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IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
O.O.C.J.

WRIT PETITION (L) NO. 3880 OF 2020

Radhika Rajesh Agarwal .. Petitioner  
**Versus**  
Union of India and Ors. .. Respondents

Mr. Subhash Jha a/w Mr. Hare Krishna Mishra and Mr. Siddharth Jha i/by Law Global for the Petitioner

Mr. Nainesh Amin i/b. N.N. Amin & Co. for Respondent No.2

Mr. Mayur Khandeparkar i/by Khan Javed Akhtar for Respondent Nos. 3 and 4

CORAM : NITIN JAMDAR &  
MILIND N. JADHAV, JJ.

DATE : 5 NOVEMBER 2020.  
(Through Video Conferencing)

JUDGMENT (PER MILIND N. JADHAV, J.):

1. Heard.
2. The petition being discussed on the ground of alternate remedy, so no question of issuing Rule.
3. This writ petition has been filed under Article 226 of the Constitution of India by the Petitioner seeking to challenge sale of two flats i.e. flat Nos. 801 and 802 situated in Shivtapi Building along with two car parking spaces on the third podium level at Gamdevi, Mumbai (hereinafter referred to as '**the two flats**' ) in

favour of Respondent Nos.3 and 4 being declared as the highest / successful bidder in the e-auction conducted by Respondent No.2 Bank. Petitioner is the second highest bidder.

**4.** Petitioner has challenged the bidding process as being compromised by Respondent No.2 Bank in collusion and connivance with Respondent Nos.3 and 4 resultantly denying the Petitioner an opportunity to better the highest bid and has invoked the extra ordinary jurisdiction of this Hon'ble Court.

**5.** Before we advert to the pleadings and submissions advanced by the parties, it would be apposite to briefly state the relevant facts necessary for adjudication of the present petition.

5.1. On 20 August 2020, Respondent No.2 Bank, *inter alia*, invited bids in respect of sale of the two flats. Scheduled date for auction in the public advertisement was 15 September 2020 between 11:00 a.m. to 3:00 p.m.. Both flats were amalgamated and a combined reserve price of Rs.8,50,00,000.00 was fixed. EMD was fixed at 10% of the reserve price.

5.2. Petitioner, represented by her brother namely Ujwal Agarwal, filled in the physical form on 14 September 2020 to participate in the e-auction and on 15 September 2020 deposited the EMD of Rs.85,00,000.00 with Respondent No.2 Bank.

5.3. 12 bids were initially received out of which 4 bids were rejected.

5.4. According to the Petitioner on 15 September 2020, while the bidding process was taking place online, the system stopped functioning at 17:57 hrs. At that time, Respondent Nos.3 and 4 who had jointly bid Rs.9,23,00,000.00 was the highest bidder and the Petitioner who had bid Rs.9,22,00,000.00 was the second highest bidder. Petitioner desired to better the bid of Respondent Nos.3 and 4 but because of the system malfunction, Petitioner could not do so.

5.5. On 16 September 2020, Petitioner learnt that Respondent Nos.3 and 4 were obtaining housing loan for the above purchase. Respondent No.2 Bank refunded the EMD of Rs.85,00,000.00 to Petitioner.

5.6. Petitioner's brother repeatedly called upon the officials of Respondent No.2 Bank on phone and informed them that the Petitioner wanted to increase the bid and because of the system malfunction could not do so.

5.7. On 18 September 2020 father and brother of Petitioner submitted a handwritten application to Respondent No.2 Bank stating that Petitioner was willing to offer a sum of Rs.9,75,00,000.00 as revised bid in respect of

the two flats and called upon the bank to accept the same since it was higher by Rs.52,00,000.00 than the highest bid offered by Respondent Nos.3 and 4. On the same date, Petitioner forwarded a copy of the letter to the Regional and Zonal Offices of the Respondent No.2 Bank and on 21 September 2020 filed the present petition.

**6.** Mr. Subhash Jha, learned counsel appearing on behalf of the Petitioner vehemently submitted that the facts and circumstances leading to the filing of the present case, denying an opportunity to the Petitioner were so gross so as to shock the conscious of this Court that the Petitioner was compelled to invoke the extraordinary jurisdiction and urged the Court to set aside the sale of the two flats. According to the Petitioner entire bidding process was replete with malafides, collusion and connivance between the Respondent No.2 Bank and Respondent Nos.3 and 4 and a systematic fraud was practiced by manipulating the bidding process denying the Petitioner an opportunity to bid higher resultantly giving an unfair and undue advantage to Respondent Nos.3 and 4. Petitioner submitted that initially Respondent Nos.3 and 4 had bid separately in respect of the two flats and had deposited the EMD of Rs.85,00,000.00 each on 13 September 2020. Respondent No.4 thereafter withdrew from the auction process on 14 September 2020 and Respondent No.2 Bank accordingly intimated the same to 'Auction Tiger' portal responsible for generating the passwords and sharing the same with the bidders. Respondent No.2 Bank thereafter colluded and allowed Respondent Nos.3 and 4 to jointly

give a single bid in respect of the two flats. Thus, there was a deviation from the terms and conditions of the auction / tender process. Petitioner submitted that while the bidding was in process on 15 September 2020 at 17:57 hrs. the system collapsed. At that time, Respondent Nos.3 and 4 had jointly bid Rs.9.23 crores and the Petitioner was deprived of giving a higher bid. Petitioner has stated that her brother and father who had participated in the auction process and thereafter received threatening calls, calling upon them to withdraw from the auction process and desist from pursuing the same. Petitioner submitted that on 15 September 2020 at 17.44 hrs the Petitioner had bid Rs.9,22,00,000.00. This bid was bettered by Respondent Nos.3 and 4 jointly to Rs.9,23,00,000.00 at 17:46 hrs. Thereafter, before the Petitioner could offer a higher bid, at 17:57 hrs the network / system of e-auction collapsed and the Petitioner was deprived of bettering the last bid. Further, Petitioner submitted that on 19 September 2020 Respondent No.2 Bank addressed a letter jointly to Respondent Nos.3 and 4 declaring them as successful bidder in respect of the two flats, but however, on 30 September 2020 Respondent No.2 Bank addressed two separate letters to Respondent Nos.3 and 4 in respect of flat No.801 addressed to Respondent No.3 and for flat No.802 addressed to Respondent No.4, *inter alia*, calling upon them to deposit the balance amount. Lastly, Petitioner submitted that the terms and conditions of e-auction and the manner in which the process of e-auction was conducted by 'Auction Tiger' portal owned by E-Procurement Technologies Limited and one of their employee namely Mr. Gnanaprakash was extraneous and smacked

of malpractice and fraud. Petitioner in support of the above facts submitted that in so far as Section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter for brevity sake referred to as '**the SARFAESI Act**') is concerned, only provided a remedy to a person who is aggrieved by the measures taken by the secured creditor or his authorized officer under Section 13(4) in relation to secured assets of the borrower. Petitioner relied on Rule 9(5) of the SARFAESI Rules and submitted that it was applicable in the facts of the present case considering that since Respondent Nos.3 and 4 had originally applied separately as bidders, the deposits made by them ought to have been forfeited and the two flats ought to have been resold subsequently. Petitioner fairly argued that though he was conscious of the provisions of Section 17(1) of the SARFAESI Act, which holds jurisdiction, the facts and circumstances spelt out above were gross and unconscionable such as to invoke the extraordinary jurisdiction under Article 226 of the Constitution of India.

**6.1.** Petitioner referred to and relied upon paragraph No.25 read with paragraph No.31 in the case of *Agarwal Tracom Pvt. Ltd. vs Punjab National Bank*<sup>1</sup>, in support of the above submission. The said paragraph Nos. 25 and 31 read thus:

*"25. Rule 9(6) empowers the authorized officer to issue sale certificate in favour of the purchaser. Rule 9(9) then empowers the authorized officer to deliver the properties to the purchaser whereas Rule 9(10) empowers the authorized officer to mention in sale certificate that the property is free from encumbrances.*

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<sup>1</sup> (2018) 1 SCC 626

31. *The auction purchaser (appellant herein) is one such person, who is aggrieved by the action of the secured creditor in forfeiting their money. The appellant, therefore, falls within the expression "any person" as specified under [Section 17\(1\)](#) and hence is entitled to challenge the action of the secured creditor (PNB) before the DRT by filing an application under [Section 17\(1\)](#) of the SARFAESI Act.*

6.2. Petitioner submitted that the object of sale by public auction envisaged that a maximum price could be secured in respect of the property sold and in the conduct of the procedure adopted for such sale, there was no arbitrariness involved whatsoever. Petitioner in support of this proposition referred to the case of ***Lakshmanasami Gounder vs C.I.T. Selvamani And Ors***<sup>2</sup> and drew our attention to paragraph No.5 which reads thus:

*"5. ....The object thereby is an invitation to the public at large that the notified property would be brought to sale at that specified time and place and that they are invited to participate, if they so desire. To reiterate for emphasis and continuity that the object of the sale is to secure the maximum price and to avoid arbitrariness in the procedure adopted before sale and to prevent under- hand dealings in effecting sale and purchase of the debtor's property. As a responsibility as sale officer and a duty towards the debtor, the sale officer should conduct the sale strictly in conformity with the prescribed procedure under the statute and the rules as the case may be. Such due and wide publicity would relieve the debtor from the maximum liability he owes and payable to the creditor. This responsibility is not only salutary to vouchsafe bonafides in the conduct of the sale officer but also to ensure fairness in the procedure adopted in bringing the property of the debtor to sale. Considered from this perspective the non-compliance of Sec.35 i.e., omission to mention the place of sale would result in deprivation of the property to the debtor for an inadequate sale consideration due to absence of competing bidders. Thus, we hold that specification of the date and place of sale shall be mandatory. The forms either 7 or 7A are only procedural and they should be in conformity with Sec. 36. The form cannot prevail over the statute. The omission of specification of the place of sale in the form renders the sale not merely irregular but also invalid."*

6.3. Petitioner referred to the case of *Standard Chartered Bank Vs. Dharminder Bhoji and Ors*,<sup>3</sup> in the context of the jurisdiction

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<sup>2</sup> 1992 SCC (1) 91

<sup>3</sup> (2013) 15 SCC 341

under Section 17 of the SARFAESI Act and the need to exercise the extra ordinary jurisdiction under Article 226 of the Constitution of India. Petitioner drew our attention to paragraph Nos. 28 to 31 which read thus:

*"28. The learned Senior Counsel is also critical of the order passed by the High Court which has declined to address the core issue by stating that there was no need to exercise the extraordinary writ jurisdiction under Article 226 of the Constitution. The learned Senior Counsel would submit that the High Court has failed in its constitutional duty to scrutinise whether a liberty of the present nature could have been granted by the Tribunal, clothed with such special and restricted jurisdiction.*

*29. Presently to the spectrum of jurisdiction, Section 17 of the SARFAESI Act allows any person, including a borrower, aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by secured creditor to submit an application to DRT having jurisdiction in the matter within 45 days from the date such measures have been taken Sub-section (3) of Section 17 empowers DRT to question the action taken by the secured creditor and the transaction entered into by virtue of Section 13(4) of the SARFAESI Act. It has been held in Ashok Saw Mill that the legislature by virtue of incorporation of sub-section (3) in Section 17 has gone to the extent of vesting DRAT with authority to set aside a transaction including sale and to restore possession to the borrower in appropriate cases. Section 18 of the SARFAESI Act makes provision for an appeal to the appellate authority from any order made by the Debt Recovery Tribunal. The Debts Recovery Tribunal, needless to say, has the same jurisdiction as conferred under Section 17 of the RDB Act.*

*30. In this context, Section 19 of the SARFAESI Act is worth reproducing :*

***"19. Right of borrower to receive compensation and costs in certain cases** - If the Debts Recovery Tribunal or the Court of the District Judge, on an application made under Section 17 or Section 17-A or the Appellate Tribunal or the High Court on an appeal preferred under Section 18 or Section 18-A, holds that the possession of secured assets by the secured creditor is not in accordance with the provisions of this Act and rules made thereunder and directs the secured creditors to return such secured assets to the borrowers concerned, such borrower shall be entitled to the payment of such compensation and costs as may be determined by such Tribunal or the Court of the District Judge or Appellate Tribunal or the High Court referred to in Section 18-B."*

*31. We have reproduced the aforesaid section to point out that*



*the legislature has brought in this provision by way of substitution by Act 30 of 2004 with effect from 11-11-2004 to confer jurisdiction on DRT and DRAT to entertain a plea of the borrower for grant of compensation and costs."*

Petitioner argued the extent of the jurisdiction in invoking extra ordinary jurisdiction of the Civil Court and submitted that in the event if the action of a secured creditor is alleged to be fraudulent or the claim is so absurd and untenable in the facts of a case, it is permissible to bring action in the Civil Court. Petitioner submitted that even if an alternative remedy was available in the normal course as is in the given case in the DRT, still a writ under Article 226 of the Constitution of India can lie in some situations in order to render quick justice to a party. Petitioner submitted that DRT has no jurisdiction to go into this aspect of the case and it was only the writ Court which could decide the reliefs prayed for in the petition.

**6.4.** Petitioner argued that under the provisions of Rule 6 of the SARFAESI Rules, it was incumbent upon the authorized officer who sold the two flats to secure maximum sale price for the same after following the due process of law as envisaged in the said Rule before issuing the certificate of sale. That there was a statutory duty and responsibility cast upon the Respondent No.2 to conduct the public auction in terms of the Rules and ensure fairness in action, act objectively, realise the maximum price free from suspicion, nepotism and favoritism. Petitioner submitted that as held in the case of *Monarch Infrastructure (P) Ltd. vs. Commissioner,*

*Ulhasnagar Municipal Corporation and Others*,<sup>4</sup> if there was any dereliction in fulfillment of the tender terms, if the actions smacked of malafides in showing special favour to any party, this Court would be justified to invoke its extra ordinary jurisdiction in setting aside such action.

**7. PER CONTRA**, Mr. Amin, learned counsel appearing for Respondent No. 2 Bank, at the outset, submitted that the petition filed by the Petitioner suffered from a serious jurisdictional error in as much as the petition was not maintainable and the Petitioner could not invoke the extraordinary jurisdiction under Article 226 of the Constitution.

**7.1.** Respondent No. 2 Bank submitted that an effective alternative efficacious remedy is available to the Petitioner to approach the Debt Recovery Tribunal, Mumbai wherein the Petitioner can raise all contentions to challenge auction proceedings and / or sale in favour of Respondent Nos. 3 and 4 by filing a Securitization Application. Respondent Bank submitted that in the event if DRT finds any lacuna in the procedure adopted for sale, it has power to set aside the auction sale at any time and even after the sale is confirmed in favour of Respondent Nos. 3 and 4.

**7.2.** The allegations of fraud pleaded and argued by Petitioner raised several disputed questions of facts which if required to be proved, would require receiving of evidence. As such, the same

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4 (2000) 5 SCC 287

cannot be gone into in a Writ Petition filed by the Petitioner. Petitioner participated in the entire auction process not by herself but through her brother and subsequent to the auction through her brother and father.

**7.3.** There is no affidavit or statement on oath either by the brother or father of the Petitioner filed in the present proceedings, inter alia, ascertaining and confirming various allegations of fraud, malpractice, collusion and connivance as alleged in the petition. Most importantly, after culmination of auction process on 15 September 2020, Petitioner, her brother or her father did not raise any complaint or objection with respect to the alleged technical glitch which prevented the Petitioner from giving a higher bid until 18 September 2020. In the facts pleaded by the Petitioner, any prudent person would have immediately lodged a police complaint or a complaint in writing with the bank or a complaint on email to the police station or the bank on 15 September itself or immediately thereafter. This was not done by the Petitioner.

**7.4.** Respondent Bank submitted that allegation of system becoming non-functional on 15 September 2020 at 17:57 hours was incorrect and false as confirmed by E-procurement Technologies Ltd which managed the auction portal namely Auction Tiger. That due process of law as contemplated by SARFAESI Act and rules framed thereunder was duly followed by the Bank in the present case.

7.5. Attention was drawn to the Division Bench judgment of the Madhya Pradesh High Court in the case of *Century 21 Town Planners Pvt Ltd Vs. J.M. Finance Assets Reconstruction Co. Pvt. Ltd .& Ors.*<sup>5</sup>. Respondent submitted that in an identical situation, a preliminary objection was raised regarding maintainability of the writ petition on the ground of alternative efficacious remedy being available to the Petitioner for approaching DRT under SARFAESI Act wherein the Petitioner was the second highest bidder. While referring to the judgment passed by the Apex Court in *United Bank of India Vs. Satyawati Tandon & Ors.*<sup>6</sup>, the Court held that in view of the wide scope of Section 17(1) of SARFAESI Act, the only remedy available to such a Petitioner would be to approach the DRT by filing an appropriate application as the said provision namely the expression "any person" used in Section 17(1) took within its fold not only the borrower but also the guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14 of the Act. The relevant paragraph Nos. 18 to 20 of the said judgment read thus:-

*"18. It is well settled that where any person is aggrieved by any notice or action pursuant thereto under the provisions of SARFAESI Act, 2002, the only remedy available to such person to approach DRT by filing appropriate application under the provisions of the SARFAESI Act, 2002. The Apex Court in the case of United Bank of India V/s. Satyawati Tandon & Ors., reported as 2010 (8) SCC 110 has held that the expression "any person used in Section 17(1) is of wide scope. It takes within its fold, not only the borrower but also the guarantor or any other person who may be affected by the action taken under section 13(4) or section 13(4) or Section 14." In the present case, the auction was held under the provisions of SARFAESI Act, 2002, and, therefore, the objection that the petitioner is having the statutory remedy before the DRT has some force.*

*19. As per auction proceedings (Annexure P/6) the petitioner having*

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5 2018 (4) MP. L.J. 697

6 (2010) 8 SCC 110

*voluntary chosen to bid for the amount which was less than that of respondent No.2 cannot now turn to question or challenge the bid of the respondent No.2, who had chosen to bid for the said property after he was declared the highest bidder and the sale was confirmed in his favour. After confirmation of sale in favour of the respondent No.2, we cannot permit him to raise his bid from Rs.231.50 crore to Rs.237.50 crores. There is no application of provisions of either Order 21, Rule 85 of Code of Civil Procedure, 1908 or Rule 57 of second Schedule of Income Tax Act, 1961 or section 29 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1992 in the present case. There are no such Rules in the present matter as alleged by the petitioner at all. After the auction proceeding was successfully concluded on 31.3.2017, the stay came to be passed in original application filed by the respondent No.3 and for which the respondent No.2 is not responsible or liable. The Act of DRT, Jabalpur by reason of passing of the order of stay dated 8.5.2017 cannot prejudice the settled rights of the respondent No.2 as highest bidder and declared auction purchaser of the property for Rs.233.50 crore. The petitioner during the pendency of this writ petition, secretly filed an application for intervention before the DRT in pending Securitisation Applications and has thus not come with clean hand. When this fact was brought to the knowledge of the court by the respondent No.2 then, only the petitioner filed additional rejoinder to the additional reply filed by the respondents No.1 and 2.*

*20. There is no collusion between the respondent No.1 and respondent No.2 as alleged by the petitioner. It is only on account of the stay order passed by the DRT, Jabalpur the balance amount was not accepted by the respondent No.1. On the date of auction, the petitioner was free to bid and once the respondent No.2 who was highest bidder was declared as successful bidder and deposited 25% of the amount on the same date, now it is too late for the petitioner to revise his offer or pay for sale of the property in question for a consideration of Rs.237.50 Crore, that too after a period of more than one year from the date of confirmation of the sale and now at this stage, he has no locus to increase offer of the bid in this writ proceeding, which was already concluded on 31.3.2017. The respondent No.2 being highest bidder, his highest bid was accepted by the respondent No.1 in presence of the petitioner. No body ever objected including the writ petitioner at that stage on any ground whatsoever, such as, that there was any irregularity in the sale nor was any objection from any one of them that the price offered by the respondent No.2 was inadequate. The Apex Court in the case of Vedica Procon Private Ltd. V/s. Baleshwar Greens Pvt. Ltd & Ors. reported as (2015) 10 SCC 94 has decided the similar issue and held that in the absence of any legal tenable ground for not confirming the sale, it cannot be declined to the appellant therein as no subsequent higher offer can constitute a valid ground for refusing confirmation of the sale or offer already made. In the case of Vedica Procon Private Ltd. V/s. Baleshwar Greens Pvt. Ltd & Ors. (supra), the highest bid of the appellant therein was accepted by the Company Court and all the stake-holders of the company in liquidation were heard before such an acceptance. Nobody ever objected including the first respondent who was second highest bidder at that stage on any ground whatsoever, such as, that there was any fraud or irregularity in the sale nor*

was there any objection from any one of them that the price offered by the appellant herein was inadequate. However, the same is not relevant in consideration determining the legality of the order dated 17.12.2013. The Apex Court in para 47, 51 and 53 has observed the following :-

'47. A survey of the abovementioned judgments relied upon by the first respondent does not indicate that this Court has ever laid down a principle that whenever a higher offer is received in respect of the sale of the property of a company in liquidation, the Court would be justified in reopening the concluded proceedings. The earliest judgment relied upon by the first respondent in *Navalkha & Sons (supra)* laid down the legal position very clearly that a subsequent higher offer is no valid ground for refusing confirmation of a sale or offer already made. Unfortunately, in *Divya Manufacturing Company (supra)* this Court departed from the principle laid down in *Navalkha & Sons (supra)*. We have already explained what exactly is the departure and how such a departure was not justified.

51. The highest bid of the appellant herein was accepted by the Company Court and all the stake-holders of the company in liquidation were heard before such an acceptance. Nobody ever objected including the first respondent herein at that stage on any ground whatsoever, such as, that there was any fraud or irregularity in the sale nor was there any objection from any one of them that the price offered by the appellant herein was inadequate. No doubt, the property in question became more valuable in view of the subsequent development. In our opinion, it is not a relevant consideration in determining the legality of the order dated 17.12.2013. Imagine, if instead of increasing the floor space index for construction from 1.0 to 1.8 the State of Gujarat had decided to reduce it below 1.0 subsequent to 17.12.2013, could the appellant be heard to argue that it would be legally justified in resiling from its earlier offer which was accepted by the Court and not bound by the contractual obligation flowing from such an offer and acceptance?

53. The first respondent submitted that the order dated 17.12.2013 only accepted the highest bid but it did not confirm the sale and, therefore, the Court is at liberty to decline confirmation of the sale in view of the subsequent developments. In our opinion, the said submission is to be rejected because there is no specific format in which a sale conducted by the official liquidator is to be confirmed by the Company Court. The mere absence of the expression "that the sale is confirmed" in the order dated 17.12.2013 is not determinative of the question. The totality of the circumstances, such as, the very tenor of the order (Footnote 1 *supra*) that none of the stake-holders of the Company in liquidation ever objected to the offer of the appellant herein on the ground that it is inadequate consideration for the property; the fact that the official liquidator himself understood the order dated 17.12.2013 to be an order not only accepting the highest bid of the appellant herein but also as an order confirming the

*sale in favour of the appellant, as evidenced by his letter dated 19.12.2013, (the relevant portion of which is already extracted earlier) and the fact that the first instalment of the payment of 25% of the sale consideration was accepted both by the official liquidator and the Company Court without raising any objection for the same and the fact that the first respondent withdrew its earnest money deposit without raising any objection regarding adequacy of the price offered by the appellant herein, in our view, clearly indicate that the sale in favour of the appellant was confirmed by the order dated 17.12.2013. Assuming for the sake of argument that there is no confirmation, in the absence of any legally tenable ground for not confirming the sale, it cannot be declined to the appellant as it was observed in Navalkha case (supra) that "...no subsequent higher offer can constitute a valid ground for refusing confirmation of the sale or offer already made."*

**8.** Mr. Khandeparkar, learned counsel appearing for Respondent Nos. 3 and 4 supported the submissions made by Respondent No. 2 Bank and addressed further on the issue of maintainability and disputed questions of facts. Respondents submitted that Section 17 of SARFAESI Act clearly provided that DRT "shall consider" whether the measures referred to and taken into Section 13(4) of the Act by the secured creditor are in accordance with the Act and Rules made thereunder. The sale of the two flats by way of auction was a measure taken under Section 13(4) of the Act and in view thereof, Petitioner had an alternative efficacious remedy available to her under Section 17 of the Act.

**8.1.** Further the petition is based on disputed questions of facts namely malfunctioning of the system, collusion, connivance and fraud effectuated by Respondent No. 2 Bank and contesting Respondents, time lag between 15 September 2020 and raising of the grievance by Petitioner through her brother for the first time on 18 September 2020, alleged threats of withdrawal from auction received by Petitioner's brother and counter threats of extortion

received by the contesting Respondents, required receiving of evidence and DRT is the only competent and statutory authority to adjudicate the same. This was more so in view of the applicability of the provisions of the Recovery of Debts and Bankruptcy Act, 1993 to the present case.

**8.2.** Respondents submitted that unless and until the sale confirmed in favour of the answering Respondents is set aside, Petitioner's reliefs in the present petition cannot be granted. Sale of the two flats in favour of the answering Respondents being conducted under Rule 9 of the SARFAESI Rules, Rule 6 and 9 of the Security Interest (Enforcement) Rules, 2002 would, therefore, require a complete adjudication on the grievances raised by Petitioner before the DRT.

**8.3.** Respondents submitted that if a petition is found to be maintainable under Article 226 in respect of the Nationalized Banks (as in the present case), it would lead to an anomaly in as much as for actions in respect of private banks (which are not amenable to writ jurisdiction), parties would have to approach the DRT under Section 17 of the SARFAESI Act. Respondents submitted that the actual time of auction as conducted on the portal was from 11.00 a.m. to 3.00 p.m. on 15 September 2020 and thereafter, with every bid given by the parties, time was automatically extended by 5 minutes and the same was reflected in the footnote of the auction portal namely Auction Tiger which was presented before us. According to Respondents these were the



issues relating to disputed questions of facts and required receiving of evidence either from the auction portal company on oath or the party alleging malafide i.e the Petitioner.

**8.4.** Attention was invited to the provisions of Section 17 and more specifically, Section 17(2) of the SARFAESI Act and it was submitted that a similar argument that the provision of Section 17 was not wide enough to entertain a challenge to sale was turned down by the Hon'ble Apex Court in the case of *Authorized Officer, Indian Overseas Bank & Anrs. Vs. Ashok Saw Mill*<sup>7</sup>. Our attention was drawn to paragraph Nos. 34 to 37 in the said case which read thus:-

*"34. The provisions of Section 13 enable the secured creditors, such as Banks and Financial Institutions, not only to take possession of the secured assets of the borrower, but also to take over the management of the business of the borrower, including the right to transfer by way of lease, assignment or sale for realizing secured assets, subject to the conditions indicated in the two provisos to Clause (b) of Sub-Section (4) of Section 13.*

*35. In order to prevent misuse of such wide powers and to prevent prejudice being caused to a borrower on account of an error on the part of the Banks or Financial Institutions, certain checks and balances have been introduced in Section 17 which allow any person, including the borrower, aggrieved by any of the measures referred to in Sub-Section (4) of Section 13 taken by the secured creditor, to make an application to the DRT having jurisdiction in the matter within 45 days from the date of such measures having taken for the reliefs indicated in Sub-Section (3) thereof.*

*36. The intention of the legislature is, therefore, clear that while the Banks and Financial Institutions have been vested with stringent powers for recovery of their dues, safeguards have also been provided for rectifying any error or wrongful use of such powers by vesting the DRT with authority after conducting an adjudication into the matter to declare any such action invalid and also to restore possession even though possession may have been made over to the transferee.*

*37. The consequences of the authority vested in DRT under Sub-Section (3) of Section 17 necessarily implies that the DRT is entitled to question the action taken by the secured creditor and the transactions entered into by*

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7 2009 (8) SCC 366

*virtue of Section 13(4) of the Act. The Legislature by including Sub-Section (3) in Section 17 has gone to the extent of vesting the DRT with authority to even set aside a transaction including sale and to restore possession to the borrower in appropriate cases. Resultantly, the submissions advanced by Mr. Gopalan and Mr. Altaf Ahmed that the DRT has no jurisdiction to deal with a post 13(4) situation, cannot be accepted.*

*38. The dichotomy in the views expressed by the Bombay High Court and the Madras high Court has, in fact, been resolved to some extent in the Mardia Chemicals Ltd.'s case (supra) itself and also by virtue of the amendments effected to Sections 13 and 17 of the principal Act. The liberty given by the learned Single Judge to the appellants to resist S.A.No.104 of 2007 preferred by the respondents before the DRT on all aspects was duly upheld by the Division Bench of the High Court and there is no reason for this Court to interfere with the same.*

*39. We are unable to agree with or accept the submissions made on behalf of the appellants that the DRT had no jurisdiction to interfere with the action taken by the secured creditor after the stage contemplated under Section 13(4) of the Act. On the other hand, the law is otherwise and it contemplates that the action taken by a secured creditor in terms of Section 13(4) is open to scrutiny and cannot only be set aside but even the status quo ante can be restored by the DRT."*

**8.5.** Respondents submitted that the legislature by including Section 17(3) has gone to the extent of vesting the DRT with authority to even set aside a transaction including sale and to restore possession to the borrower in appropriate cases and the law contemplated that action taken by a secured creditor in terms of Section 13(4) is open to scrutiny and cannot only be set aside but even the status quo ante can be restored by the DRT.

**9.** We have heard the learned counsel for the parties, perused the pleadings and considered the submissions advanced

**10.** The issue involved in the present petition is whether the remedy of the Petitioner (second highest bidder) lies in challenging the action of the secured creditor i.e Respondent No. 2 Bank in

confirming the sale in favour of Respondent Nos. 3 and 4 by filing an application under Section 17 of the SARFAESI Act before the DRT or whether the remedy of the Petitioner is in filing the Writ Petition under Article 226 of the Constitution of India to challenge the validity and legality of such action.

**11.** It would be apposite to quote the provisions of Section 13(4) and Section 17 of the SARFAESI Act, Rules 8 and 9 of the Security Interest (Enforcement) Rules, 2002 to the extent they are relevant for deciding the issue involved.

*"13. Enforcement of security interest-*

*(1) to (3-A).....*

*(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-*

*(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset;*

*(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset:*

*Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:*

*Provided further that where the management of whole, of the business or part of the business is severable, the secured creditor shall take over the*

*(c) appoint any person (hereinafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;*

*(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt."*

**Section 17**

**"17. Application against measures to recover secured debts-**(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorized officer under this Chapter, may make an application along with such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:

\* \* \*

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order,-

(a)-(c) \* \* \*

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

(4-A)-(6) \* \* \*

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993(51 of 1993) and the rules made thereunder.

**Rule 8**

**8. Sale of immovable secured assets -(1)-(8) \* \* \***

**Rule 9**

**9. Time of sale, issue of sale certificate and delivery of possession, etc. -**

(1) to (4).....

(5) In default of payment within the period mentioned in sub-rule (4), the deposit shall be forfeited to the secured creditor and the property shall be resold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold.

*(6) On confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorized officer exercising the power of sale shall issue a certificate of sale of the immovable property in favour of the purchaser in the form given in Appendix V to these rules."*

**12.** Section 17 provides a remedy to a person who is aggrieved by the steps taken by the secured creditor or the authorized officer of the secured creditor i.e the Bank under Section 13(4) in relation to secured assets i.e the two flats. Sub-section (1) of Section 17 refers to "any person" aggrieved by any of the measures referred to in Section 13(4) taken by the secured creditor or its authorized officer, and states that such person may make an application to the DRT having jurisdiction in the matter within 45 days from the date on which such measure has been taken. The words "any person" is of very wide amplitude and would include any aggrieved person and in the present case, the Petitioner who is aggrieved. Sub-section (2) of Section 17 was added by way of an amendment w.e.f. 11 November 2004 and it provides that the DRT on any such application / grievance being made under Section 17(1), shall consider whether the measures referred to and taken under Section 13(4) by the secured creditor are in accordance with the provisions of SARFAESI Act and the rules made thereunder. Further, sub-sections (3), (4) and (7) of Section 17 deal with the power of the DRT and use the expression " in accordance with the provisions of the act and the rules made thereunder."

**13.** In the case of *United Bank of India Vs. Satyavati Tondon & Ors (supra)*, the Apex Court had the occasion to examine in detail

the provisions of the SARFAESI Act and the question regarding invocation of the extraordinary jurisdiction under Articles 226 / 227 in challenging the actions taken under the SARFAESI Act. While delivering a note of caution with respect to writ filed to challenge the actions taken under the SARFAESI Act, their Lordships made the following pertinent observations, which in our view squarely apply to the present case:(SCC p.143, paragraphs 42-45).

*"42. There is another reason why the impugned order should be set aside. If Respondent 1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression "any person" used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also the guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective.*

*43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.*

*44. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other*

*purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution.*

*45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.”*

**14.** The law is therefore well settled that where any person is aggrieved by any notice or action pursuant thereto under the provisions of SARFAESI Act, the only remedy available to such person would be to approach the DRT by filing an appropriate application under the provisions of the Act.

**15.** In the light of the foregoing discussion, we are of the considered opinion that on account of availability of alternative statutory remedy of filing an application under Section 17(1) of the SARFAESI Act before the DRT Mumbai being available to the Petitioner to challenge the action of Respondent No.2 Bank in confirming the sale of the two flats in favour of Respondent Nos. 3 and 4, we do not think fit to interfere with the Petitioner's case in writ jurisdiction.

**16.** Writ Petition is rejected.

**17.** This order will be digitally signed by the Private Secretary of this Court. All concerned to act on production by fax or email of a

digitally signed copy of this order.

[ MILIND N. JADHAV, J. ]

[ NITIN JAMDAR, J. ]