A VASU P. SHETTY

v.

M/S HOTEL VANDANA PALACE & ORS.

(Civil Appeal No. 4679 of 2014)

APRIL 22, 2014

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[SURINDER SINGH NIJJAR AND A.K. SIKRI, JJ.]

Security Interest (Enforcement) Rules, 2002 – rr.8 & 9 – Default in repayment of loan by borrower – Auction sale of C *mortgaged property set aside by High Court on ground that public notice issued for the sale was defective as 30 days time mandatorily required under rr.8 and 9 was not given – Plea of auction purchaser as well as the Bank that the borrower by its conduct had waived said mandatory requirement of the* D *Rules – Held: Not tenable – No case of waiver made out in the instant case – Two earlier failed auctions and one failed One time Settlement (OTS) proposal of the borrower does not lead to the conclusion that the Bank was relieved from its obligation not to follow the mandatory procedure contained* E *in the Rules, while taking fresh steps for disposal of the property – Even if delaying tactics were adopted by borrower in respect of the first two auctions, the conduct of borrower cannot be taken as waiver of the mandatory condition of 30 days notice for auction as well as other requirements – There* F *was not even slightest move on the part of borrower amounting to waiver either express or implied – In view of breach of mandatory requirements, auction sale in question to be treated as null and void – Two months time granted to borrower to discharge the entire liability of the Bank – If* G *borrower pays the amount due, the property shall revert back to it – Otherwise, the Bank shall be at liberty to proceed with the sale of the property – Purchaser refunded entire amount spent by it – No interest granted to purchaser on the amount refunded, as he, in the meantime, utilized the property in*

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question – Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 – ss. 13 and 18 – Doctrines – Doctrine of waiver.

Respondent no.1 took loan from Bank but defaulted in making re-payment. Taking action under provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2000, the Bank took formal possession of the mortgaged property given as surety for due discharge of the loan. The property was put to auction sale. The appellant was highest bidder and therefore a sale certificate was issued in his favour. Respondent challenged the sale by filing application before Debt Recovery Tribunal which was dismissed. Respondent then filed petition before the High Court which was dismissed by a Single Judge. On appeal, the Division Bench set aside sale of property in favour of the appellant on the ground that the public notice issued for the said sale was defective as 30 days time mandatorily required under Rules 8 and 9 of the Security Interest (Enforcement) Rules, 2002 was not given.

Notwithstanding the fact that insufficient notice was given and the mandatory nature of Rules 8 & 9, the appellants viz auction purchaser as well as the Bank maintained before this Court that the sale was valid because respondent-borrower by its conduct had waived the said mandatory requirement of the Rules.

In this backdrop, the question that arose for consideration before this Court was as to whether there could be a waiver of the aforesaid mandatory condition; and if so, whether this waiver could be discerned in the present case.

Dismissing the appeals, the Court

HELD:1.1. In the instant case, no case of waiver is

made out. From what is argued by the appellants, at best it can be inferred that the borrower tried to thwart the earlier attempts of the Bank in selling the property. When the first notice was issued, the borrower filed the writ petition. However, in the said Writ Petition no interim order was passed staking the auction on the stipulated date. The only stay granted was against confirmation of sale. That did not preclude anybody from participating in the auction. Many times pendency of such a Writ Petition challenging the auction notice and the kind of stay granted, even partial in nature, deter the intending buyers to come forward and participate in the auction. Be as it may, even in the second attempt when the reserve price was reduced to Rs. 2.39 crores, the highest bid received was in the sum of Rs. 2.25 crores. Further, even the bid of the appellant which was accepted was in the sum of Rs.2.16 crores. Likewise, after the second auction when the Bank requested the borrower to accept the bid of Rs.2.25 crores giving its reasons and the borrower instead of doing so took initiative resulting in One Time Settlement (OTS) but defaulted therein, it would merely indicate that the borrower was at fault in not adhering to the OTS. By no logic it can be deduced therefrom that the Bank was relieved from its obligation not to follow the mandatory procedure contained in the Rules, while taking fresh steps for the disposal of the property. [Paras 22, 24] [58-F; 61-C-G]

1.2. Even if there were delaying tactics adopted by the borrower in respect of first two auctions, the conduct of the borrower cannot be taken as waiver to the mandatory condition of 30 days notice for auction as well as other requirements. There was not even the slightest move on the part of the borrower in this regard which may amount to waiver either express or implied. On the contrary, when notice dated 27.4.2006 was published, the borrower immediately filed the Writ Petition challenging

the auction notice. Thus, its conduct, far from waiving the aforesaid requirement, was to confront the bank by questioning its validity. It is a different matter that it had to withdraw the said writ petition in view of availability of alternate remedy. Immediately, it filed application under Section 18 of the SARFAESI Act. There is, thus, not even an iota of material suggesting any waiver on the part of the borrower. [Para 25] [61-H; 62-A-D]

1.3. The moment it is found that the mandatory requirement of the Rules had not been waived by the borrower, consequences in law have to follow. When there is a breach of the said mandatory requirement the sale is to be treated as null and void. Moreover, the appellant have no answer to many other infirmities pointed out by the High Court. Two months time is granted to the borrower to discharge the entire liability of the Bank. The borrower shall also reimburse the amount of registration fee and stamp duty to the purchaser. The direction to pay this amount is given having regard to the conduct of the borrower on earlier occasions. If the borrower pays the amount due to the Bank, registration charges, stamp duty as well as amount of encumbrances paid by the purchaser, which was the liability of the borrower i.e. a sum of Rs.49,91,000/- + 2,86,078/-, the property shall revert back to the borrower. If the aforesaid amounts are not paid within the aforesaid two months, the Bank shall be at liberty to proceed with the sale of the property following due procedure under the law. In so far as the purchaser is concerned, he shall be refunded entire amount spent by the purchaser. This Court has consciously not granted interest to the purchaser on the aforesaid amount, as the purchaser has, in the meantime, utilized the property in question. [Paras 26, 27] [62-E-F; 63-B-E]

A *State of Punjab v. Davinder Pal Singh Bhullar & Ors.* **2011 (14) SCC 770: 2011 (15) SCR 540 – relied on.**

Mathew Varghese v. M. Amritha Kumar & Ors. **2014 (2) SCALE 331;** *J. Rajiv Subramaniyan & Anr. v. M/s Pandiyas & Ors.* **2014 (3) SCALE 646;** *General Manager, Sri Siddeshwara Cooperative bank Limited and Anr. v. Ikbal & Ors.* **(2013) 10 SCC 83 – referred to**

Case Law Reference :

2014 (2) SCALE 331	**referred to**	**Para 13**
2014 (3) SCALE 646	**referred to**	**Para 13**
(2013) 10 SCC 83	**referred to**	**Para 14**
2011 (15) SCR 540	**relied on**	**Para 23**

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4679 of 2014.

From the Judgment and Order dated 21st November, 2011 of by the High Court of Karnataka Circuit Bench at Dharwad in WA No. 6368/2011 (GM-DRT).

WITH

Civil Appeal No. 4680 of 2014

F Ranjit Kumar, Adarsh B. Dial, Basava Prabhu S. Patil, Prasanth P., Sumati Anand, Rajiv Nanda, Shailesh Madiyal, G.S. Gokak for the appearing parties.

The Judgment of the Court was delivered by

G **A.K. SIKRI, J.** 1. Leave granted.

2. Respondent No. 1 herein had taken loan from Syndicate Bank (hereinafter to be referred as the 'Bank'). Because of its default in repaying the said loan, the bank took action under H the provisions of the Securitization and Re-construction of

Financial Asset and Enforcement of Security Interest Act, 2002 (SARFAESI Act). After taking formal possession of the mortgaged property which was given as a surety for due discharge of the loan, the said property was put to sale. The appellant herein was the highest bidder whose bid was accepted resulting into issuance of the sale certificate. Respondent No. 1 (hereinafter referred to as the 'borrower') challenged the said sale by filing application before the Debt Recovery Tribunal (DRT). This application was dismissed. The borrower filed Writ Petition before the High Court of Karnataka against the order of DRT. The learned Single Judge dismissed the Writ Petition as well. Undeterred, the borrower appealed against the order of the learned Single Judge. This time it triumphed, as the Division Bench has set aside the sale of the property in favour of the appellant. The reason given is that the public notice issued for the said sale was defective as 30 days time which is mandatorily required under Rules 8 and 9 of SARFAESI Act was not given. Concededly the public notice was published in the newspaper on 28.4.2006, fixing the date for sale as 8.5.2006, inviting tenders from prospective buyers at 2.00 p.m. on 6.5.2006.

3. This fact that insufficient notice was given, is, therefore, not in dispute. Legal position about the mandatory nature of Rule 8 & 9 is also not agitated. Notwithstanding this legal possession, the appellants viz auction purchaser as well as the Bank maintain that the sale was valid because of the reason that delay was entirely attributable to the borrower who by its conduct waived the said mandatory requirement of the Rules. In this backdrop, the question that arises for consideration is as to whether there could be a waiver of the aforesaid mandatory condition? If so, whether this waiver can be discerned in the present case? Before we answer these questions it would be apposite to have a thorough glimpse of the facts on record.

4. The borrower had availed a loan of Rs. 1,84,70,000/-.

A This loan was obtained from the bank to construct a hotel in a prominent place in Belgaum. The borrower has constructed the hotel at the said place for a land measuring 1825.25 sq. mtrs. with a built up area of 4749.64 sq. mtrs. At the time of sanction of the loan, the premises were valued at Rs. 3.16 crores. As B mentioned above, the borrower committed default in the repayment of these financial facilities granted to it. Notice under Section 13(2) of the SARFAESI Act to take formal possession of the property was issued. Thereafter, the Authorised Officer of the Bank (Respondent No. 2)under SARFAESI Act C proceeded to sell this property. Property could not be sold in the first attempt and the efforts were fructified only when it was put to auction third time. Since the earlier endeavour made by the Authorised Officer are used as shield against the borrower's attack on sale in question, it becomes necessary to take a note D of these attempts as well.

5. First notice for auction was published on 11.9.2004 fixing the auction date as 15.10.2004. Reserve Price was fixed at Rs. 3.50 crores. This notice, admittedly, was for more than 30 days. At that stage, the borrower filed the Writ Petition in E the High Court challenging the said notice 3 days before the proposed sale i.e. on 12.10.2004. Though the High Court did not grant stay against the scheduled auction, it granted stay against confirmation of sale. As per the appellant, in view of the said partial stay order, nobody came forward to participate F in the auction and the exercise went into futility.

6. The Writ Petition filed by the borrower was dismissed by the High Court on 28.2.2005 upholding notice dated 27.7.2004 issued under Section 13(4) of the SARFAESI Act. In the meantime, it came to the notice of the Authorised Officer G of the bank that there were encumbrances in the form of statutory liabilities to the tune of Rs. 43,01,100/- payable by the borrower and, therefore, the Reserve Price fixed at Rs. 3.50 crores had to be reduced. The borrower was informed about it. The Bank issued fresh notice on 9.3.2005 for auction of the H

property fixing date of auction as 21.3.2005 with reduced Reserve Price at Rs. 2.39 crores. A

7. In the auction held on 21.3.2005 the highest offer which was received was in the sum of Rs. 2.25 crores which was less than even the reduced reserve price. It can well be discussed that this sale notice was for a period of less than 30 days. Be as it may, the bank wrote letter dated 28.6.2005 to the borrower asking it to convey its consent for the sale of property for a sum of Rs. 2.25 crores which was the highest bid. However, the borrower did not respond to this letter. Thereafter, another letter dated 16.8.2005 written by the bank stating the reasons as to why it was constrained to reduce the Reserve Price. B C

8. The borrower did not accede to the request of the Bank. Instead, on 15.11.2005, the borrower expressed its intention to settle the matter by making the proposal under One Time Settlement (OTS) scheme of the RBI. It was followed by letter dated 8.1.2006 by the borrower to the Bank requesting for OTS at Rs. 2,13,93,320/-. This proposal of the borrower was sanctioned by the Bank on 8.2.2006 with further stipulation that the amount would be paid on or before 31.3.2006. Cheque of Rs. 20 lakhs which was given by the borrower along with its OTS proposal was encashed by the Bank and was credited to the 'No Lien Account'. However, on 31.3.2006, instead of paying the amount as per the agreed OTS, the borrower requested for extension of time giving its own reasons. Time was extended upto 15.4.2006 for payment as a last chance. However, on 14.4.2006 another request for extension of time by two months was made which was followed by letter dated 22.4.2006 to the same effect. This time the Bank rejected the request of the borrower vide letter dated 25.4.2006. As a consequence, the OTS did not fructify. D E F G

9. On failure of OTS due to the fault of the borrower, the Authorised Officer of the Bank sprung into action and took steps for the sale of the property, in question. Notice dated 27.4.2006 was published in Indian Express (English) and in Tarun Bharat H

A (Marathi) on 7.5.2006 for the acution of the property. The Auction date was published as 8.5.2006. Auction was held on 8.5.2006 wherein the bid of the appellant in the sum of Rs. 2.16 crores being the highest, was accepted. The appellant paid 25 percent of the bid amount and the balance amount was paid B on 24.5.2006. The appellant also made payment for the encumbrances to the concerned statutory authorities which was in the sum of Rs. 49.91 lakhs. In this way the appellant made total payment of Rs. 283,39,735/-. On receiving the full consideration as per the auction, sale deed conveying the C property was executed in favour of the appellant on 26.5.2006 followed by issue of the sale certificate.

10. It would be relevant to mention here that the borrower had filed the Writ Petition 6471/2006 challenging the auction notice. However, it withdrew this Writ Petition on 1.6.2006 with D liberty to avail alternate remedy to challenge the auction that is provided under SARFAESI Act. Thereafter, it filed the appeal under Section 18 of the SARFAESI Act before the DRT. This appeal was dismissed by the DRT on 5.7.2007 with the observations that the borrower was only adopting dilatory E tactics. This order was challenged by the borrower in the form of writ petition filed before the High Court of Karnataka, Circuit Bench, Dharwad. The learned Single Judge echoed the reasoning given by the DRT and dismissed the Writ Petition vide orders dated 19.9.2011. Against this order, the borrower F approached the Division Bench by filing intra court appeal which has been allowed by the High Court. The sale in question is set aside.

11. The High Court took into consideration provisions of G the sub-Rule (5) and (6) of Rule 8 as well as Rule 9 of these Rules which are as under:

"Rule 8 Sale of immovable secured assets:

(5) Before effecting sale of the immovable property H referred to in sub-rule (1) of rule 9 the Authorised Officer

shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods:-

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

(b) By inviting tenders from the public.

(c) By holding public auction; or

(d) By private treaty.

(6)The authorised officer shall serve to the borrower a notice of 30 days for sale of the immovable secured assets, under sub-rule (5):

Provide that if the sale of the such secured asset is being effected 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 decription 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.

9.Time of same, issues of sale certificate and delivery of possession, etc.-

(1) No sale of immovable property under these rules shall take place before the expiry of 30 days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub-rule (6) or notice of sale has been served to the borrower.

(2) The sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid or tender or quotation or offer to the Authorised Officer and shall be subject to confirmation by the secured creditor.

Provided that no sale under this rule shall be confirmed, if the amount offered by sale price is less than the reserve price, specified under sub-rule (5) of Rule 9.

Provided further that if the authorised officer fails to obtain a price higher than the reserve price, he may, with the consent of the borrower and the secured creditor effect the sale at such price.

(3) On every sale of immovable property, the purchaser shall immediately pay a deposit of 25 percent of the amount of the sale price, to the property shall forthwith be sold again.

(4) The balance amount of purchase price payable shall paid by the purchaser to the Authorised Officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be

agree upon in writing between the parties. A

(5) In default of payment within the period mentioned in sub-rule (4), the deposit shall be forfeited 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 B 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 Authorised Officer exercising the power of sale shall issue a certificate of sale of the immovable property in favour C of the purchaser in the form given in Appendix V to these rules.

(7) Where the immovable property sold is subject to any encumbrances, the authorised officer may, if the thinks fit, D allow the purchaser to deposit with him the encumbrances and any interest due thereon together with such additional amount that may be sufficient to meet the contingencies or further cost, expenses and interest as may be determined by him. [Provided that if after meeting the cost E of removing encumbrances and contingencies there is any surplus available out of the money deposited by the purchaser such surplus shall be paid to the purchase within fifteen days from the date of finalisation of the sale.

(8) On such deposit of money for discharge of the F encumbrances the Authorised Officer shall issue or cause the purchaser to issue notices to the persons interested in or entitled to the money deposited with him and take steps to make the payment accordingly.

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(9) The authorised officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in sub-rule (7) above.

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A (10) The certificate of sale issued under sub-rule (6) shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not."

B 12. The High Court has found the following informaties in the conduct of the impugned sale:-

(i) Before bringing the property for sale vide notice dated 28.4.2006 and 5.5.2006 fresh valuation of the property from the accrued valuer was not obtained by the Bank when the C property worth crores had to be sold. There was infraction of sub-rule (5) of Rule 8 which is mandatory.

(ii) 30 days notice as required under sub-rule 6 of Rule 8 was not given thereby committing breach of this mandatory D provision as well.

(iii) According to the High Court publication in Tarun Bharat Marathi language was effected just one day prior from receiving from the prospective buyers. However, publication in Marathi language cannot be considered as E vernacular language as the Belgaum is in Karnataka where the vernacular language is Kannada and not Marathi.

(iv) As per the sale notice, the appellant was required to F deposit entire sale consideration within 15 days from the date of confirmation of the sale. In the counter, the Bank has stated that the appellant has made the payment within the time allowed by the Authorised Officer. When the sale consideration is Rs. 2.16 crores, the bank was required G to give details of the payment made by the appellant in order to hold whether the payment was made within the time stipulated in the sale and whether the time was extended by the Officer by accepting the reasonable cause shown by the purchaser and whether the purchaser is

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bonafide purchaser or not. Unfortunately, the bank has failed to produce these documents.

13. We may point out, at the outset, that the opinion of the High Court on the interpretation of sub-Rules (5)and (6)of Rule 8 of the Rules is flawless. In this behalf it would be pertinent to mention that there is an imprimatur of this court as identical meaning is assigned to these provisions. In the case of *Mathew Varghese* v. *M. Amritha Kumarr & Ors.*; 2014 (2) SCALE 331. The aforesaid judgment has been followed by this very Bench of the Court in C.A. No. 3865 of 2014 titled as *J. Rajiv Subramaniyan & Anr.* v. *M/s Pandiyas & Ors.* decided on March 14, 2014, wherein the earlier referred case has been discussed in the following manner:-

> "12. This Court in the case of Mathew Varghese Vs. M.Amritha Kumar & Ors. examined the procedure required to be followed by the banks or other financial institutions when the secured assets of the borrowers are sought to be sold for settlement of the dues of the banks/ financial institutions. The Court examined in detail the provisions of the SARFAESI Act, 2002. The Court also examined the detailed procedure to be followed by the bank/financial institutions under the Rules, 2002. This Court took notice of Rule 8, which relates to Sale of immovable secured assets and Rule 9 which relates to time of sale, issue of sale certificate and delivery of possession etc. With regard to Section 13(1), this Court observed that Section 13(1) of SARFAESI Act, 2002 gives a free hand to the secured creditor, for the purpose of enforcing the secured interest without the intervention of Court or Tribunal. But such enforcement should be strictly in conformity with the provisions of the SARFAESI Act, 2002. Thereafter, it is observed as follows:-
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> > "A reading of Section13(1), therefore, is clear to the effect that while on the one hand any SECURED CREDITOR may be entitled to enforce the

> SECURED ASSET created in its favour on its own without resorting to any court proceedings or approaching the Tribunal, such enforcement should be in conformity with the other provisions of the SARFAESI Act."

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

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

> sale or transfer effected without complying with the said statutory requirement would be a constitutional violation and nullify the ultimate sale."

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

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

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

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

17. It must be emphasized that generally proceedings under the SARFAESI Act, 2002 against the borrowers are initiated only when the borrower is in dire-straits. The provisions of the SARFAESI Act, 2002 and the Rules, 2002 have been enacted to ensure that the secured asset is not sold for a song. It is expected that all the banks and financial institutions which resort to the extreme measures under the SARFAESI Act, 2002 for sale of the secured assets to ensure, that such sale of the asset provides maximum benefit to the borrower by the sale of such asset. Therefore, the secured creditors are expected to take

A bonafide measures to ensure that there is maximum yield from such secured assets for the borrowers. In the present case, Mr. Dhruv

Mehta has pointed out that sale consideration is only
B Rs.10,000/- over the reserve price whereas the property was worth much more. It is not necessary for us to go into this question as, in our opinion, the sale is null and void being in violation of the provision of Section 13 of the SARFAESI Act, 2002 and Rules 8 and 9 of the Rules, 2002."
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14. Thus, when the matter is to be examined from this angle it cannot be said that the view of the High Court is perfunctory or flawed. Procedure contained in the aforesaid Rules was admittedly not followed. Notwithstanding this position, Mr. Ranjit
D Kumar, learned Senior Counsel appearing for the appellant submitted that a contrary view is taken by this Court in *General Manager, Sri Siddeshwara Cooperative bank Limited and Anr.* v. *Ikbal & Ors.*; (2013) 10 SCC 83 wherein it is held that the mandatory provision of 30 days notice can be waived by the
E borrower and in such an eventuality, the sale cannot be voided.

15. After recapitulating the facts which have already been narrated above, his submission in this behalf was that the borrower had, in the present case, delayed the sale of the
F property and he was not entitled to take advantage of its own wrong. He dilated this submission by pointing out that first notice for auction which was published on 11.9.2004, clear 30 days notice was provided therein as the date of auction was fixed as 15.10.2004. However, conduct of the borrower in filing frivolous Writ Petition and obtaining interim order therein,
G desisted any intending purchaser from coming forward and participating in the auction. Further, even when second notice for auction sale was published on 28.2.2005 and notice of less than 30 days was given therein fixing the date of auction as 23.1.2005, the borrower never challenged the validity of this
H notice. Instead, at that stage the borrower expressed its

intention to settle the matter by offering OTS proposal. The bank succumbed to this request of the borrower treating the same to be a bonafide offer and even accepted the OTS proposal of the borrower. Here again the borrower committed default and never remitted the money as per OTS arrangement agreed to between the parties. In this way, highlighting the aforesaid blameworthy conduct of the borrower, Mr. Ranjit Kumar submitted that it is estopped from challenging the validity of the notice for auction. It was also pointed out that not only entire amount is paid by the appellant towards the sale consideration, the appellant has discharged statutory liabilities/ encumbrances as well; sale deed registered in its favour way back on 26.5.2006; sale certificate issued; and the appellant is in possession of this property ever since. Therefore, the sale should not have been invalidated. Mr. A.B. Dial, learned Senior Counsel for the appellant Bank in other appeal also argued on the same lines.

16. Let us examine the aforesaid submission of the appellant in the light of the judgment in the case of Ikbal on which strong reliance is placed by the learned Senior Counsel. That was a case where R-1 (the borrower) took a housing loan from the appellant Bank by mortgaging certain immovable property. As R-1 committed default in repayment of the said housing loan, the Bank issued a notice to him on 30.6.2005 under Section 13(2) of the Securatisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the SARFAESI Act) informing him that if he failed to discharge the outstanding dues within 60 days, the Bank may take action under Section 13(4) and the mortgaged property shall be sold. On 18.12.2005 the Bank published the auction notice in the local newspapers and the public auction was conducted on 11.1.2006. The bid of the auction-purchaser for Rs. 8,50,000 was accepted being the highest bid. The auction-purchaser paid 25% of the sale consideration immediately but he did not make the payment of remaining 75% within 15 days of the confirmation of sale. He made the final payment on

A 13.11.2006 and the Bank issued the sale certificate in his favour. As the proceeds from the sale of the mortgaged property fell short of the total outstanding amount against the borrower, the Bank moved the Joint Registrar of Cooperative Societies for recovery of the outstanding amount. In those B proceedings, an ex parte award for the outstanding amount was passed against the borrower R-1. It was then that R-1 challenged the sale certificate issued in favour of the auction purchaser in two writ petitions before the High Court. The Single Judge of the High Court quashed the sale certificate issued in C favour of the auction-purchaser on the ground that the mandatory requirements of Rule 9 of the 2002 Rules were not followed and, therefore, despite the remedy of appeal to the borrower provided under Section 17 of the SARFAESI Act, a case was made out for interference under Article 226 of the Constitution, D which was affirmed by the Division Bench of the High Court. The Bank and the auction-purchaser had filed the appeals challenging the judgments of the High Court.

17. This Court, after interpreting the provisions of Rule 9, returned a categorical opinion that the said provision is E mandatory in nature. It was further held that even though this Rule is mandatory, that provision is for the benefit of the borrower. The Court held that it is a settled position in law that even if a provision is mandatory, it can always be waived by a party (or parties) for whose benefit such provision has been F made. The provision in Rule 9(1) being for the benefit of the borrower and the provisions contained in Rule 9(3) and Rule 9(4) being for the benefit of the secured creditor (or for the benefit of the borrower), the secured creditor and the borrower can lawfully waive their rights. These provisions neither G expressly nor contextually indicate other wise. Obviously, the question whether there is waiver or not depends on the facts of each case and no hard and fast rule can be laid down in this regard.

18. In the facts of that case it was found that the letter dated

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13.11.2006 sent by the borrower to the Bank clearly depicted that the borrower had waived his right under Rule 9 (1) and the provisions contained in Rule 9(3) and Rule 9(4) as well. It was also found that at the time of auction sale on 11.1.2006, the borrower was present but did not object to the auction being held before expiry of 30 days from the date of which public notice of sale was published. Not only this, he agreed that the bid given by the auction purchaser, which was the highest bid, be accepted as the auction purchaser happened to be his known person. Another important feature which was noted was that the borrower expressly gave consent in writing that the balance sale price may be accepted from the auction purchaser even when tendered after some delay and the sale certificate be issued to him. There was a written agreement between the borrower and the Bank for extension of time upto 15.4..2006 within which the auction purchaser had made the payment. On these facts, the court came to the conclusion that condition in Rule 9(4) viz. "such extended period as may be agreed upon in writing between the parties" would be treated as substantially satisfied. Again, pertinently, the Writ Petition was filed by the borrower more than 4 years after the issuance of the sale certificate. On these facts the court concluded that there was a waiver of the aforesaid mandatory provisions by the borrower.

19. It can, thus, be seen that there is no conflict between the two sets of judgments namely Mathew Varghese case followed in J. Rajiv Subramaniyan case on the one hand and Ikbal's case on the other hand. In the first set of cases the interpretation given to Rule 8 and 9 of the Rules hold that these Rules are mandatory. It is so held even in Ikbal's case. However, Ikbal's case proceeds further to lay down the principle that since these provisions are for the benefit of the borrower, borrower can always waive those procedural requirements. This latter aspect never fell for consideration in the earlier two judgments. Therefore, we see no force in the contention of the learned Senior Counsel of the appellant that judgment in

A Mathew Varghese (supra) goes contrary to the law laid down in Ikbal's case.

20. The only question, therefore, is as to whether it can be held that the borrower in the present case had also waived the mandatory provisions of Rules 8 and 9 of the Rules. We may remark that it is expressly clarified in Ikbal's case itself that the question whether there is a waiver or not depends on the facts of the each case and no hard and fast rule can be laid down in this regard.

C 21. We would like to point out at the outset that the argument of waiver was not raised by the appellant in the High Court. In fact, this ground is not even raised in the Special Leave Petition. The appellant's case rested with hammering the blameworthy conduct of the borrower by relying upon the D observations of the DRT to the effect that the borrower had been adopting dilatory tactics and delaying the recovery of amounts due to the bank somehow or the other. It was also argued that the appellant is a bonafide purchaser and equities are in favour of the appellants which should be balanced and E the borrower is not entitled to any relief because of his intemperate conduct.

22. Be as it may. Since the arguments is predicated on the admitted facts appearing on record, we proceed to examine the same on merits. Our examination reveals that no case of F waiver is made out.

23. In *State of Punjab* v. *Davinder Pal Singh Bhullar & Ors.*; 2011 (14) SCC 770; the Court explained the doctrine of waiver on the basis of earlier pronouncements which are taken G note of discussed in the following manner:

> **"37.** In *Manak Lal* this Court held that alleged bias of a Judge/official/Tribunal does not render the proceedings invalid if it is shown that the objection in that regard and particularly against the presence of the said official in

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question, had not been taken by the party even though the party knew about the circumstances giving rise to the allegations about the alleged bias and was aware of its right to challenge the presence of such official. The Court further observed that: (SCC p. 431, para 8)

> "*8.* ... waiver cannot always and in every case be inferred merely from the failure of the party to take the objection. Waiver can be inferred only if and after it is shown that the party knew about the relevant facts and was aware of his right to take the objection in question."

38. Thus, in a given case if a party knows the material facts and is conscious of his legal rights in that matter, but fails to take the plea of bias at the earlier stage of the proceedings, it creates an effective bar of waiver against him. In such facts and circumstances, it would be clear that the party wanted to take a chance to secure a favourable order from the official/court and when he found that he was confronted with an unfavourable order, he adopted the device of raising the issue of bias. The issue of bias must be raised by the party at the earliest. (See *Pannalal Binjraj* v. *Union of India* and *P.D. Dinakaran (1)* v. *Judges Enquiry Committee.*)

39. In *Power Control Appliances* v. *Sumeet Machines (P) Ltd.* this Court held as under: (SCC p. 457, para 26)

> "*26.* Acquiescence is sitting by, when another is invading the rights.... It is a course of conduct inconsistent with the claim.... It implies positive acts; not merely silence or inaction such as involved in laches. ... The acquiescence must be such as to lead to the inference of a licence sufficient to create a new right in the defendant...."

40. Inaction in every case does not lead to an inference

A of implied consent or acquiescence as has been held by this Court in *P. John Chandy & Co. (P) Ltd.* v. *John P. Thomas*. Thus, the Court has to examine the facts and circumstances in an individual case.

B **41.** Waiver is an intentional relinquishment of a right. It involves conscious abandonment of an existing legal right, advantage, benefit, claim or privilege, which except for such a waiver, a party could have enjoyed. In fact, it is an agreement not to assert a right. There can be no waiver unless the person who is said to have waived, is fully C informed as to his rights and with full knowledge about the same, he intentionally abandons them. (Vide *Dawsons Bank Ltd.* v. *Nippon Menkwa Kabushiki Kaisha*, *Basheshar Nath* v. *CIT*, *Mademsetty Satyanarayana* v. *G. Yelloji Rao*, *Associated Hotels of India Ltd.* v. *S.B.* D *Sardar Ranjit Singh*, *Jaswantsingh Mathurasingh* v. *Ahmedabad Municipal Corpn.*, *Sikkim Subba Associates* v. *State of Sikkim* and *Krishna Bahadur* v. *Purna Theatre*.)

E **42.** This Court in *Municipal Corpn. of Greater Bombay* v. *Dr Hakimwadi Tenants' Assn.* considered the issue of waiver/acquiescence by the non-parties to the proceedings and held: (SCC p. 65, paras 14-15)

> F "*14.* In order to constitute waiver, there must be voluntary and intentional relinquishment of a right. The essence of a waiver is an estoppel and where there is no estoppel, there is no waiver. Estoppel and waiver are questions of conduct and must necessarily be determined on the facts of each G case. ...
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> *15.* There is no question of estoppel, waiver or abandonment. There is no specific plea of waiver, acquiescence or estoppel, much less a plea of H abandonment of right. That apart, the question of

waiver really does not arise in the case. Admittedly, the tenants were not parties to the earlier proceedings. There is, therefore, no question of waiver of rights by Respondents 4-7 nor would this disentitle the tenants from maintaining the writ petition." A B

24. From what is argued by the appellants, at best it can be inferred that the borrower tried to thwart the earlier attempts of the Bank in selling the property. When the first notice was issued, the borrower filed the writ petition. However, it is to be borne in mind that in the said Writ Petition no interim order was passed staking the auction on the stipulated date. The only stay granted was against confirmation of sale. That did not preclude anybody from participating in the auction. We are mindful of the ground realities that many times pendency of such a Writ Petition challenging the auction notice and the kind of stay granted, even partial in nature, deter the intending buyers to come forward and participate in the auction. Be as it may, we find out that even in the second attempt when the reserve price was reduced to Rs. 2.39 crores, the highest bid received was in the sum of Rs. 2.25 crores. Further, even the bid of the appellant which was accepted was in the sum of Rs.2.16 crores. Likewise, after the second auction when the Bank requested the borrower to accept the bid of Rs.2.25 crores giving its reasons and the borrower instead of doing so took initiative resulting in OTS but defaulted therein, it would merely indicate that the borrower was at fault in not adhering to the OTS. By no logic it can be deduced therefrom that the Bank was relieved from its obligation not to follow the mandatory procedure contained in the Rules, while taking fresh steps for the disposal of the property. C D E F G

25. The moot question is, even if there were delaying tactics adopted by the borrower in respect of first two auctions, whether that conduct of the borrower would amount to waiving the mandatory requirement of publishing subsequent notice H

A dated 27.4.2006 fixing the date of auction as 8.5.2006? Our answer has to be in the negative. The aforesaid conduct cannot be taken as waiver to the mandatory condition of 30 days notice for auction as well as other requirements. For examining the plea of waiver, we will have to see as to whether by implied or B express actions, the borrower has waived the aforesaid mandatory requirement when the property was put to sale. We do not find, nor it is suggested, even the slightest move on the part of the borrower in this regard which may amount to waiver either express or implied. On the contrary, when notice dated C 27.4.2006 was published, the borrower immediately filed the Writ Petition 6471 of 2006 challenging the auction notice. Thus, its conduct, far from waiving the aforesaid requirement, was to confront the bank by questioning its validity. It is a different matter that it had to withdraw the said writ petition in view of availability of alternate remedy. Immediately, it filed application D under Section 18 of the SARFAESI Act. There is, thus, not even an iota of material suggesting any waiver on the part of the borrower.

26. The moment we find that the mandatory requirement E of the Rules had not been waived by the borrower, consequences in law have to follow. As held in Mathew Varghese's case, when there is a breach of the said mandatory requirement the sale is to be treated as null and void. Moreover, the appellant have no answer to many other infirmities pointed F out by the High Court. We, therefore, are of the opinion that present appeals lack merit.

27. Before we part with, it is imperative to mention that the purchaser has paid a sum of Rs.1.86 crores towards purchase of property and Rs.30 lakh towards moveable items to the G Bank. He has also spent Rs.1,86,335/- towards registration fee and Rs.15,62,400/- towards stamp duty. In addition, dues towards municipal tax, Sales Tax liability, dues of Employees State Insurance Corporation, Employees Provident Fund and Belgaum Industrial Cooperative Bank have also been paid. A H

total whereof comes to Rs. 49,91,000/-. These were the liabilities of the borrower. In this way, total amount of Rs. 2,83,39,735/- is paid by the purchaser. He has also discharged municipal tax liability in the sum of Rs.2,86,078/- for the period 1.4.2007 to 31.3.2009. As we have affirmed the order of the High Court setting aside the sale, we grant two months time to the borrower to discharge the entire liability of the Bank. The borrower shall also reimburse the amount of registration fee and stamp duty to the purchaser. The direction to pay this amount is given having regard to the conduct of the borrower on earlier occasions. If the borrower pays the amount due to the Bank, registration charges, stamp duty as well as amount of encumbrances paid by the purchaser, which was the liability of the borrower i.e. a sum of Rs.49,91,000/- + 2,86,078/-, the property shall revert back to the borrower. If the aforesaid amounts are not paid within the aforesaid two months, the Bank shall be at liberty to proceed with the sale of the property following due procedure under the law. In so far as the purchaser is concerned, he shall be refunded entire amount spent by the purchaser, as mentioned above. We have consciously not granted interest to the purchaser on the aforesaid amount, as the purchaser has, in the meantime, utilized the property in question.

28. Subject to the above, the appeals are dismissed.

Bibhuti Bhushab Bose Appeal dismissed.