that the right of the borrower to redeem the secured asset stands extinguished thereunder on the very date of publication of the notice for public auction under Rule 9(1) of the Rules of 2002. In effect, the right of redemption available to the borrower under the present statutory regime is drastically curtailed and would be available only till the date of publication of the notice under Rule 9(1) of the Rules of 2002 and not till the completion of the sale or transfer of the secured asset in favour of the auction purchaser.

(iv) The Bank after having confirmed the sale under Rule 9(2) of the Rules of 2002 could not have withhold the sale certificate under Rule 9(6) of the Rules of 2002 and enter into a private arrangement with a borrower.

(v) The High Court under Article 226 of the Constitution could not have applied equitable considerations to overreach

> the outcome contemplated by the statutory auction process prescribed under the SARFAESI Act.
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> (vi) The two decisions of the Telangana High Court in the case of Concern Readymix (supra) and Amme Srisailam (supra) do not lay down the correct position of law. In the same way, the decision of the Punjab and Haryana High Court in the case of Pal Alloys (supra) also does not lay down the correction position of law.
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> (vii) The decision of the Andhra Pradesh High Court in Sri Sai Annadhatha Polymers (supra) and the decision of the Telangana High Court in the case of K.V.V. Prasad Rao Gupta (supra) lay down the correct position of law while interpreting the amended Section 13(8) of the SARFAESI Act."

23. We have heard Sri Kumar Kartikeya and Vinayak Mithal for the appellant and Ms. Shruti Malviya for the Bank; Sri Vivek Yadav, Advocate has appeared for the auction purchaser and have perused the material on record.

24. In the facts of the present case, taking of loan by the appellant as well as default in its repayment is admitted. It is also not in dispute that notices were served upon the appellant in the year 2016 itself under Section 13(2) of the Act of 2002. It is also undisputed that despite such service of notice the dues were not cleared by the appellant. Appropriate action referable to Section 13(4) of the Act of 2002 was also taken with symbolic possession of the property being taken by the bank in the year 2016 and physical possession was also taken pursuant to orders passed by the District Magistrate under Section 14 on 28.3.2017. The appellant, therefore, was continuously aware with regard to the steps initiated against it for recovery of the amount due to the bank. The only submission urged on behalf of the appellant is that the right of redemption available to the appellant in terms of Section 13(8) read with Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 has not been extended to the appellant. This argument is raised relying upon the finding returned by the

Debt Recovery Appellate Tribunal as per which the bank had been informed by the proprietor about change of its address and no notices were sent on such changed address of the appellant. This finding returned by the appellate forum has not been reversed by the writ court. The writ court has merely observed that since the appellant had acknowledged information with regard to auction proceedings and had specifically admitted having knowledge of the date of auction as 10.9.2018, therefore, the requirement of notice was sufficiently met. On behalf of the appellant, it is argued that service of notice upon the borrower in terms of Section 13 of the Act of 2002 read with Rule 8(6) of the Rules of 2002 has a distinct purpose and object to achieve. It is submitted that the Act contemplates opportunity being granted to the borrower to redeem its property by depositing the defaulted amount alongwith interest. This opportunity is available till a notice for sale of the property is issued under Rule 9(1) of the Rules. It is, therefore, submitted that non-service of notice in terms of Section 13(4) read with Rule 8(6) of the Rules of 2002 has caused serious prejudice to the appellant, inasmuch as its right of redemption is lost by non-service of notice. It is also argued that even when fresh steps towards sale is proposed to be initiated by the Bank a notice under rule 8(6) of the Rules of 2002 would be required to be served so that the borrower could ensure right of redemption.

25. The order passed by learned Single Judge is defended by Ms. Malviya, who submits that the appellant was throughout aware of its liability to the bank and as the appellant in its e-mail had acknowledged the date of auction as such no prejudice is caused to the appellant even if the notice were not sent on the changed address. It is also submitted that the

change of address was informed only for the proprietor Raju Solanki and not for other two persons, who were served with the notice on the original address. Attention of the Court has been invited to the observations made by learned Single Judge in para 15 of the judgment as per which the borrower has not come up with any proposal to repay the outstanding amount even till the date of disposal of the writ. It is, therefore, submitted that the appellant is not entitled to the benefit claimed in the appeal even if the service of notice has not been effected on the changed address of the borrower.

26. In order to consider the rival submissions advanced, it would be appropriate to take note of the statutory scheme contained in the Act No. 54 of 2002 as well as the Security Interest (Enforcement) Rule, 2002. Section 13(2) contemplates service of notice on the borrower where there is a default in repayment of secured debt. Sub-section 3 of Section 13 requires the notice referred to in sub-section 2 to furnish details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of the secured debts. Sub-section 3A of Section 13 provides an opportunity of raising objection/ representation. Sub-section 4 of Section 13 provides that where there is a failure on part of the borrower to discharge its liability the secured creditor may take recourse to one or more of the measures contemplated in any of the sub-sections of Section 13(4). The action contemplated under sub-section 4 includes the right to take possession as well as right to transfer by way of lease, assignment or sale for realizing the secured asset. Section 13(4) of the Act has to be given effect to in the manner stipulated in the Rules of 2002. Where the secured creditor proceeds to sell the immovable secured asset the

observance of Rule 8 would become necessary. Rule 8(6) of the Rules is relevant in the facts of the present case and is reproduced hereinafter:-

> "(6) The authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5): Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which shall include,—
>
> (a) The description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;
>
> (b) the secured debt for recovery of which the property is to be sold;
>
> (c) reserve price, below which the property may not be sold;
>
> (d) time and place of public auction or the time after which sale by any other mode shall be completed;
>
> (e) depositing earnest money as may be stipulated by the secured creditor;
>
> (f) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property."

27. It is by now well settled that service of notice upon the borrower in terms of Rule 8(6) is mandatory. Law in this regard stands crystallized by the Supreme Court in Mathew Verghese (supra) in para 53, which is already quoted above.

28. The law laid down in Mathew Verghese (supra) has consistently been followed in other judgments [see: Celir LLP (supra)]. We may note that Section 13(8) of the Act of 2002 has been amended in the year 2016 and the two judgments, referred to above, consider the pre-amended and post-amended provisions of Section 13(8) and the course required to be followed by the secured creditor stands specified. The observation made in Mathew Verghese (supra) that the procedure contemplated in Section 13(8) read with Rules 8(6) and 8(9) is mandatory has been reiterated in Celir LLP (supra).

29. Right of redemption is an important right available to a borrower, who is in default. Such important right cannot be taken away and any action taken in its breach cannot be approved of.

30. In the facts of the present case, it is apparent that the borrower had sent an e-mail on 5.9.2018 acknowledging the fact that auction was proposed to be held on 10.9.2018. This e-mail does not refer to the notice under Section 8(6) and the appellate tribunal observed that even if such e-mail has the effect of acknowledging the date of auction, by the borrower, yet it cannot be a substitute for issuance of notice upon the borrower in terms of Rule 8(6). Going by the scheme of the Act, we are inclined to endorse the view so taken by the appellate tribunal.

31. It is not in issue that notice has not been served upon the borrower under Rule 8(6) on the amended address of the proprietor. We are not in agreement with the view taken by the learned Single Judge that merely because appellant had the knowledge of the date of auction it would mean that non-adherence with the requirement of notice under Rule 8(6) would stand obliterated. On this aspect we are inclined to endorse the view taken by the appellate tribunal that non-service of notice upon the appellant would be a material irregularity and the subsequent action of the bank cannot be approved of.

32. It is, however, discernible that after the auction was conducted on 10.9.2018 the auction purchaser has deposited the entire amount and has also been issued a sale certificate. This was done in September, 2018. A period of more than five years has expired since then. The auction purchaser is before

this Court and it is submitted on its behalf that for no fault of the auction purchaser it has been denied the fruits of the auction settled in its favour.

33. In the facts of the case, the rival claim of the parties as well as equities emanating therefrom will have to be appropriately balanced. While the right of the borrower to redeem the property has to be respected yet in our endeavor to do so, we cannot lost sight of the interest of the auction purchaser altogether.

34. The right of redemption only allows an opportunity to the borrower to repay the entire dues and redeem the secured asset. We are of the view that this Court must ascertain as to whether the appellant is willing to opt for the right of redemption and for such purposes whether it is willing to offer repayment of the dues alongwith interest on the date of notice under Rule 8(6). Records reveal that a sum of Rs. 2,32,03,637/- was the amount due and payable by the appellant as on 5.4.2016, as per the notice sent on the incorrect address i.e. on 16.8.2018. This liability has already been specified. We are of the view that an opportunity ought to be given to the appellant to exercise its right of redemption by offering to pay the entire amount due to the bank in terms of the notice dated 16.8.2018. For such purposes we call upon the appellant to produced a bank draft/banker’s cheque for the aforesaid amount within a period of thirty days which is the statutory time frame available to a borrower for redemption of the secured asset. It is provided that in the event appellant exercises such right this Court will nullify the subsequent acts in terms of the order passed by the appellate tribunal.

35. Let this matter appear once again as fresh on 5.2.2024, in

order to extend an opportunity to the appellant to avail its right of redemption of secured asset.

Order Date :- 5.1.2024
RA