

Lakshmi Mohan Vs. Airtech Projects Engineers Pvt. Ltd.

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Court : Chennai

Decided On : Mar-22-2013

Judge : The Hon'ble Mrs.Justice Chitra Venkataraman

Appellant : Lakshmi Mohan

Respondent : Airtech Projects Engineers Pvt. Ltd.

Judgement :

In the High Court of Judicature at Madras Dated:22.03.2013 Coram The Honourable Mrs.JUSTICE CHITRA VENKATARAMAN and The Honourable Mr.JUSTICE R.KARUPPIAH Writ Petition Nos.24241 to 24244, 32610 and 32611 of 2012 & M.P.Nos.1,1,1,1,1,1,2,2,2,2,3,3,4,4,5 and 6 o

1. Mrs.Lakshmi Mohan 2. M.Premkumar .. Petitioners in W.P.Nos.24241 to 24244 of 2012 & Respondents 2 and 3 in W.P.No.32610 and 32611/2012 Vs.

1. M/s.Airtech Projects Engineers Pvt. Ltd., rep. By its Director S.P.Sundaram, S/o Subramanian, No.6, Golden Enclave, 4th Floor, New No.274, Poonamallee High Road, Chenna

010. .. Respondent in the above W.Ps 2. The Chief Manager and Authorised Officer, United Bank of India, T.Nagar Branch, First Floor, No.48, North Usman Road, Chenna

017. .. Respondent in W.P.Nos.24241 to 24144 of 2012 and Petitioner in W.P.No.32610 and 32611 o

3. The Registrar, Debts Recovery Tribunal II, Spencer Towers, Chennai

002.

4. The Registrar, Debts Recovery Appellate Tribunal, Egmore, Chennai

008. .. Respondents in the above W.P.s W.P.Nos.24241 and 24242 of 2012: PETITIONS under Article 226 of The Constitution of India praying for the issuance of writ of Certiorari calling for the records on the file of the 4th respondent herein in R.A.(S.A.)Nos.86 and 87 of 2010 and quash the order passed by the 4th respondent in R.A.(S.A.)Nos.86 and 87 of 2010 dated 31.8.2012. W.P.Nos.24243 and 24244 of 2012: PETITIONS under Article 226 of The Constitution of India praying for the issuance of writ of Certiorari calling for the records on the file of the 4th respondent herein in I.A.Nos.1026 and 1027 of 2011 in R.A.(S.A.)Nos.86 and 87 of 2010 and quash the order passed by the 4th respondent in I.A.Nos.1026 and 1027 of 2011 in R.A.(S.A.)Nos.86 and 87 of 2010 dated 31.8.2012. W.P.Nos.32610 and 32611 of 2012: PETITIONS under Article 226 of The Constitution of India praying for the issuance of writ of Certiorari calling for the records relating to the order dated 31.8.2012 made in R.A.(S.A.)Nos.86 and 87 of 2010 on the file of the 5th respondent herein and quash the same. For Petitioners in W.P.Nos.24241 & 24244 of 2012 & for Respondents 2 and 3 in W.P.Nos.32610 & 32611 of 2012 : Mr.V.T.Gopalan, S.C. For M/s. Sree Sun Associates For Petitioner in W.P.Nos.32610 & 32611 of 2012 and for Respondent No. 2 in W.P.Nos.24241 & 24244 of 2012 & : Mr.F.B.Benjamin George For first respondent in all W.Ps. : Mr.T.R.Rajagopalan, S.C. For Mr.S.N.Kirubanandam ----- C O M M O N O R D E R CHITRA VENKATARAMAN,J.

Writ Petition Nos.32610 and 32611 of 2012 and 24241 to 24244 of 2012 are filed by the United Bank of India and the purchasers of the guarantor's property respectively in the auction conducted by the Authorised Officer of the Bank against the orders of the Debt Recovery Appellate Tribunal in R.A.(SA) Nos.86 and 87 of 2010 dated 31.8.2012 and the orders of the Debt Recovery Tribunal in I.A.Nos.1026 and 1027 of 2011 in R.A.(S.A.)Nos.86 and 87 of 2010 dated 31.8.2012.

2. The first respondent in the above Writ Petitions is Airtech Projects Engineers Pvt. Ltd, the borrower, who defaulted in the payment of its dues to the bank. Since the issue and facts are common, the status of the parties as in W.P.No.31610 of 2012, filed by the Bank, is maintained herein in this order.

3. The first respondent herein had the cash credit facility for Rs.85.00 lakhs from the bank. One of its Directors by name Vasantha Devi (not a party in the Writ Petitions) offered her immovable property of an extent of 2.04 Grounds (4900 sq.ft at 32, McNichols Road, Chetpet, Chennai-31 for the above-said credit facility as security and guaranteed the repayment of the dues. Admittedly, the first respondent did not repay its due; thus its account became NPA. This led to the petitioner issuing a demand notice on 01.08.2008, calling upon the first respondent and its Directors to repay the dues of Rs.88,52,741/- within a period of 60 days of receipt of the notice. On issuing the notice, the petitioner also arranged for valuation of the property. After due notice to the guarantor and in her presence, on 14.10.2008, the property given as security was valued at the market price of Rs.2,68,20,000/- by one M/s.United Shakthi Associates. The petitioner served notice of possession and sale notice dated 12.11.2008 on the borrower. The petitioner took possession of the secured asset on 12.11.2008 and had the valuation done once again by the very same valuer who did the valuation on 14.10.2008. Although the market value of the secured asset was arrived at, the valuer fixed the market value at Rs.2,68,20,000/- and the distress sale value at Rs.2,14,56,000/-. The service was accepted by the Authorised Officer on the upset price at Rs.2,15,00,000/-. It is stated that a combined possession cum auction notice dated 12.11.2008 was issued through publication on 17.11.2008 fixing the date of sale as 04.01.2009 at 12.00 noon. Since this happened to be a Sunday, through a corrigendum affixed on the notice board of the Bank, the same was adjourned to 05.01.2009.

4. The first respondent challenged the notice dated 12.11.2008 before the Debt Recovery Tribunal III, Chennai in S.A.No.136 of 2008 questioning the date of sale originally fixed for 04.01.2009, that it being a Sunday, the sale could not go on. According to the petitioner, the corrigendum issued postponing the sale to 05.01.2009 was not brought to the notice of the Debt Recovery Tribunal. By order

dated 29.12.2008, the Debt Recovery Tribunal set aside the possession-cum-auction notice dated 12.11.2008. It however permitted the Bank to take action afresh according to law. The petitioner challenged this in C.R.P.No.501 of 2009 before this Court, contending that the order passed by the Debt Recovery Tribunal was in violation of the principles of natural justice, the same having being passed without hearing the petitioner. The first respondent did not respond to the notice in the Civil Revision Petition. By order dated 21.4.2009, this Court allowed the Civil Revision Petition and remanded the case back to the Debts Recovery Tribunal not II, Chennai, to decide the case on merits and in accordance with law, after notice of hearing to the parties.

5. However, in the meantime, the petitioner bank issued another possession cum - sale notice on 18.3.2009 under Section 13(4) of the SARFAESI Act, fixing the auction sale on 24.4.2009. The creditor Bank was stated to have received two offers. In the auction sale held on 24.4.2009, respondents-2 and 3 (Writ Petitioners in W.P.Nos.24241 to 24244 of 2012) were declared as successful bidders at a total bid amount of Rs.2,17,40,000/-. Since they paid 25% of the bid amount (Rs.2,15,00,000/-), they were declared as successful bidders. This auction sale dated 18.03.2009 was again challenged by the borrower/first respondent in S.A.No.52 of 2009 before the Debt Recovery Tribunal II, Chennai and it sought for stay of the auction sale to be held on 24.4.2009. By order dated 21.04.2009, the Debt Recovery Tribunal granted a conditional order of stay that the first respondent/borrower shall deposit a sum of Rs.25 lakhs on or before 21.5.2009 and a further sum of Rs.25 lakhs on or before 21.6.2009 and the Bank was, however, permitted to proceed with the auction, but was directed not to confirm the auction sale till 21.5.2009. Admittedly the borrower paid Rs.10,00,000/- to the Bank on 23.04.2009.

6. Aggrieved by this, the first respondent/borrower filed an appeal before the Debt Recovery Appellate Tribunal in S.A.No.307 of 2009. By order dated 01.05.2009, the Debt Recovery Appellate Tribunal granted stay on condition that the defaulter/borrower deposited a sum of Rs.7,50,000/- by 02.06.2009 and another sum of Rs.7,50,000/- by 06.07.2009. On 28.05.2009, the borrower paid Rs.7,50,000/-. Admittedly, the first respondent had paid a sum of Rs.10.00 lakhs

on 23.4.2009; Rs.7.50 lakhs on 28.5.2009; Rs.6.50 lakhs on 19.6.2009 and Rs.1.00 lakh on 30.7.2009, totalling to a sum of Rs.25,00,000/-.

7. As against these orders dated 21.4.2009 and 01.05.2009 passed by the Debt Recovery Tribunal and Debt Recovery Appellate Tribunal respectively, the petitioner filed Writ Petitions in W.P.Nos.9686 and 9700 of 2009 before this Court. By order dated 02.06.2009 in W.P.No.9700 of 2009, this Court directed the Debt Recovery Tribunal to dispose of S.A.Nos.136 of 2008 and 52 of 2009 within a period of two months from the date of receipt of the order. W.P.No.9686 of 2009, challenging the order of the Debt Recovery Appellate Tribunal was disposed of later.

8. Pursuant to the order dated 06.05.2009 in W.P.No.9700 of 2009, the Debt Recovery Tribunal passed orders on 01.10.2009 in S.A.Nos.136 of 2008 and 52 of 2009, dismissing both the applications on 01.10.2009, holding that Section 13(4) proceedings dated 12.11.2008 and 18.3.2009 were in accordance with the Act. Pursuant to this, the successful bidder paid the balance sale consideration on 05.10.2009 and the sale certificate was issued on 10.10.2009. Later, on 15.10.2009, the sale certificates were also registered before the Registering Authorities. As against the order of the Debts Recovery Tribunal, the first respondent-borrower preferred S.A.Nos.749 and 750 of 2009 before the Debt Recovery Appellate Tribunal, which stayed the order of the Debt Recovery Tribunal.

9. We further note that the borrower filed Writ Petitions against the orders of the Debt Recovery Tribunal dated 01.10.2009 in W.P.Nos.22453 and 22454 of 2009 and sought for a Writ of Mandamus to forbear the Bank from recovering the sale consideration from the auction purchaser. By order dated 03.11.2009, this Court directed the borrower to pay Rs.15,00,000/- to the Bank and directed the Bank not to confirm the sale. The borrower paid the said amount on 16.11.2009. The writ petitions were disposed of on 30.11.2009 with the direction to the borrower-first respondent to work out the remedies before the Debt Recovery Appellate Tribunal in the pending appeal. It may be noted that the purchasers were handed over physical possession on 06.03.2010. From the sale proceeds, a sum of

Rs.79,06,445.32, due in the account of the borrower was credited to the loan account and the balance amount of Rs.1,38,33,554.32 was returned to the borrower by way of pay order dated 08.03.2010. It is a matter of record that the Debt Recovery Appellate Tribunal passed an order on 03.03.2010 that it had no jurisdiction to grant stay without the pre-deposit as per Section 18 of the SARFAESI Act. As against this, the borrower filed W.P.Nos.4772 and 4773 of 2010. By order dated 09.03.2010, this Court directed the Debt Recovery Appellate Tribunal to dispose of the application filed by the borrower.

10. By order dated 20.06.2011, the Debt Recovery Appellate Tribunal allowed the appeals filed against the order dated 01.10.2009 and directed the petitioner bank to restore possession of the secured asset to the first respondent within seven days from the date of receipt of a copy of the order. The Debt Recovery Appellate Tribunal pointed out from the documents produced by the bank that the Earnest Money Deposit paid by both the bidders were less than the prescribed Earnest Money Deposit, viz., 10% of the upset price of Rs.21,50,000/-. Thus as against a sum of Rs.21,50,000/-, both the bidders had paid a sum of Rs.21,15,000/- only. In the circumstances, pointing out to the ineligibility of the purchasers to participate in the auction, among various other grounds on the issuance of possession notice, bona fides on the obtaining of the valuation report from the valuer, the Tribunal allowed the appeals filed by the borrower, thereby set aside the sale and the possession taken on 12.11.2008. This led to the filing of the Writ Petitions by the bank and the purchasers/respondents 2 and 3 before this Court, in W.P.Nos.16120 and 16121 of 2004 (at the instance of the bank) W.P.Nos.15321 and 15322 of 2011 (at the instance of the Purchasers).

11. By order dated 16.08.2011, this Court set aside the order of the Tribunal and remanded the same to the Debt Recovery Appellate Tribunal for hearing once again; that as the appeal memorandum did not contain any challenge made as to the non-compliance of Rule 8(5) of the Rules or the violation of the conditions in the auction notification, the auction purchasers were not in a position to rebut the said contention. This Court felt that an opportunity should be given to the borrower to raise specific grounds with regard to the non-compliance of Rule 8(5) and other material irregularities in the conduct of sale, besides all other contentions available

to them, including the point raised by the learned Senior Counsel regarding setting aside of the possession notice earlier on the basis of which the auction notification was issued. Thus, for that limited purpose, the impugned order was set aside and the matter was remitted to the Debts Recovery Appellate Tribunal.

12. After the remand, the borrower/first respondent herein filed a petition in Application No.1025 of 2011 before the Debts Recovery Appellate Tribunal and sought permission to raise additional grounds. Although the petitioner raised its objection on this, it, however, made an endorsement on 19.9.2011 that it had no objection to allow the petition, but granting liberty to the petitioner to raise the maintainability issue along with the main appeal. According to the petitioner, there was no order allowing Application No.1025 of 2011. On 28.9.2011, the petitioner filed its reply to the additional grounds. By order dated 31.8.2011, the Debt Recovery Appellate Tribunal stated that the Application No.1025 of 2011 was allowed on 19.9.2011 itself. On merits, the Tribunal allowed the appeals filed by the first respondent on the additional grounds too.

13. The Tribunal held that there was no material to show that the petitioner sought for the valuation of the property at any time i.e., either for the valuation done vide report dated 14.10.2008 or for the valuation done vide report dated 12.11.2008. The report revealed the name of the client and address and there was no request referred to, seeking valuation. Possession was taken on 12.11.2008 and in the absence of materials to indicate that valuation was sought on that date, there was no valuation done, in fact, on that date. Even for the valuation done vide report dated 12.11.2008, there was no indication that the petitioner sought for valuation. On a comparison of the two valuation reports, the Tribunal observed that no request was made by the petitioner to the valuer to value the property at any point of time, either on 14.10.2008 or on 12.11.2008; thirdly, even though the charges on the valuation done on 14.10.2008 were debited to the account of the borrower, no bill was given by the valuer for the valuation done on 12.11.2008 or any fee paid for the same. The photocopy of the photographs taken on 14.10.2008 were appended to the valuation done on 12.11.2008, which means, there was, in fact, no inspection on 12.11.2008; further, the valuation done on 14.10.2008 and 12.11.2008 made a reference to the valuation done on 16.10.2004 and there was

no reference in the relevant report dated 12.11.2008 as to the valuation done on 14.10.2008. Thus, there was a failure to comply with Rule 8(5) of the Security Interest (Enforcement) Rules, 2002 and the Bank had proceeded to sell the property in contravention of Rule 8(5) of the Rules. There was no service of possession notice in person on the guarantor Vasantha Devi, who was present at the time of taking possession and who was present at the time of valuation also. The borrower was not present at the time of taking possession and hence, the absence of service of notice on the guarantor, who was present when possession was taken and valuation was done, makes the proceeding illegal and hence, the possession as well as auction notice dated 12.11.2008 was liable to be set aside.

14. As far as the second possessioncumsale notice dated 18.09.2009 was concerned, in view of the absence of valuation, as had been contended by the petitioner on 12.11.2008, the Debt Recovery Appellate Tribunal viewed that the second possession-cum-sale notice was liable to be set aside. Further, the reserve price in the case was fixed at Rs.2,15,00,000/- and 10% of the Earnest Money Deposit was Rs.21,50,000/-. Each of the two bidders deposited Rs.21,15,000/- only. Thus, when the conditions in the sale notice were not complied with, the offer by the two bidders should have been rejected. However, the Authorised Officer permitted the two bidders to participate in the auction and accepted the bid by the second and third respondents. The sale conducted, accepting the offer of the ineligible bidder, is contrary to Rule 8(5)(e) of the Rules. In the circumstances, the possession notice dated 12.11.2008 and the possessioncumauuction notices dated 12.11.2008 and 18.3.2009 were liable to be set aside; the Authorised Officer had acted in contravention of the provisions of the Act and the Rules. Thus the first respondent's appeals were allowed.

15. Aggrieved by this, the present Writ Petitions have been filed by the Bank and the successful purchasers. W.P.Nos.24241 and 24242 of 2012 are filed by the successful bidders, viz., Mrs.Lakshmi Mohan and Premkumar, son of Mrs.Lakshmi Mohan, against the final orders of the Debts Recovery Appellate Tribunal dated 31.8.2012 in R.A.(S.A.) Nos.86 and 87 of 2010 in so far as the borrower/first respondent had preferred the appeals without paying the statutory requirement of pre-deposit of 50% of the demand amount. Writ Petition Nos.24243 and 24244 of

2012 are also filed by the successful bidders against the order in I.A.Nos.1026 and 1027 of 2011. Writ Petition Nos.32610 and 32611 of 2012 are filed by the Bank against the order dated 31.8.2012 in S.A.Nos.86 and 87 of 2010.

16. Mr.V.T.Gopalan, learned senior counsel appearing for the purchasers in W.P.Nos.24241 to 24244 of 2012 challenged the order of the Tribunal that when the Bank had complied with the requirements of law under Section 13(2) and 13(4) of the SARFAESI Act read with Rules 5 and 8 of the Rules and that the valuation of the property was done in the presence of the guarantor and the borrower, the Tribunal committed a serious error in holding that there was no valuation done on 12.11.2008. The grounds on which the valuation done by the approved valuer was rejected, are totally unsustainable. Neither the guarantor nor the borrower had given any objection to the valuation report. The property was purchased for a fair value much above the guideline value. When the borrower had failed to comply with the demand notice, the further proceedings being in the nature of execution, the Tribunal was not correct in setting aside the sale. As regards the deficiency in the Earnest Money Deposit payment, he submitted that the first respondent/borrower had not established any prejudice caused to them. In any event, when the purchasers had remitted 25% of the bid amount within the time stipulated in the auction notice, that is , on the date of sale and the further 75% within the time on 05.10.2009, the Tribunal committed serious error in setting aside the sale on the sole ground that the auction purchasers/ petitioners in W.P.Nos.24241 to 24244 of 2012 had paid Rs.21,15,000/- as against a sum of Rs.21,50,000/- towards EMD, which was only a bona fide mistake committed by the purchasers.

17. Learned senior counsel appearing for the purchasers submitted that the first respondent/borrower has the right of appeal under Section 17 only as regards the proceedings under Section 13(4) of the SARFAESI Act. The valuation taken on 14.10.2008 and 12.11.2008 shows the valuation of the property at Rs.2,68,20,000/- based on materials and hence, there can be no procedural irregularity to be spoken to on the second valuation done as one in violation of Rule 8(5) of the Rules. The guarantor was present on the date of valuation and notice was sent to the guarantor in accordance with the Rules through Registered

Post with Acknowledgment Due. Thus the personal service on the guarantor cannot be emphasized as the only mode of service or the absence of it as a vitiating circumstance. In any event, the guarantor, whose property is the subject matter of sale, made no complaint against the same till this date. As regards the deficiency in the payment of 10% of Earnest Money Deposit, he submitted that as against a sum of Rs.21,50,000/-, what was paid by the purchasers was Rs.21,15,000/-. The defect was noticed for the first time by the Appellate Tribunal, long after the confirmation of the sale. However, when the purchasers had complied with the 25% payment, no grievance could be raised, that too by the purchasers. Considering the object of Rule 8(6)(e), that the participants in the auction are bona fide persons, the small difference in the Earnest Money Deposit payment cannot be taken as a strong circumstance to set aside the sale. In the absence of any prejudice suffered by the borrower on this account, the sale could not be set aside.

18. In this connection, learned Senior Counsel placed reliance on the decision reported in (1974) 4 SCC 75.(Bhoor Singh and another V. State of Punjab), particularly paragraph 22, that the illegality complained of must be an illegality, incurable because of prejudice leading to failure of justice. In any event, whatever irregularity was there in the payment of Rs.21,15,000/- as against a sum of Rs.21,50,000/-, the same was made good by the deposit of 25% of the price at which the property was sold. Emphasizing on the need to keep in the background, the meaning of the term "illegality" and "irregularity" on the conduct of the prejudice to be complained of, he referred to the decision reported in (2007) 1 SCC 25.(State of U.P. and others V. Desh Raj) and submitted that the irregularity in taking Earnest Money Deposit at a difference of Rs.35,000/- cannot lead to setting aside of the sale. The first respondent had not specifically challenged the sale registered in favour of the purchasers. As such, after the issuance of sale certificate, it is not open to the first respondent to question the non-compliance of the Earnest Money Deposit at 10%. In any event, the difference being of a sum of Rs.35,000/- only, the sale cannot be set aside. Referring to the objects of the SARFAESI Act and the objection, particularly as regards the valuation of the property, he referred to the decision reported in (2010) 13 SCC 9.(May George V. Special Tahsildar and others) that to hold the sale as illegal, would work serious

setback to the recovery proceedings as well as injustice to the purchasers, who had no control over those aspects. Thus, setting aside the sale at this juncture would not promote the object of the Act. As to the requirement of payment of 10% of the Earnest Money Deposit, he further pointed out that such compliance cannot be taken in absolute sense as a mandatory requirement. The use of the term 'shall' in the auction notice has to be read as meaning 'may'. He further impressed on the fact that the purchasers had taken loan from the Bank on the strength of the property providing for meeting the payment of the sale consideration and has been paying interest thereon. With the rights of yet another person involved, setting aside the sale would cause serious hardship. Consequently, the order of the Debt Recovery Appellate Tribunal be set aside.

19. Continuing the said arguments, Mr. Benjamin George, learned counsel appearing for the bank/petitioner in W.P.No.32610 and 32611 of 2012, made his preliminary objection to the orders passed by the Tribunal that in setting aside the sale, the Tribunal had granted a relief which was not prayed for by the borrower before the Tribunal. None of the grounds raised by the petitioner/bank was considered by the Tribunal. The guarantor was not made as a party in the proceedings taken by the borrower. There was no objection raised by the said guarantor as to the service of possession notice on her. She did not deny the fact that the Bank took possession of the secured asset on 12.11.2008 or as to the valuer valuing the property on 12.11.2008 in her presence. The Act and the Rules do not contemplate service of notice of possession or sale on the person of the guarantor or the borrower. Thus, the findings of the Appellate Tribunal are not based on materials and the provisions of the Act and hence, perverse. As to the Tribunal's view that the valuer was not asked to value the property and that he had not raised any bill, he submitted that the Tribunal had found that the charges for valuing the secured asset was debited to the account of the debtor. The first time the bank had obtained the valuation report was on 14.10.2008. This was done only to identify the property for issuing possessioncum sale notice. This is only an act of fair play. Before bringing the property for sale, once again the bank caused a valuation done. This, however, does not import any illegality to the proceedings. More so, when the owner of the secured asset was very much there at the time of valuation and taking possession and there are no complaints as to the compliance

of the procedure, it is not open to the borrower to take this as an issue to challenge the sale. The first respondent/borrower's locus standi, at best, on this, can arise only when he disputes the very declaration of NPA, or as to the amount due and payable by them. Referring to Rule 3 of the Rules, he submitted that sending the notice to the guarantor through Registered Post with Acknowledgment Due is well in accordance with Rule 3 of the Rules. Referring to Rule 8(1), he submitted that where the Authorised Officer takes possession of the secured asset, he shall deliver the possession notice prepared as per Appendix IV to the Rule to the borrower. One of the modes specified on the service of notice is by affixing of the possession notice on the outer door or at such conspicuous place of the property. The Act does not contemplate personal service on the guarantor too. Hence, when notice was given to the borrower and the guarantor, there is full compliance as per the Rule.

20. As to the need for the second valuation after 14.10.2008 valuation, he pointed out that before taking possession, in order to ascertain the value of the property, the Bank took the first valuation on 14.10.2008 through the approved valuer of the bank. The same was reported to the Regional Officer and approval was obtained for fixing the upset price. Thereafter, on 12.11.2008, after taking possession, to comply with the requirement of the Security Interest (Enforcement) Rules, 2002, a fresh valuation was done through the same valuer. The valuer's bill dated 14.10.2008 was debited to the account of the borrower. He pointed out that the documents relating to the bill and the details were submitted before the Debt Recovery Tribunal, vide petition dated 02.12.2011. A reading of the valuation report would show that the same was done in the presence of the owner of the secured asset and except for the distress value stated in the first report, there are no differences. In any event, the Authorised Officer, who also happened to be the General Manager in the secured creditor Bank, had fixed the upset price. Thus, the object of the second valuation is one and the same, viz., to find out the market value of the property to be sold. Thus, the absence of a bill for the second valuation will not vitiate the valuation or the sale.

21. As to the locus standi of the borrower to question the sale, learned counsel appearing for the Bank stated that admittedly, the guarantor had had no grievance

on the sale of the property. The said guarantor was very much present at the time when the valuation of property had taken place on both occasions, i.e., on 14.10.2008 and 12.11.2008. The receipt of possession notice was also acknowledged by the guarantor on 12.11.2008. As per Section 13(4) of the SARFAESI Act, on the default committed by the borrower, the secured property vests in the secured creditor on the compliance of the procedure under Section 13(2) of the SARFAESI Act. Taking us through Section 17 of the SARFAESI Act, he submitted that once the Bank had notified the sale under Section 13(4) of the SARFAESI Act, the respondent should have challenged the sale proceedings independently. Going by the decision reported in (2009) 8 SCC 36.(Indian Overseas Bank v. Ashok Saw Mill), every part of the proceedings contemplated under Section 13 is amenable to challenge before the statutory body. In the circumstances, when the petitioner had not shown any prejudice caused and had not, in any manner, challenged the sale, even assuming that there is a violation of the provisions under Rule 8, the challenge made by the respondent borrower could not be sustained. Placing reliance on the decision reported in (2004) 8 SCC 67.(Anil Kumar Srivastava V. State of U.P. and another), he further submitted that considering the conceptual difference between the distress value and the market value, the upset price was fixed by the Bank. No materials were placed by the borrower to show that the upset price fixed was low.

22. Learned counsel appearing for the petitioner further pointed out to Section 69 of the Transfer of Property Act vis-a-vis Section 13 of the SARFAESI Act and submitted that going by Section 69(4) of the Transfer of Property Act, the sale cannot be questioned by the borrower. Thus, when Section 13 contemplates sale of the property without the intervention of the Court, restriction under Section 69-A, 69B and 69C alone are protected. In the circumstances, he referred to the decision reported in 2009-3-L.W. 792 (Nazima Continental & others Vs. The Indian Overseas Bank, Triplicane Branch and others) and submitted that without amending the prayer and the pleading, the borrower-respondent herein cannot take shelter under the orders of this Court to raise additional grounds. Considering the findings by the Debts Recovery Tribunal based on the documents available, the valuation was properly done and once the sale is completed and the sale certificate executed, going by Section 69(3) of the Transfer of Property Act, the

remedy of the borrower is only for damages and he cannot claim any re-possession. He pointed out that when the Bank had complied with the statutory requirement in taking possession by the issue of possession notice and the valuation done in accordance with Rule 8(6) and the auction done accordingly, if the borrower is to question the sale on the ground of violation of the auction notification, then, necessarily, prayer should have been made in the application by stating his grievance. Incidentally, even after the decision was given by the Appellate Tribunal on the deficiency in the E.M.D. paid, there was no prayer from the borrower to stay the sale. Thus, the application before the Debts Recovery Appellate Tribunal contains a material defect in not challenging the sale. Hence, the Tribunal committed a serious error in granting a relief which is larger than a relief sought for by the borrower. In this connection, he placed reliance on the decisions reported in (2003) 1 SCC 47.(Ram Nibas Gagar Vs. Debojyoti Das), (2008) 17 SCC 49.(Bachhaj Nahar Vs. Nilima Mandal) and (1997) 7 SCC 38.(J.Jermons Vs. Aliammal and others) and submitted that the grounds raised by the borrower were very much available when this Court decided in the earlier round of litigation. After the issuance of sale certificate on 10.10.2009, it is not open to the borrower to question the sale. Thus, referring to the decisions reported in (2011) 5 SCC 60.(Shankara Cooperative Housing Society Ltd Vs. M.Prabhakar), AIR 198.Bombay 351 (M/s.B.D.Yadav & M.R.Meshram E. & C. Vs. Administrator) and (1991) 3 SCC 27.(Poddar Steel Corporation Vs. Ganesh Engineering Works), he seeks setting aside of the order of the Appellate Tribunal. He further pointed out that assuming for a moment that there are certain lapses, still, no prejudice is caused to the borrower to complain about the sale. The borrower is bound to prove substantial injury caused to him by the sale. Referring to the decisions reported CDJ 201.APHC 54 (M/s.PLR Products Pvt. Ltd Vs. Government of Andhra Pradesh), (2007) 2 CTC 39.(Industrial Development Bank of India Ltd., Chennai-15 Vs. Kamaldeep Synthetics Ltd., Chennai) and (2006) 4 SCC 41.(Manish Mohan Sharma Vs. Ram Bahadur Thakur Ltd.), he submitted that even if there be a violation, taking note of the object of the Act, the sale has to be confirmed. It is also submitted by the learned counsel appearing for the Bank that there was no dispute that the EMI paid fell short of the notified amount of Rs.21,50,000/- and the compliance of the conditions in the notification are

mandatory in nature.

23. Mr.T.R.Rajagopalan, learned senior counsel, attacked the contentions of the Bank made on the lack of pleadings, particularly in the context of the decisions of this Court, permitting the petitioner to raise additional grounds alone. Referring to the petition filed before the Tribunal as well as before the Appellate Tribunal and the grounds taken subsequent to the remand order passed by this Court, he pointed out that except for the EMD deficiency, all other pleadings are already there in the original application itself. The borrower had attacked the sale, particularly in the context of violation as regards valuation, fixing a low upset price and referring to the distress sale value to fix the low price. Taking us through Ground Nos.A, D, M, N and O in S.A.No.136 of 2008, he also pointed out to the absence of any personal notice served on the guarantor in S.A.No.52 of 2009. Referring to the violations done on both the occasions, learned senior counsel pointed out that there are hardly any material disclosed as forming the basis for arriving at the market value or the details of the enquiries made, to arrive at a particular value. Referring to the valuation done in 2004, he pointed out that no materials were available as regards the valuation done on 14.10.2008 and it came into light only after the remand by this Court. Pointing out the difference in the valuation reports dated 14.10.2008 and 12.11.2008 respectively, particularly as to the seal of the valuer found, he questioned the rationale behind making two reports by the self-same valuer. While the seal as found in the valuation report dated 14.10.2008 contains the valuation number etc., the seal found in the report dated 12.11.2008 by the same valuer, however, was different. There are no materials to show the communication between the Bank and the valuer, requiring the valuation on both occasions. In other words, according to the learned senior counsel, they are all created documents and there was, in fact, no valuation done at all on 12.11.2008.

24. Referring to the order of this Court in W.P.No.15321 and 15322 of 2011 dated 16.08.2011, learned senior counsel drew our attention to paragraph 29 of the order on the submissions by the learned senior counsel appearing for the auction purchaser that no opportunity was given to the auction purchaser to make the submission on the EMD payment of Rs.21,15,000/- as against Rs.21,50,000/-.

Referring to paragraph 39 of the order holding that the auction purchasers were not in a position to rebut the contention on the borrower's allegation of non-compliance of Rule 8(5) and the violation of the terms of the auction notification and the absence of grounds on this issue, all that this Court did was to give an opportunity to the borrower to make specific grounds as regards the non-compliance of Rule 8(5) and other material irregularities in the matter of sale and all contentions available to them, including the possession notice on the basis of which the auction notification was issued and thereby grant the Bank and the auction purchaser an opportunity to state their case. Thus, for that limited purpose alone, the order was set aside and the matter was remitted back to the Debt Recovery Tribunal. Thus, this Court permitted the borrower to raise additional grounds and the auction purchaser and the Bank to submit their version with respect to the grounds to be taken by way of additional grounds. He drew our attention to paragraph 40 of the order, wherein, this Court observed "it is made clear that we are not remitting the matter only on account of the absence of pleadings in the memorandum of appeal pertaining to violation of Rule 8(5) and the material irregularities in the sale. Every endeavour shall be made by the DRAT to dispose of the matter as expeditiously as possible and in any case, within a period of two months from the date of receipt or production of a copy of the order."

25. In the background of this observation, all that the borrower had to do was to raise specific grounds as regards the non-compliance of Rule 8(5) of the Rules, which the borrower had done rightly. He also referred to the review grounds taken by the auction purchaser before this Court in the writ petition referred to above, questioning the remand order.

26. Referring to the said grounds, by order dated 30.8.2011 in Review Application Nos.121 and 122 of 2011, this Court rejected the said applications. In paragraph 4, this Court pointed out to the absence of specific ground on the challenge under Rule 8(5) in the memorandum of appeal of the borrower and hence, only to give an opportunity to the borrower to raise the grounds as well as to the Bank and the successful purchaser to defend the sale, the matter was remitted. In these circumstances, when the facts as to the legality of the issue were considered by the Tribunal and the issues thereon were raised before this Court, rightly, this Court permitted the borrower to raise additional grounds.

27. Thus the remand order was necessitated on account of the documents contained in the file maintained by the Bank and referred to by the Debt Recovery Appellate Tribunal to set aside the sale, that opportunity to defend the respective case of the parties was afforded by this Court by allowing the borrower to raise further grounds on the basis of Rule 8(5) of the Rules. This Court further observed that the observations made in the order in the Writ Petition, however, would not stand in the matter of considering the case afresh independently.

28. In terms of the directions of this Court, the questions before the Tribunal were accordingly raised by the borrower as regards the compliance of the EMD conditions, the failure of which came to light only during the appeal proceedings, apart from the grounds raised based on Rule 8(3) of the Rules. As already noted, since the application filed by the borrower clearly referred to the challenge made to the proceedings and sought for a relief to set aside the demand notice and the consequential alleged possessioncum-sale notice issued under Section 3(4) dated 12.11.2008 as well as the proposed auction dated 04.01.2009, the petitioner also sought for an interim prayer to stay the auction proceedings taken pursuant to the demand notice dated 01.08.2008 issued under Section 13(2) and sale notice dated 12.11.2008 issued under Section 13(4) of the SARFAESI Act.

29. Learned senior counsel submitted that in the application filed in S.A.No.52 of 2009, the borrower had also sought for a similar prayer. He further pointed out that the borrower had taken a specific allegation that there was no due publication inviting prospective bidders. Considering the need for wide publication to attract bidders in more numbers for competitive bidding to arrive at the best possible price, the failure to cause effective publication would only result in prejudice to the borrower. Alleging that the value of the property is more than Rs.6 crores, the borrower also questioned the upset price fixed at Rs.2,15,00,000/-. The borrower also challenged the proceedings on the failure to follow Rule 8(5) of the Security Interest Enforcement Rules in getting the valuation from an approved valuer as well as the absence of materials to indicate the deliberation by the secured creditor in arriving at the upset price. Referring to the need for compliance of Rule 9 of the Security Interest Enforcement Rules, 2009, he submitted that when the prayer is a comprehensive one, as directed by this Court, questioning the sale, the

borrower raised grounds on the validity of the sale. Learned senior counsel further pointed out to the reply statement filed by the Bank in S.A.No.136 of 2008 and pointed out that the counter affidavit was silent as regards the so called valuation done on 14.10.2008 and it merely referred to the valuation done on 12.11.2008. He further referred to the order passed by the Tribunal on 1st October 2009 that in view of the order passed by the Tribunal on 21.04.2009, the auction scheduled on 24.04.2009 was deferred by the Bank. On 21.04.2009, the borrower was directed to deposit a sum of Rs.50,00,000/- as a condition that the sale shall not be confirmed. The said amount was to be paid in two instalments. The first instalment was to be paid on 21.05.2009 and the second instalment was to be paid on 21.06.2009.

30. He submitted that on the appeal filed before the Debt Recovery Tribunal, by order dated 01.05.2009, there was a stay on condition that the borrower should deposit a sum of Rs.7.50 lakhs on or before 02.06.2009 and another Rs.7.50 lakhs on or before 06.07.2009. Evidently, the borrower deposited a sum of Rs.7,50,000/- on 28.05.2009, Rs.6,50,000/- on 19.06.2009 and Rs.1,00,000/- on 30.07.2009 respectively. The borrower filed writ petitions in W.P.Nos. 22453 and 22454 of 2009 for a Writ of Mandamus to forbear the appellant and the Bank from receiving the balance sale consideration from the purchasers and confirming the sale till the adjudication of the appeals S.A.Nos.749 and 750 of 2009 before the Debt Recovery Tribunal. One of the allegations made in the writ petition was collusion by the Bank with the auction purchaser in fixing the upset price at Rs.2.15 crores and in selling the property at Rs.2.17 crores. This Court directed the Bank to state as to whether any guidelines had been framed by the Reserve Bank of India based on which the upset price of the property could be reflected in the notice. The Bank informed that no guideline value was fixed by the Reserve Bank of India. Consequently, this Court directed the Bank to produce the original valuation report. On perusing the original report, by order dated 30.11.2009, in paragraph 3, this Court observed as follows: "3. From the original report, it appears that the valuer has assessed the value of the property at Rs.2.88 crores. But it is not known as to how and under which law or provision of law or guideline the valuer has shown the distress price of the property at Rs.2.15 crores. The bank, on the basis of such valuation, instead of giving the value of the property at Rs.2.88

crores, has reflected the upset value at Rs.2.15 crores, it was shown to be distress offer. " 31. This Court, however, directed the petitioner to move the Debt Recovery Appellate Tribunal, Chennai, or before the Debt Recovery Appellate Tribunal, Mumbai, if the Tribunal is not functioning, and seek an order regarding the possession over the property in question within a period of three months from the date of receipt of a copy of the order and till the said petitions were filed, this Court held that the Bank should not take any coercive action against the borrower.

32. The borrower filed an appeal before the Debt Recovery Appellate Tribunal on 14.10.2009. It is stated that by 05.10.2009, the entire sale consideration was paid. By order dated 23.12.2009, the Debt Recovery Appellate Tribunal passed an order of stay dated 04.01.2010, by which time, the borrower had paid Rs.40 lakhs. The Tribunal also granted waiver of deposit of further amount. In the background of this, learned senior counsel submitted that before taking possession, the Bank should record its satisfaction on the upset price. Apparently, there are no such records to indicate any such satisfaction reached to arrive at the upset price. Consequently, the possession and sale notice suffer a serious irregularity.

33. Referring to Rule 8(2) and particularly to Appendix 4, he pointed out that there is no separate form prescribed for sale and the possession notice, as per Rule 8(2), should be published within a period of seven days from the date of taking possession in two leading newspapers, one in vernacular language having sufficient circulation in the locality by the Authorised Officer. On 17.11.2008, there was a publication in the newspaper as to the possession taken on 12.11.2008. Since the sale was to be held on 04.01.2009, it being a Sunday, S.A.No.136 of 2008 filed, was allowed, as no sale could take place on a Sunday. Thereafterwards, a corrigendum was issued on 24.12.2008, shifting the sale date to 05.01.2009, regarding which, there was no proper publication. The second sale notice was issued on 23.4.2009. According to the learned senior counsel, the said proceedings is contrary to Rule 8, for, once the first notice failed, fresh possession notice should have been given as per Rule 8(2). Further, as per Rule 8(5), before effecting sale, the Authorised Officer has to obtain the valuation of property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property. As per Rule 8(6), the Authorised Officer has to serve a notice

within 30 days from the date of sale of the immovable asset, on the borrower. The said Rule prescribes the method of publication and the contents of the notice. According to the learned senior counsel, when the notice was issued on 24.12.2008, it failed to comply with Rule 8(6). He further pointed out that as per Rule 8(6)(c), the notice should indicate the reserve price, below which the property may not be sold. The notice fixing the distress value as the reserve price goes against Rule 8(6)(c), for, the distress value is not the reserve price. Thus, when the Authorised Officer fixed the distress value, he should have taken care of the debtor and the guarantor's interest in fixing the correct reserve price.

34. Thus he pointed out to the violation of Rule 8(5) that rightly the Debt Recovery Appellate Tribunal held the possession-cum-sale notices dated 12.11.2008 and 18.03.2009 as bad; that the sale conducted could not be termed as proper in the eye of law. There was a contravention of the provisions of the SARFAESI Act and the Rules made thereunder. Touching on the upset price fixation based on the distress price fixed by the valuer at Rs.2.18 crores and not Rs.2.50 crores, learned senior counsel submitted that there are no reasons assigned as to the satisfaction on fixing the upset price at Rs.2.18 crores as against the market price of Rs.2.50 crores.

35. Commenting on fixing the upset price lower than the market price, for which no reasons are assigned, since fixing the upset price is a vital step in the auction, the Bank should have recorded the reasons for acceptance of the upset price fixed. Consequently, referring to the decision reported in AIR 200.SC 242.(Authorised Officer, Indian Overseas Bank Vs. Ashok Saw Mill), he pointed out that in the background of the illegality writ large, the proof of prejudice is unnecessary. Thus he placed reliance on the decisions reported in (2008) 2 MLJ 89.(Hanu Reddy Realty India Pvt. Ltd. Vs. Jignesh), AIR 200.SC 242.(M/s.S.J.S.Business Enterprises (P) Ltd. Vs. State of Bihar) followed in AIR 200.SC 242.(Authorised Officer, Indian Overseas Bank Vs. Ashok Saw Mill), (2000) 6 SCC 6.(Divya Manufacturing Company (P) Ltd. Vs. Union Bank of India), AIR 200.P&H 14.(Bhupinder Singh Vs. State of Patiala), AIR 200.Orissa 147 (Swastik Agency Vs. State Bank of India, Bhubaneswar) and (2012) 5 CTC 1 (Hemalatha Ranganathan Vs. The Authorised Officer, Indian Bank Circle Office). He also

referred to the decision in W.P.No.15272 of 2009 dated 10.08.2010 (Sheeba Philominal Merlin & another Vs. The Repatriates Coop Finance Development Bank Ltd. & others) that non-compliance of the procedure is fatal to the auction held.

36. On the petitioner's allegation on the absence of pleadings, he further pointed out to the allegations on the debtor not being served with possession notice. Referring to the counter affidavit filed by the Bank before the Debt Recovery Tribunal, he submitted that there is absolutely no pleading by the Bank or any document filed to show that there was service of notice on the guarantor as per Rule 8(1), which calls for personal notice on the guarantor.

37. Apart from this violation, he again pointed out to the valuation done by the valuer that the valuation reports made reference to the valuation done as on 26.08.2004. As far as the second valuation report dated 12.11.2008 is concerned, there is absolutely no reference to the valuation done on 14.10.2008. The files relating to the said valuation done on 14.10.2008 was brought only after the remand order and hence, they are to be treated as created documents, to get over the illegality.

38. Apart from the attack on earnest money deposit paid as one in violation of the auction conditions, he also attacked the manner in which the auction was conducted, that the offer was never received in the sealed cover. Placing reliance on the decision reported in (2011) 4 MLJ 4.(T.Mathias Vs. M.Krishnakumar), he submitted that when the tender notice contained mandatory conditions for compliance so as to confer eligibility for an auction purchaser to participate in the auction, deposit of Earnest Money Deposit being one of the mandatory conditions in the tender apart from the submission of sealed covers, the failure to comply with the condition allowing ineligible persons to bid at the auction and accepting the offer of an ineligible person, makes the entire proceedings illegal and contrary to the auction notification. Referring to the decision of this Court made in W.P.Nos.15321 and 15322 of 2011 dated 16.08.2011 and the reasons for remand as noted in this Court's order, he submitted that when the Earnest Money Deposit paid is admittedly far less than the one noted in the auction notice with ineligible

persons' participation and acceptance of the bid from the ineligible persons, the sale has to fail. On the petitioner's allegation on the absence of pleadings, he pointed out to the original pleadings, particularly to the violations alleged as regards the compliance of Rule 8(1), 8(5) and 8(6) and contended that since, in the appeal memo, separate grounds were not highlighted, the Division Bench gave liberty to the borrower to raise additional grounds. Therefore, the contention that there were no pleadings on the allegation of violation of Rule 8(1), 8(5) and 8(6), is totally incorrect.

39. As regards the allegation on shortfall of EMD, he submitted that this Court permitted the auction purchaser to defend on the shortfall of EMD payment. On the allegation that the Tribunal had no jurisdiction to question the shortfall, he referred to the decision of this Court in W.P.Nos.16120 and 16121 of 2004 (at the instance of the bank) W.P.Nos.15321 and 15322 of 2011 (at the instance of the Purchasers), that even without a pleading, the Tribunal is duty bound to check the violation. Therefore, the allegation that without a pleading the issue of EMD could not be raised, would be against the directions of the Division Bench of this Court. Admittedly, no appeal has been filed by the Bank against the order of this Court, permitting the borrower to raise additional grounds. In the circumstances, when the borrower had been permitted by this Court to raise additional grounds in the context of the pleadings available questioning the sale alleging violation of Rule 8(1), 8(2), 8(5) and 8(6), no exception could be taken to the vital grounds taken as per the orders of this Court.

40. Mr.V.T.Gopalan, learned senior counsel appearing for the auction purchaser, replying to the contentions of the borrower, particularly on the difference in the EMD payment, submitted that the difference between what ought to have been paid and what had been paid, was 9.8%. Pointing out to the difference between illegality and irregularity, he placed reliance on the decision reported in (1974) 4 SCC 75.(Bhoor Singh and another V. State of Punjab) and submitted that no case was pleaded by the borrower as to the prejudice caused to the borrower on account of short payment. At best, such non-payment could only be treated as an irregularity. It was made good by the payment of 25% bid amount soon after the auction. He further submitted that in any event, the payment of 10% EMD was not

a mandatory condition. This he contended so, by placing reliance on the decision reported in (2007) 1 SCC 25.(State of U.P. and others V. Desh Raj) and submitted that the term "shall" used in Rule 8(6) has to be understood as "may", because no penal consequence is prescribed therein on such compliance. Hence, the shortfall of payment of EMD was only a curable defect. Referring to the decision reported in (2010) 13 SCC 9.(May George V. Special Tahsildar and others), particularly, paragraphs 15 to 18 as to the purpose of the SARFAESI Act, he submitted that while the purpose and object of the Act is to facilitate speedy recovery, on the default committed resulting in recovery proceedings, the Bank has to observe the procedure and be fair to the borrower too. Considering the fact that the Bank had to sell the secured asset at the best price and that its dues are recovered, when the purchaser had deposited the sale consideration, the bona fides of the purchaser also has to be seen. Thus the bona fides of the course of conduct adopted by the secured creditor and the buyer observing the conditions in the auction proceedings are of vital importance while testing the challenge made to an auction sale. He further submitted that the intention in making the EMD was to ensure that the participants in the auction are bona fide purchasers, really credit-worthy and are in a capacity to participate in the auction. In compliance of the terms on payment of EMD, the borrower has nothing to say and in the matter of fixing the upset price, it is only the secured creditor who needs to be consulted. In the above circumstances, no prejudice could be seen to have been caused to the borrower and hence, the sale cannot be set aside.

41. Mr.Benjamin George, learned counsel appearing for the writ petitioner, made his reply that there was no pleading on the additional grounds as regards the violation of Rule 8(5); therefore, there is no question of entertaining the additional grounds by the borrower. Leaving that apart, learned counsel gave the reason for accepting the distress sale value as the upset price by referring to the Bank's affidavit filed in W.P.No.22453 of 2009. Pointing to the decision reported in (2004) 8 SCC 67.(Anil Kumar Srivastava V. State of U.P. and another) on the distinction between distress value and the market value, he pointed out that the borrower had not shown that the upset price fixed was less when compared to similarly situated properties. He also referred to the valuation given by the borrower before the Debt Recovery Appellate Tribunal, which is of the value as in the year 2010.

42. As regards the service of notice on the borrower under Section 13(4) of the SARFAESI Act, he submitted that as per the decisions reported in (2007) 2 CTC 1 (Sundaram Home Finance Limited, rep by its Manager-Recovery, Madhavan, 46, Whites Road, Royapettah, Chennai-14 vs.

1. The Tahsildar, Hosur 2. The District Collector, Krishnagiri) and (2007) 3 CTC 79.(The State Bank of India rep. by its Executive Committee Vs. Mr. A.K. Kandaswamy, Proprietor, Sri Ranga Industries and Asset. Reconstruction Company (India) Ltd.), there was no necessity to issue a notice to the borrower while proceeding under Section 13(4) of the SARFAESI Act. There is no ground made by the borrower that no possession notice was served on him.

43. As regards the re-scheduling of the date of sale on 05.01.2009, he pointed out that the sale did not take place on 05.01.2009. Hence, the non-service of notice was not of any consequence and the said proceedings itself had come to an end. In this regard, he referred to the decision reported in CDJ 201.MHC 354.(M/s.Indi Shopee Private Limited, rep. by its Director A.Senthilnathan & Others Vs. The Authorized Officer, Union Bank of India & Another) and pointed out that the notice of possession dated 21.01.2008 was published on 17.11.2008. This was referred to in the sale notice published on 18.03.2009. Referring to the possession notice dated 17.11.2008, the second notice dated 18.3.2009 was published. Replying to the contention that there was no consultative process before the upset price was fixed, he referred to the dual role of the Officer who acted as an Authorised Officer as well as the secured creditor and referred to the decision of this Court in C.R.P.No.2291 of 2009 dated 10.08.2009, particularly to paragraphs 13, 14 and 19 and submitted that the possession and sale notice dated 18.03.2009 was signed by the Chief Manager in his capacity as secured creditor as well as the Authorised Officer. Recording the cancellation of sale certificate, he submitted that the decision in W.P.No.15272 of 2009 dated 10.08.2010 (Sheeba Philominal Merlin & another Vs. The Repatriates Coop Finance Development Bank Ltd. & others) and (2012) 5 CTC 1 (The Authorised Officer, Indian Bank, Mylapore Branch, since transferred to Asset Recovery Management V. M/s.Tetrahedron Ltd. rep. by its Managing Director & Others) are distinguishable, which is of no relevance to this case.

44. He further pointed out that the borrower had not impleaded the purchaser in the Debt Recovery Tribunal, but impleaded only before the Debt Recovery Appellate Tribunal and there was no application to set aside the sale or for raising additional grounds. The Bank had filed the entire sale details before the Court on 23.07.2009 before the Debt Recovery Tribunal, including the document pertaining to EMD and no question was raised before the Debt Recovery Tribunal by the borrower. Thus, without amending the pleading, no relief could be granted to the petitioner (1997) 7 SCC 38.(J.Jermons Vs. Aliammal and others). Referring to the contention raised before the Debts Recovery Tribunal by the borrower seeking six months' time for making full payment, he submitted that the conduct of the borrower in not making payment as per the undertaking or as per the conditional order, clearly point out the lack of bona fides and hence, the borrower was not entitled to any relief.

45. The sum and substance of the contentions of the Bank is that, even though the purchaser had not paid EMD as per the auction notice, yet, whatever was the shortfall, was made good while paying 25% of the purchase price as on the date when the auction was held; that the shortfall was only a bona fide mistake and thereby no prejudice had been caused to the borrower to question the sale. In the absence of any pleadings questioning the conduct of sale, the prayer ought not to have been granted by the Tribunal. The guarantor had not, in any manner, questioned the sale or the valuation to show prejudice in the matter of selling the secured assets. In the circumstances, the writ petition may be allowed and the order of the Debts Recovery Appellate Tribunal be set aside.

46. Heard learned counsel appearing for either side and perused the documents placed on record.

47. The questions that arise for consideration herein may be formulated under the following heads, namely: (i) Whether the borrower is entitled to raise additional grounds without raising issues in the pleadings? (ii) Whether there was proper valuation done by the Bank before bringing the property for sale? (iii) Whether the act of fixing the distress sale price as upset price is justified in law? (iv) Whether payment of EMD as per the auction notice is mandatory; if that be so, whether the

failure to comply with the sale would make the participant in the auction ineligible? (v) Whether the absence of protest by the owner of the property would disentitle the borrower questioning the sale? 48. As far as the question as to the maintainability of additional grounds without raising issues in the pleadings is concerned, we agree with the submission made by the learned senior counsel appearing for the borrower-first respondent in the writ petition. In the order passed by this Court dated 16.8.2011 in W.P.Nos.15321 and 15322 of 2011 and the writ petitions filed by the purchasers/petitioners in W.P.Nos.24241 to 24244 of 2012 against the orders of the Tribunal, one of the questions raised before this Court by the auction purchaser and the Bank was that the bidders had not deposited the required 10% EMD; consequently their tender should have been rejected. The Appellate Tribunal pointed out that as the violations seen went into the root of the matter, invalidating the auction sale, the possession-cum-sale notices dated 12th November 2008 and 18th March 2009 were liable to be set aside; consequently, it directed the Bank to restore the possession of the secured asset to the borrower. The Authorised Officer was given liberty to take fresh proceedings against the borrower under the provisions of the SARFAESI Act. The Debt Recovery Appellate Tribunal perused the minutes of the auction proceedings and found that the reserve price for sale of the property was fixed at Rs.2,15,00,000/- and the intended bidder was bound to deposit a sum of Rs.21,50,000/- towards earnest money deposit. However, the two bidders deposited only Rs.21,15,000/-. The Tribunal further found that there was a clear violation of Rule 8(5) of the Security Interest Enforcement Rules, 2002, inasmuch as before publishing the auction notification, the Authorised Officer had not obtained the valuation of the property from the approved valuer and that there was no consultation with the secured creditor before fixing the reserve price of the property. Thus the sale of the property was in violation of the mandatory provisions of the SARFAESI Act and the Rules. In considering this decision, this Court pointed out that the question regarding the Authorised Officer's failure to obtain the valuation certificate from a valuer under Rule 8(5) of the Rules and the earnest money deposit below the prescribed amount were not subject matter of consideration before the Debts Recovery Tribunal, and it only examined the legality and correctness of the measures taken by the Bank under Section 13(4) of the SARFAESI Act, to come

to the conclusion that the steps taken by the Bank under Section 13(2) and 13(4) were in accordance with the provisions of the SARFAESI Act and the Rules.

49. Even though learned counsel appearing for the Bank contended that the entire file and the typed set relating to valuation and the details of Earnest Money Deposit was there in the file and produced before the Debt Recovery Tribunal, the fact remains that none of the parties to the proceedings had ever taken an objection either as regards the two valuation reports dated 14.10.2008 and 12.11.2008 on the deposit of EMD at Rs.21,15,000/- as against Rs.21,50,000/- making the applicants ineligible to participate in the auction. This Court further pointed out that even though the borrower specifically contended that the sale was made with a mala fide intention, there was no substantial challenge to the auction proceedings on the ground of violation of Rule 8(5). So too, as regards the EMD falling short of the required amount as stated in the auction notice, it was only during the pendency of the appeal, the Debt Recovery Appellate Tribunal verified the minutes of the auction proceedings and noted the grave irregularities in the sale proceedings.

50. As regards the valuation certificate produced dated 12th November 2008 before the Debt Recovery Tribunal, this Court pointed out that the valuation certificate referred to the valuation done under the valuation report dated 26th August 2004, which was also referred to in the first valuation report dated 14.10.2008, while taking possession on 14.10.2008. This Court observed that the file maintained by the Authorised Officer was directed to be produced before this Court only to confirm as to whether the findings of the Debt Recovery Appellate Tribunal were on the basis of the records. This Court pointed out that the file did not contain any document to prove the request made by the Authorised Officer to the valuer to have the valuation thereof done by the valuer for the purpose of fixing the reserve price or a covering letter accompanying the valuation certificate forwarded by the valuer. This Court further pointed out that there was no material in the file to show that the reserve price was fixed in consultation with the secured creditors. As regards the deficiency in the deposit of EMD, this Court pointed out that in the bid letter submitted by one of the bidders - Meena Alagappan, she had quoted the bid amount as Rs.2,15,00,000/- and that the letter also referred to the

pay order for a sum of Rs.21,50,000/- enclosed towards earnest money deposit. The successful bidder Lakshmi Mohan and Premkumar (writ petitioners) had also written similar letter, quoting a sum of Rs.2,15,00,000/- as their offer. In both the letters, the amount was not quoted in rupees. There was only a figure without any indication as to whether it was made in rupees. However, the contents in both the letters were verbatim the same, except that one of them was handwritten and the other, typed. Both the letters proceed on the basis that they had enclosed pay orders for a sum of Rs.21,50,000/-; yet the records maintained by the Authorised Officer on the sale conducted, show that both the bidders had deposited only a sum of Rs.21,15,000/- as by way of pay orders, instead of the mandatory deposit of Rs.21,50,000/-. The bidders were expected to submit their bids in a sealed cover. However, the duly opened sealed covers were not found in the file. On a perusal of the pay orders in original produced by the Bank, this Court pointed out that the pay orders were made at the instance of both the bidders on 23.04.2009. Pay Order bearing No.006518 was prepared at the instance of Lakshmi Mohan and Premkumar, writ petitioners before this Court - the successful bidders, and Pay Order bearing No.006519 was prepared at the instance of Meena Alagappan and both the demand drafts were issued a day before the auction. Even though the letters of the intending bidders stated in their letters that they had deposited 10 % of the bid amount as EMD of Rs 2150,000,yet,the receipt of the pay order for a sum of Rs.21,15,000/- was mentioned in Column No.3 as EMD received as well as Column No.8 of the auction proceedings. Thus, admittedly, the successful bidder who had participated in the auction had deposited a sum of Rs.21,15,000/- only as against the required minimum of Rs.21,50,000/- as stipulated in the auction notification and as stated in their letters.The auction notification contained the stipulation that the offer without EMD would be rejected thus making the said condition a mandatory condition. Referring to the decision reported in (1992) 1 SCC 9.(Lakshmanasami Gounder V. C.I.T., Selvamani and Others) as to the consequence of violation of the mandatory condition indicated by the use of the term "shall", this Court also referred to the decision reported in (2005) 1 SCC 36.(State of Jharkhand v. Ambay Cements), that when a particular act has to be done in a particular manner and the penalty for failure to comply with the condition is stipulated therein, such requirement is mandatory in nature. In paragraph 29 of

the order, this Court further held that the EMD was a mandatory requirement as stipulated in the auction notice. This Court took note of the contention of the auction purchaser that no opportunity was given to the successful bidder in this regard to make their submission, there being no ground raised in the appeal memorandum of the borrower and the further submission of the borrower as regards the fixing of the upset price as far too low to the market price and as per the provisions of the Act, in fixing the upset price, there was no consultative process with the secured creditor, and consequently this Court held that the order of the Debt Recovery Appellate Tribunal was liable to be set aside and the matter was remanded back so as to give an opportunity to the borrower to raise additional grounds and the auction purchaser and the Bank to make their respective defence. This Court, however, rejected the submission made by the auction purchaser as to the loan taken of Rs.1,50,00,000/- from the Indian Overseas Bank, mortgaging the subject property immediately after the registration of the sale certificate and held that the subsequent mortgage effected by the auction purchaser had no relevance to the issue raised in the appeal. It further observed that the findings recorded by the Tribunal on the basis of the records produced by the Authorised Officer could not be treated as perverse. However, taking note of the fact that in the absence of any grounds in the appeal memorandum regarding the non-compliance of Rule 8(5) or the violation of the conditions of the auction notification, the auction purchasers were not in a position to rebut the contentions of the borrower. This Court observed as follows: " Therefore, we are of the view that opportunity should be given to the borrower to raise specific grounds with regard to non-compliance of Rule 8(5) and the material irregularities in the matter of sale besides all other contentions available to them, including the point raised by the learned Senior Counsel regarding set aside the possession notice earlier on the basis of which the auction notification was issued, and to the Bank and the auction purchaser to state their case in reply, and for that limited purpose, the impugned order is set aside and the matter is remitted to the Debts Recovery Appellate Tribunal. Accordingly, the matter is remitted to the DRAT for fresh consideration. The borrower is permitted to raise additional grounds as indicated above. The Tribunal will permit the auction purchaser and the Bank to submit their version with respect to the grounds urged by the borrower by way of additional

grounds. The DRAT is directed to consider the issue thereafter on merits and as per law, the absence of pleadings in the memorandum of appeal pertaining to violation of Rule 8(5) and the material irregularities in the sale. Every endeavour shall be made by the DRAT to dispose of the matter as expeditiously as possible and in any case, within a period of two months from the date of receipt or production of a copy of this order." 51. Consequent on the remand, the borrower filed a petition to receive additional grounds and in the meantime, the auction purchaser filed Review Petition Nos.121 and 122 of 2011. By order dated 30.08.2011, this Court observed as follows: "4. We have observed in our order that the file produced by the authorised officer was perused to confirm as to whether the findings recorded by the DRAT was on the basis of records. Even though the findings were supported by documents, we found that the memorandum of grounds of appeal does not contain specific grounds of challenge and as such the petitioners were not in a position to submit their version. It was only to give an opportunity to the first respondent to raise specific grounds and the petitioners and the Bank to rebut the same, we have remitted the matter. Neither the petitioners nor the contesting first respondent would be prejudiced on account of referring the documents contained in the file maintained by the Authorised Officer. " 52. In the circumstances, rejecting the Review Applications, this Court observed that the observations contained in the order dated 16th August 2011 would not stand in the way of the Debt Recovery Appellate Tribunal considering the matter independently on merits.

53. It is seen from the documents placed before this Court that the borrower filed an application in Application No.1025 of 2011 before the Debt Recovery Appellate Tribunal and raised additional grounds. Pointing out that the Debt Recovery Tribunal had failed to consider that the Bank had unreasonably fixed the upset price of the property when the valuer had fixed a value of Rs.2,88,00,000/- as by way of additional grounds, in Ground No.4, the borrower pointed out that the Bank had not issued possession notice as contemplated under Section 13(4) of the SARFAESI Act, nor served a possession notice as contemplated under Rule 8(1) of the Security Interest Enforcement Rules. The borrower contended that there was a failure to comply with the mandatory provisions contemplated under Rule 8(1) to 8(6) of the Security Interest Enforcement Rules; hence, the proceedings

were vitiated as per the law declared in (2004) 1 SCC 1 (State of Uttar Pradesh Vs. Lalit Tandon). The borrower further raised a ground that strict compliance of the provisions of Rule 8 was mandatory. Taking possession and valuation on the same day i.e., 12.11.2008, was contrary to the decision reported in [2008] 17 VST 3.(Lakshmi Machine Works Ltd. Vs. Deputy Commissioner (CT), Coimbatore and others) as well as AIR 200.SC 83.(Haryana Financial Corporation V. Jagadamba Oil Mills). Thus, the non-compliance of Rule 8(1), 8(2), 8(5) and 8(6) vitiated the entire proceedings. So too the absence of possession notice under Section 13(4) of the SARFAESI Act. The borrower further referred to the order in C.R.P.No.50 of 2009 filed at the instance of the Bank before this Court, wherein, by order dated 03.03.2009, this Court stayed the operation of the order of Debt Recovery Tribunal. However, the Bank went ahead with the issuance of possession and sale notice dated 18.03.2009 without adhering to Section 13 of the SARFAESI Act read with Rule 8(1) to 8(6), fixing the auction sale by 24.04.2009. Thus the borrower alleged that when the possession-cum-sale notice dated 12.11.2008 was questioned in S.A.No.136 of 2008 and the matter was pending in C.R.P.No.5011 of 2009, no fresh auction could be taken under Section 13(4) based on the possession notice dated 12.11.2008. The borrower also questioned the shortfall in the EMD, thereby disqualifying the participants in the bid. Thus, this aspect also vitiated the sale in favour of the writ petitioners.

54. The borrower further alleged collusion between the Bank and the auction purchaser and the valuation was done on 12.11.2008 even without a visit to the property and there was no consultative process with the secured creditor while arriving at the said price. The borrower further alleged that the Authorised Officer never requested the valuer to value the property. There were no materials at all to substantiate that there was any request made. Thus, the entire possession and valuation done were contrary to Rule 8. Consequently, the borrower sought for setting aside of the sale.

55. Similar other contention was also made in I.A.Nos.1026 and 1027 of 2011 in S.A.Nos.86 and 87 of 2010. This was countered by the Bank and the auction purchaser. In the common counter affidavit filed by the purchaser, the petitioners contended that without setting aside the sale, the borrower was not entitled to

seek possession.

56. As far as the Bank is concerned, the Bank took the objection that the borrower had not challenged the sale held in favour of the auction purchaser on 24.04.2009 and the sale certificate issued. The counter affidavit, however, pointed out in paragraph 10 that most of the averments made in the additional grounds were made in the application filed before the Deb Recovery Tribunal and the Debt Recovery Appellate Tribunal.

57. Denying the allegation that there was a collusion between the purchaser and the Bank, it pointed out that the accounts of the borrower remained as NPA. The attempt of the borrower in bringing additional grounds was only to fill up the holes in the case. The borrower had not paid the dues within a period of sixty days from the date of sale.

58. The sum and substance of the counter affidavit filed by the Bank was that there was full compliance of Rule 8 as regards the valuation done by the Bank in the conduct of the sale and in making the sale in favour of the auction purchaser. The Bank also took a pleading that without a further pleading in the grounds, no new grounds could be taken by the borrower. In any event, the borrower had not questioned the sale made in favour of the auction purchaser and the confirmation of the same in her favour. The failure to challenge the same, hence, disentitles the borrower from maintaining the case.

59. A perusal of the order of the Appellate Tribunal in this regard shows the consideration on the aspect of valuation, particularly as regards the obtaining of the reports dated 14.10.2008 and 12.11.2008, the notice on the guarantor, the reliability of the valuer's report and fixing of the upset price. The consideration of the Tribunal is also on the aspect of the shortfall in the EMD paid, which ultimately resulted in the setting aside of the sale.

60. Referring to the orders of this Court dated 16.08.2011 in the writ petitions filed, remitting the matter for a de novo consideration, the Tribunal pointed out that the valuation reports dated 14.10.2008 and 12.11.2008 were by the same valuer and both made a reference to the earlier valuation report dated 16.10.2004, done by

one Sridharan. The Tribunal arrived at the finding that: (i) no request had been made by the Authorised Officer / Bank to the valuer for the valuation of the property either on 14.10.2008 or on 12.11.2008. (ii) the bill had been submitted for the valuation made by the valuer on 14.10.2008 and the payment had been debited to the account of the borrower; (iii) No bill was given by the valuer for the valuation said to have been done on 12.11.2008 and no payment had been made either by the Bank or debited from the account of the borrower; hence, an inference was drawn that there was no inspection/valuation done by the valuer on 12.11.2008 as otherwise, the valuer would have raised a bill and the Bank would have paid the same by deducting the bill amount to the account of the borrower. (iv) Comparing the valuation reports dated 14.10.2008 and 12.11.2008, that the photographs as regards the property were one and the same and appended to the report, the Tribunal held that the photographs taken on 14.10.2008 were appended to the valuation report dated 12.11.2008. Hence, the inference was that no inspection or valuation of the property was done by the Authorised Valuer on 12.11.2008. In other words, the valuation report having been prepared by the very same valuer and there being no reference to the valuation done on 14.10.2008 in the subsequent valuation report dated 12.11.2008, it was clear that the report dated 12.11.2008 was only a reproduction of the earlier report dated 14.10.2008; consequently there was no inspection. (v) there was no proof produced by the Bank as regards the request made for the valuation done on 12.11.2008. Thus, there was no valuation actually taking place on 12.11.2008, which is a contravention of Rule 5 of the Security Interest Enforcement Rules. The further sale thereon, hence, contravenes Rule 8(5). (vi) The Tribunal further found that a copy of the possession notice was not served on Vasanthi Devi, who happened to be the guarantor as well as one of the borrowers. The Bank had served notice through registered post without any attempt made on serving a notice on the guarantor, who was present in the property, according to the Bank. The present service on the guarantor was not even attempted to by the Bank. Thus, coupled with this fact, the Tribunal came to the conclusion that the possession notice dated 12.11.2008 was liable to be set aside. Consequently, the sale as per the possession-cum-sale notice dated 12.11.2008 was bad in law. In other words, the valuation report dated 12.11.2008 is only a created document and hence, no

reliability could be placed on the same. The possession-cum-sale notice dated 18.03.2009 without having valued the property, hence, was liable to be set aside. (vii) As regards the EMD of Rs.21,15,000/- as against Rs.21,50,000/- being 10% of the upset price of Rs.2,15,00,000/-, the Tribunal held that there was a clear violation of the condition; consequently, the Authorised Officer had violated the terms and conditions under Rule 8(6)(e) of the Security Interest (Enforcement) Rules. (viii) Therefore, the failure to get the valuation report as required under Rule 8(5) of the Security Interest (Enforcement) Rules and the violation of Rule 8(6)(e) go to the root of the matter, making the sale liable to be set aside. The possession notice dated 12.11.2008 and the sale notice dated 18.03.2009 were thus set aside and the direction application filed in I.A.No.1026 of 2011 and the application for injunction in I.A.No.1027 of 2011 by the borrower seeking return of the property was allowed. As far as the case of the borrower on filing of additional grounds without making pleading is concerned, a reading of the application filed by the borrower dated 26.12.2008 in S.A.No.136 of 2008 and the application filed by the borrower dated 16.04.2009 in S.A.No.52 of 2009 shows that specific grounds were taken in Ground Nos.A, D, M, N and O by the borrower, alleging violation of Rule 8(5) in the matter of valuation and fixing low upset price. The borrower also took a specific plea on the combined notice issued and the low price fixed, there being no due publication inviting prospective purchasers as required under Rule 9 of the Security Interest (Enforcement) Rules.

61. Thus leaving aside the merits of the order of the Tribunal, a reading of the grounds in the application made before the Debt Recovery Tribunal shows a specific ground of challenge on the demand notice dated 01.08.2008 and the possession-cum-sale notice issued under Section 13(4) of the SARFAESI Act dated 12.11.2008 on the proposed auction dated 04.10.2009.

62. In the application filed in S.A.No.52 of 2009, in Ground Nos.K, L, M and N, they repeated the grounds as in the earlier application and prayed for setting aside the demand notice as well as the possession-cum-sale notice dated 18.03.2009 and the auction sale dated 24.04.2009. This is apparently for the reason that the sale originally fixed on 04.01.2009 could not take place, it being a Sunday and it was postponed subsequently to 05.01.2009, on which date, for want of bidders, no

sale took place.

63. We had already seen that this Court gave liberty to the borrower to raise additional grounds as to the violation of Rule 8(5) and 8(6), particularly noting the objections from the auction purchaser and accordingly, the borrower also raised an additional ground narrating the facts therein. In the circumstances, having gone through the papers herein, we have no hesitation in holding that the prayer originally made is further supported by the additional grounds dealing with the subject matter on facts by the borrower and hence, no exception could be taken to the Appellate Tribunal entertaining such grounds for passing orders on the additional grounds taken. The additional grounds taken, particularly with reference to the violation of Rule 8(5) and the EMD as per the tender notification, has to be seen in the context of the decision of this Court and the circumstances under which this Court permitted the borrower to raise the issue before the Debt Recovery Appellate Tribunal. It is no doubt true that the borrower contended that the preliminary objection on the maintainability of raising additional grounds was taken in its objection. But then, with the order of this Court permitting the borrower to raise such grounds on the violation of Rule 8(6), the objection of the Bank based on the Review Order dated 30.08.2011 that the Tribunal has to decide the case independently on merits, does not mean that it covers the maintainability on the additional grounds taken by the borrower. As already seen, the remand order made by this Court has to be seen in the context of the submission made by the purchaser, noted in para 39.

64. It may be of relevance to note herein that the order passed by the Division Bench of this Court in W.P.Nos.16120 and 16121 of 2004 (at the instance of the bank) W.P.Nos.15321 and 15322 of 2011 (at the instance of the Purchasers) has reached a finality and has not been challenged by the Writ Petitioner before the Apex Court. In the background of this fact, we reject the preliminary objection taken by the Bank as well as by the auction purchaser as without any substance.

65. Learned counsel appearing for the Bank submitted that there is no discussion on the preliminary objection taken. We do not find, such an objection merits consideration, particularly when this Court had permitted the borrower to raise

additional grounds. The basis on which such grounds were made are narrated in the application filed by the borrower. Consequently, we reject the said issue. We may also point out that the interest of the auction purchaser comes post valuation and after his offer was accepted. Consequently, we do not understand how the auction purchaser could, in any manner, attack the ground on the compliance of Rule 8(5). In any event, having regard to our decision on the objection taken on the maintainability of additional grounds, we do not deem it necessary to discuss it further.

66. The second issue that arises for our consideration is on the validity of the possession notice. Section 13(4) of the SARFAESI Act speaks about taking of possession of the secured assets of the borrower for the purpose of taking recourse to any one or more of the measures specified in sub clauses (a) and (b) of sub section (4). On taking possession as per sub section (4), if a borrower tenders the dues of the secured creditor with costs, charges and expenses at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor and further steps shall be taken by him for transfer or sale of a secured asset. The Security Interest (Enforcement) Rules, made in exercise of the powers conferred under sub section (1) and Clause (b) of sub section (2) of Section 38, read with Section 13(4), 13(10) and 13(12) of the SARFAESI Act, provides for the service of demand notice, as follows: "3. Demand notice.-- (1) The service of demand notice as referred to in sub-section (2) of section 13 of the Act shall be made by delivering or transmitting at the place where the borrower or his agent, empowered to accept the notice or documents on behalf of the borrower, actually and voluntarily resides or carries on business or personally works for gain, by registered post with acknowledgment due, addressed to the borrower or his agent empowered to accept the notice or documents on behalf of the borrower, actually and voluntarily resides or carries on business or personally works for gain, by registered post with acknowledgement due, addressed to the borrower or his agent empowered to accept the service or by Speed Post or by courier or by any other means of transmission of documents like fax message or electronic mail service. Provided that where authorised officer has reason to believe that the borrower or his agent is avoiding the service of the notice or that for any other reason, the service cannot be made as aforesaid, the

service shall be effected by affixing a copy of the demand notice on the outer door or some other conspicuous part of the house or building in which the borrower or his agent ordinarily resides or carries on business or personally works for gain and also by publishing the contents of the demand notice in two leading newspapers, one in vernacular language, having sufficient circulation in that locality. " 67. Sub Rule (3) of Rule 3 states that any other notice in writing to be served on the borrower or his agent by the Authorised officer, should be served in the same manner as provided for in the Rule. Thus, the Rule contemplates service by Registered Post with Acknowledgment Due, addressed to the borrower or his agent, empowered to accept the service or by speed post or by courier or by any other means of transmission of documents like fax message or electronic mail service.

68. As far as the service of notice on the borrower is concerned, we had perused the file produced by the Bank. We find that as evidenced by the acknowledgments available in the file, the borrower was duly served by the Bank as regards the notice sent under Section 13(2) of the SARFAESI Act. It is also seen that the respondent was also served with a notice under Section 13(4) of the SARFAESI Act and there is due compliance of the provisions as regards the service of notice. The notice under Section 13(4) of the SARFAESI Act as regards the possession taken on 12.11.2008 was also affixed at the premises. The valuation was done on the same day and the possession-cum-sale notice dated 12.11.2008 was issued on the same day and the borrower was duly served by Registered Post with Acknowledgment Due on 17.11.2008. So too was the guarantor. The notice was also published in the two news papers, one of which happened to be a vernacular paper on 17.11.2008. The contention taken by the borrower otherwise, cannot be sustained.

69. It is a matter of record that the possession of secured creditor was taken by the writ petitioner by affixing the notice on the site on 12.11.2008. It is also available in the records produced before this Court. The sale-cum-possession notice dated 12.11.2008 was also duly served. So too the subsequent notice of sale. It is a matter of record that the guarantor is not before this Court to question the service of notice. The acknowledgment cards as regards the service of notice

on the borrower as well as on the guarantor are also produced before this Court. On that score, we have no hesitation in holding that the service of notice was in accordance with law and no case is made out against the petitioner as regards the violation of the procedure contemplated under Rule 8(1) and (2) of the Rules. It may also be noted that the order passed by the Debt Recovery Tribunal II dated 29.12.2008 was set aside by this Court in C.R.P.No.51 of 2009. By order dated 21.04.2009, the order of the Debt Recovery Tribunal was set aside and the matter stood restored to the Debt Recovery Tribunal. In the meantime, the borrower filed S.A.No. 52 of 2009 before the Debt Recovery Tribunal II, challenging the possession-cum-sale notice dated 18.03.2009 which referred to the possession taken on 12.11.2008, on the ground that the Debt Recovery Tribunal had set aside the possession-cum-sale notice dated 12.11.2008 on 29.12.2008 and hence, there was no possession taken on 12.11.2008. The borrower contended that there was no compliance of the procedure under Rule 8(5) of the Rules. However, with the order of the Debt Recovery Tribunal dated 29.12.2008 set aside in C.R.P.No.501 of 2009 by this Court by order dated 21.09.2009, S.A.No.136 of 2008, challenging the possession-cum-sale notice, stood restored to the files of the Debt Recovery Tribunal. Thus the entire issue on Rule 8(1), 8(2) and 8(5) stood restored to the Debt Recovery Tribunal for consideration as per the order of this Court in the writ petition once again. With the records thus showing the service of notice on the borrower, we do not agree with the borrower on the allegation of violation of Rule 8(2) of the Rules.

70. It is also a matter of record that the valuation report filed on 22.11.2008 records the presence of the guarantor on 12.11.2008. This is also true of the first valuation report dated 14.10.2008. The valuation report records the presence of the guarantor and no objection so far has been taken by the guarantor on the valuation done. Apparently, the guarantor has no cause to complain on the valuation reached. We may also point out herein that the Manager of the Bank and the Authorised Officer being one and the same, has also recorded his satisfaction as to the valuation done in both capacities. Thus there is no wanting of compliance of these requirements from the Bank. Thus, on the objection taken as to the non-compliance of Rule 8(1), we reject the contention of the borrower.

71. Rule 8(5) of the Security Interest (Enforcement) Rules, is a specific provision regarding the valuation of the property by an approved valuer and the reserve price of the property has to be fixed in consultation with the secured creditor on the notification of sale to be published. Sub Rule (6) specifies that the secured creditor has to cause a public notice in two leading newspapers, one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which shall include (a) the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor; (b) the secured debt for recovery of which the property is to be sold; (c) reserve price, below which the property may not be sold; (d) time and place of public auction or the time after which sale by any other mode shall be completed; (e) depositing earnest money as may be stipulated by the secured creditor; (f) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property.

72. A reading of sub Rule (5) and (6) of Rule 8 thus shows the conditions that the secured creditor has to observe before bringing the secured asset for sale. One of the serious objections taken by the borrower was that there was no valuation done, in fact, by the secured creditor, a contention which found favour with the Debt Recovery Appellate Tribunal. The objection of the learned senior counsel appearing for the borrower was that in the valuation report reports dated 12.11.2008, except for a reference to the valuation done by one Sridharan, Approved Valuer, dated 26.08.2004, there is no reference to the valuation done on 14-10-2008 . If, in fact, there had been a valuation done on 14.10.2008, then there was no need for a second valuation to be done on 12.11.2008. Consequently, there was no reason for the second report dated 12.11.2008 to refer to the valuation done in 2004 and not to the valuation done on 14.10.2008. There are no details in the valuation report as to the manner of arriving at the value. Further, there are no details regarding the enquiry made to arrive at the valuation, fixing the sale value of Rs.2,14,56,000/-, when according to the valuer, the fair market value of the property was stated as Rs.2,68,20,000/-. He further pointed out to the difference in the first valuation report dated 14.10.2008 and the second valuation report and the reference of the client's name and address as that of the borrower, which raises serious doubt as to the very authenticity. Reiterating the reasoning of

the Tribunal, learned senior counsel submitted that the findings therein are well justifiable.

73. It is an admitted fact that the borrower did not send any reply to the demand notice dated 01.08.2008. The possession and sale notice dated 12.11.2008 mentioned the Bank taking possession on 12.11.2008 and the sale was fixed for 04.01.2009. In the documents produced before the Debt Recovery Tribunal, the Bank enclosed the valuation report dated 12.11.2008 done in the presence of the guarantor. The second possession-cum-sale notice dated 18.03.2009 was made during the pendency of the Civil Revision Petition and there was only a notice ordered in the stay petition, filed at the instance of the Bank. The absence of a fresh valuation or a possession once again taken does not, in any manner, make the notice dated 18.03.2009 illegal. The order of the Debt Recovery Tribunal dated 29.12.2008 merely held that the sale proposed to be held on 04.01.2009 as per the notice dated 12.11.2008, was on the ground that the sale could not take place on a Sunday or a declared holiday. Consequently, the Debt Recovery Tribunal directed the Bank to issue fresh auction. In the light of the above and the order of this Court in the Civil Revision Petition dated 18.03.2009 possession taken and the sale notice fixing the auction sale for 24.04.2009 is valid in law.

74. As already pointed out, at the time of site inspection, the guarantor was stated to have been present, a fact which hitherto had not been denied by the said guarantor. Therefore, we do not find any justifiable ground to accept the ground of attack by the borrower as to the factum of valuation by the valuer.

75. The second aspect of the matter is the need for two valuations. Learned counsel appearing for the Bank submitted that at the time of taking possession, the Bank had the valuation done through the Valuer on 14.10.2008 and this was only for the purpose of facilitating possession. Subsequently, when the Bank took steps to sell the property, it went in for valuation once again by the very same valuer. The fact that the said valuer was not paid twice by the Bank, by itself, would not make the valuation as a fictitious one.

76. We agree with this contention. As far as the Bank going in for valuation of the property more than once is concerned, as in the case of report dated 14.10.2008,

so too, while valuing the property on 12.11.2008, the guarantor was there. There is no inhibition in the Act that the secured creditor should not go for a second valuation before going in for auction sale. The fact of the guarantor's presence at the time of taking possession is not denied by the borrower, or for that matter, by the guarantor. Except for the difference in the seal of the valuer found in the valuation reports, there is no material difference in the fair market value of the secured asset given at Rs.2,68,20,000/-. The only other improvement that one finds in the later report is as regards the distress value supplied by the valuer. The valuation report dated 14.10.2008 appears to have been filed before the Debt Recovery Appellate Tribunal as evidenced by the memo filed by the Bank dated 02.12.2011. The Bank depends on the second valuation report taken as one for the purpose of fixing the value for sale and that the first valuation report was taken while taking possession.

77. As far as the reliability of the valuation report is concerned, the second report does not make the second valuation done or even for that matter the first valuation as of doubtful facts. The absence of payment to the valuer for the work done on 12.11.2008 also is of little consequence, since payment could always be a matter of arrangement between the valuer and the Bank.

78. As already pointed out, we had also referred to the fact of the borrower being served with notice, as had been evidenced by the files. The property was taken possession on 12.11.2008 when it was subjected to second valuation.

79. It is a matter of record and the Tribunal had also given a finding, that the borrower's account was debited for the payment made to the valuer on 14.10.2008. It is no doubt true that the Bank did not cause a letter served on the valuer to value the property. But then, it does not negate the fact that the valuation was done only at the instance of the Bank, for, it is not the case of the borrower that it sought for a valuation from the said valuer. It also does not deny that the payment to the valuer was debited to the account of the borrower. Thus when the payment for valuation was debited to the account of the borrower for the services rendered by the valuer in valuing the secured asset, the absence of the letter, per se, cannot stand in the way of accepting the genuineness of the valuation done by

the Bank through a particular approved valuer. In any event, as already pointed out, the owner of the property has not raised any objection on the valuation of the property on both occasions and there is not even a whisper from the side of the owner of the secured asset, namely, the guarantor at any stage of the proceedings produced by the borrower, that there was no valuation done. In the circumstances, on the aspect of valuation made as a ground on the challenge made by the borrower, we do not agree with the reasoning of the Tribunal.

80. As far as the contentions taken by the borrower as to the factum of the service by affixture is concerned, we do not think much could be made out of such triviality, to support the cause of the borrower. The service is in accordance with Rule 3, which we have extracted earlier. In the light of the alternative modes provided in the Rules on the service of notice, valuation done by the approved valuer in the presence of the guarantor at the time of valuation, the payment debited to the account of the borrower and the satisfaction recorded by the Authorised Officer who happened to be the General Manager of the creditor Bank too, we do not find, much could be made in favour of the borrower. Thus, the various grounds given in Paragraph 19 of the Tribunal's order do not merit acceptance by this Court. Consequently, to that extent, we hold that the order of the Tribunal suffers an illegality. The facts disputed herein do not support such a view taken by the Debt Recovery Appellate Tribunal. Consequently, we hold that the contentions taken based on Rule 8(1), 8(5) and 8(6), fail in this case. However, on the terms of compliance of the auction notice, we hold that there is a violation of the mandatory condition stipulated in the auction notice.

81. As far the fixation of the distress sale price by the valuer is concerned, we do agree with the creditor that the mere fact that the valuer had referred to Rs.2,18,00,000/- as the distress sale value, per se, would not make the decision of the Authorised Officer fixing the reserve price, as bad.

82. Learned counsel appearing for the purchaser as well as the Bank made their submissions on the aspect of the mandatory conditions of the sale notice. A perusal of the sale notice issued by the Bank reveals in paragraph 5 that while fixing the reserve price for sale at Rs.2,15,00,000/-, the earnest money to be

deposited was fixed at 10% of the reserve price i.e., at Rs.21,50,000/-. Paragraph 6 of the notice dated 12.11.2008 stated that the offers would be opened on 04.01.2009 by the Authorised Officer and intending purchasers/bidders should be present before the Authorised Officer on the date, time and the place mentioned therein when the offers would be opened in their presence. In Paragraph 7 relating to the payment of earnest money deposit, the eligibility of the bidder to participate in the auction were given, which reads as under: "(7) The interested purchasers / bidders may send their offers for the properties described herein above in a sealed cover on or before 23.04.2009 along with Demand Draft / Pay order drawn in favour of United Bank of India payable at Chennai towards earnest money as mentioned above (Rs.21,50,000/0) to the Authorised Officer & Chief Manager, United Bank of India, T.Nagar Branch between 9.00 am and 4.00 pm for property described above for which they may contact the undersigned at the above address. The offer without earnest money deposit will be rejected. There will be an Inter Se bidding amongst the eligible bidders on the aforesaid date of sale. The undersigned, reserves the right to accept or reject any or all the offers or adjourn / postpone the sale without assigning any reason thereof. If the offer of the highest bidder is accepted, the said highest bidder / purchaser has to deposit immediately 25% of the sale price adjusting the amount of E.M.D. already deposited and if he fails to deposit the same, the amount deposited towards the earnest money shall be forfeited and the property shall be sold again. The balance amount of purchase price shall be paid within 15 days of date of the confirmation of sale or within the extended period as allowed by the undersigned in writing and in default of payment within the period, the deposit and earnest money shall be forfeited and the properties shall be resold. ... " 83. It is a matter of record that the sale fixed on 04.01.2009 did not take place on account of it being a holiday and was postponed more than once. A corrigendum notice was issued, rescheduling the date to 05.01.2009. The Bank also published this in the newspapers on 27.12.2008. This was followed by a sale notice dated 11.03.2009. This was published in two newspapers on 21.03.2009, fixing the auction sale to 24.04.2009. In the meantime, under order passed by the Debt Recovery Tribunal dated 21.04.2009, the borrower was granted time to pay a sum of Rs.25 lakhs on or before 21.05.2009. In the meantime, the auction had taken place on 24.04.2009. It is a

matter of record that there were only two bidders, one of whom happens to be the petitioner herein by name Lakshmi Mohan and Premkumar, apart from yet another bidder by name Meena Alagappan. It is a matter of record that both these bidders had taken a pay order towards EMD from the very same Bank viz., United Bank of India. The EMD paid by Lakshmi Mohan and Premkumar vide Pay Order No.006518 dated 23.04.2009 was for a sum of Rs.21,15,000/- and also that of Meena Alagappan by Pay Order No.006519 dated 23.04.2009, for a sum of Rs.21,15,000/-. As already seen, both Meena Alagappan and the writ petitioner Lakshmi Mohan and Premkumar also quoted the same price i.e., Rs.2,15,00,000/-. It is a matter of record that the letter written by the successful bidder and the co-bidder dated 23.04.2009 stated that they had enclosed a pay order for a sum of Rs.21,50,000/-. The notice of the proceedings in the sale of immovable secured assets, however, clearly mentioned the receipt of EMD by both the successful bidder and the co-bidder at Rs.21,15,000/-, a fact which is not denied by the Bank. The offer of the successful bidder, was accepted at Rs.2,17,40,000/-, who remitted a sum of Rs.33,20,000/- to make up for 25% of the bid amount required to be deposited immediately on the acceptance of the offer. The payment of 25% included the EMD actually paid.

84. It is a matter of record that these documents were before the Debt Recovery Tribunal. Neither the Bank nor the borrower and the Office of the Debts Recovery Tribunal adverted their respective attention on the shortfall in the EMD by both the bidders. Although the Bank claims that it was an oversight, a malady which continued till the Debt Recovery Appellate Tribunal pointed out, we fail to understand how such a defence could be taken, particularly in the context of working out the 25% payment, immediately on the acceptance of the offer by the highest bidder. Even though learned senior counsel appearing for the purchaser and the Bank would state that any deficiency in the EMD is made good by the compliance of 25% immediately on the sale being accepted by the Bank, the question is not that of the compliance of 25% but one of eligibility to participate in the auction. Legally, we do not find that such a contention could be well laid before this Court, particularly in the context of the mandatory conditions prescribed by the Bank for participation in the auction sale of the property. We must record herein that even though learned senior counsel appearing for the purchaser would make

a statement that payment of 10% EMD is not a mandatory requirement, yet, learned counsel appearing for the Bank admitted that payment of 10% of the upset price is a mandatory condition and failure to adhere to the 10% EMD payment would make an applicant ineligible to participate in the auction. He however hastened after making such an admission that it was a bona fide mistake on the part of the petitioner in not noticing the deficiency and hence, the non-compliance of EMD need not stand in the way of accepting the eligibility of the participant.

85. It is an admitted fact that there were only two bidders and there were no huge number of bidders, for the Bank to contend that it is an oversight. The bidders wrote in their letter that they had enclosed a pay order for a sum of Rs.21,50,000/-. Incidentally, the pay order was taken from the very same Branch which conducted the auction. We do not think one needs to emphasize or even to make it as a matter of discussion to speak on the onerous responsibility of the Bank to point out the percentage of EMD and thereafter in finding out who are the eligible bidders to participate in the auction. When before us, the Bank raised serious objections to the borrower not making an issue before the Debts Recovery Tribunal or before the Debts Recovery Appellate Tribunal originally, we do not appreciate this attitude of the Bank, which fails to see its own irresponsible conduct in allowing ineligible candidates participating in the auction. This is so even from the stage of the eligible bidders' letters that they had enclosed a pay order towards EMD at Rs.21,50,000/- when, in fact, they had paid Rs.21,15,000/- only. It is surprising that this aspect was omitted to be noted even thereafter on accepting the highest offer and working out the 25% payment at the time of opening the bids. Thus, with irresponsibility writ large, we only wish to record our displeasure on the mechanical attitude shown by those officers, which alone has led to the setting aside of the sale, thereby defeated the very purpose of the action taken under the SARFAESI Act. In the circumstances, with ineligible persons participating in the sale vitiating the entire proceedings, we have no hesitation in rejecting the contention of the learned counsel appearing for the successful bidder as well as that of the Bank.

86. With the admission fairly made by the Bank through its counsel before the Court that non-compliance of the mandatory conditions would make a person

ineligible to participate in the auction proceedings, we hold that the sale made in favour of the Lakshmi Mohan and Premkumar, writ petitioners herein, is liable to be set aside.

87. In this connection, the contentions taken by the learned senior counsel appearing for the purchaser need to be seen. He submitted that the buyer had paid a sum of Rs.21,15,000/- as against a sum of Rs.21,50,000/-, bringing in a difference of a sum of Rs.35,000/-, which is only 9.8% of the bid amount. He further stated that in view of such a trivial percentage, this Court should ignore the same and accept the successful bidder's case. We do not find, such a plea could weigh well with this Court for acceptance. He made a distinction between an illegality and irregularity through the decision reported in (1974) 4 SCC 75.(Bhoor Singh and another V. State of Punjab), that in the absence of any prejudice caused to the borrower, the contention regarding the EMD payment shall not be read as a mandatory requirement. He emphasized on the objects behind the SARFAESI Act by placing reliance on the decision reported in (2010) 13 SCC 9.(May George V. Special Tahsildar and others). This is countered by the learned senior counsel appearing for the borrower by placing reliance on the decision reported in (2011) 4 MLJ 4.(T.Mathias Vs. M.Krishnakumar) and the decision of the Division Bench of this Court in W.P.No.15321 of 2011 dated 16.08.2011 in the petitioner's case herein.

88. As far as the reliance placed on the decision reported in (1974) 4 SCC 75.(Bhoor Singh and another V. State of Punjab) is concerned, the Apex Court pointed out to the decision reported in (1955) 2 SCR 114.(Willie Slaney Vs. State of M.P. and explained in (1955) 1 SCR 120.(Nanak Chand Vs. State of Punjab) as to the meaning of the term "illegality" as meaning "incurable illegality" "incurable illegality incurable prejudice leading to failure of justice". Learned senior counsel referred to the decision of a Constitution Bench of the Apex Court reported in AIR 196.SC 107.(State of Mysore Vs. S.V.Narayanappa) as well as the decisions reported in (1972) 1 SCC 40.(R.N.Nanjundappa Vs. T.Thimmiah), (1979) 4 SCC 50.(B.N.Nagarajan Vs. State of Karnataka) and (2007) 1 SCC 25.(State of U.P. and others V. Desh Raj), making distinction between irregularity and illegality.

89. We do not think that these decisions would be of any avail to the borrower. It may be noted that in the decision reported in (2011) 4 MLJ 4.(T.Mathias Vs. M.Krishnakumar), relied on by the learned senior counsel appearing for the borrower, this Court pointed out that the question as to whether a condition is mandatory or directory, has to be seen only from the wordings embodied in the concerned Rule. The question raised in the said decision related to the tender notification issued by P.W.D. Tender Award Committee for the construction of Groyne at Enayamputhenthurai in Vilavankode Taluk, Kanyakumari District. Based on a tender notification, the first respondent contractor, the contesting respondent submitted the sealed cover along with another cover containing 15 documents as proof of pre-qualification. The third respondent in the appeal/the Department opened the cover to verify the application only to find that the contesting party in appeal/first respondent had not produced all documents regarding the key personnel available with him and that false documents were produced. On rejection of his eligibility, a writ petition was filed before this Court. On a question as to whether furnishing of names of personnel was mandatory in nature or not, this Court pointed out to the decisions reported in AIR 197.SC 162.(Ramana Dayaram Shetty Vs. International Airport Authority of India and others) and AIR 199.SC 157.(Poddar Steel Corporation Vs. Ganesh Engineering Works), holding that the test of eligibility laid down was an objective test and not a subjective one; that the authority issuing the tender has to enforce the terms of tender rigidly, particularly those which laid down the essential conditions of eligibility. Conditions which are ancillary or subsidiary with the main object to be achieved may not be of the same force. Thus the Court has to examine the nature of the conditions closely and its impact before answering the question as to whether any particular condition not complied with, could be validly condoned. Reading the said decision, this Court held that when there was compulsion on the contractor to produce the names of co-personnel, the participant was bound to conform to the tender terms. However, on merits, this Court held that the rejection order being made by an incompetent authority, the order was liable to be set aside.

90. In the decision dated 16.08.2011 made in W.P.No.15321 15322 of 2011 concerning the parties herein, this Court pointed out that the condition regarding deposit of Rs.21,50,000/- was a mandatory one. The auction notification further

stipulated that an offer without EMD would be rejected.

91. Learned counsel further referred to the decision reported in (2004) 11 SCC 1 (Indian Banks' Association Vs. Devkala Consultancy Service) that when a procedure has been laid down, the statutory authority may exercise its power in the manner prescribed, or not at all. On the admitted fact position that the auction purchaser and the other bidder, though stated that they had enclosed pay order for a sum of Rs.21,50,000/-, admittedly, they produced a pay order for a sum of Rs.21,15,000/-. This Court remanded the matter only on the submission made by the auction purchaser's counsel that no opportunity was given to the successful bidder to make their submission. Thus with the observation of this Court that it is a mandatory one and going by the terms of the auction notice that the default in not remitting 10% EMD would make a bidder ineligible, we have no hesitation in holding that the auction proceedings held with just two of the bidders who are admittedly ineligible on account of their furnishing of EMD for a sum of Rs.21,15,000/- as against the mandatory condition of furnishing pay order for a sum of Rs.21,50,000/-, suffers a serious illegality and hence, liable to be set aside. The decision reported in (2007) 1 SCC 25.(State of U.P. Vs. Desh Raj) does not, in any manner advance the case of the petitioner Bank and the purchaser. The Apex Court pointed out that an appointment made "throwing all constitutional obligations and statutory rules to the winds would render the same illegal, whereas the irregularity presupposes substantial compliance with the rules." The decision relied on by the Bank reported in AIR 198.Bombay 351 (M/s.B.D.Yadav & M.R.Meshram E. & C. Vs. Administrator) does not, in any manner, advance the cause of the petitioner Bank and in fact, is in favour of the borrower. On the admitted fact and as evidenced by the tender conditions, payment of 10% EMD being a mandatory condition, we reject the contention of the Bank. The question of substantial compliance does not appeal to us. With no power of relaxation and it is not the case of the Bank too, with two participants alone taking pay order from the very same Bank which is also the secured creditor and the Authorised Officer, it is difficult to presume any such power of relaxation. The Bank has also not placed any materials indicating such practices in the past. The decision of the Andhra Pradesh High Court reported in CDJ 201.APHC 54 (M/s.PLR Products Pvt. Ltd Vs. Government of Andhra Pradesh) and the decision reported in (1991) 3 SCC

27.(Poddar Steel Corporation Vs. Ganesh Engineering Works), do not help the Bank in any manner.

92. Learned senior counsel appearing for the purchaser pointed out to the hardship that the purchaser would face in such an event and the absence of proof of prejudice to the borrower. As rightly submitted by the learned senior counsel appearing for the borrower, when facts speak for themselves as to the non-compliance of the eligibility conditions, proof of prejudice suffered by the borrower is totally unnecessary.

93. As regards the auction purchaser's prejudice on the sale being set aside on account of their borrowing money to pay the sale consideration, a Division Bench of this Court, by order dated 16.08.2011 in W.P.No.15321 and 15322 of 2011, had already rejected this line of reasoning in paragraphs 27 and 38 of the order. In the circumstances, with the Bank itself admitting that compliance of EMD condition is a mandatory one to confer eligibility on a participant and the tender condition being mandatory in nature, we do not find any good ground to accept the plea of the purchaser/writ petitioner. The decision cited by the learned senior counsel appearing for the purchaser, does not, in any manner, advance the case of the purchaser.

94. As held in the decision reported in (2012) 5 CTC 1 (Hemalatha Ranganathan Vs. The Authorised Officer, Indian Bank Circle Office), a decision relied on by the borrower, when there is a patent illegality in the auction proceedings by reason of ineligible participants' offers being considered and accepted, it is the duty of the Court to set the wrong right. It is a matter of record that there were only two participants in the auction proceedings. Both these participants had had their pay order taken from the very same Bank. Both the participants had submitted their letter as they they have enclosed a pay order for for a sum of Rs.21,50,000/-. The Authorised Officer recorded as a matter of fact that the pay order submitted by both the participants were only for a sum of Rs.21,15,000/-, as against the 10% EMD of a sum of Rs.21,50,000/-. We do not think, this requires further elaboration as to the sense of responsibility with which those who were involved in the conduct of the auction proceedings had conducted themselves.

95. In the unreported decision in W.P.No.15272 of 2009 (Sheeba Philominal Merlin & another Vs. The Repatriates Coop Finance Development Bank Ltd. & others), by judgment dated 10.08.2010, a Division Bench of this Court considered the case of sale made in violation of the provisions of the Act. On going through the sale proceedings, this Court pointed out to the tampering of bid amount and raised doubt about the integrity, bona fides and motives of the Bank officials involved in the transaction. Referring to the concept of public accountability and performance of functions in accordance with law, this Court observed that both public duty and public obligation are essentials of good administration, which are by the State instrumentalities or by the financial institutions. This Court referred to the decision reported in (2010) 6 SCC 19.(Eureka Forbes Ltd. Vs. Allahabad Bank), wherein, the Apex Court held that the adverse impact of lack of probity in discharge of public duties may result varied defects not only in the decision making process, but in the decision as well. Touching on the claim of the successful bidder as a bona fide purchaser, this Court held that irrespective of whether the purchaser is a bona fide purchaser or not, when once the procedure resulting in auction sale was found to be vitiated on many grounds including fraud which vitiates every auction, the sale in favour of the successful bidder had to be necessarily set aside.

96. Learned counsel appearing for petitioner Bank placed reliance on the decision reported in (2007) 2 CTC 39.(Industrial Development Bank of India Ltd., Chennai - 15 vs. Kamaldeep Synthetics Ltd., Chennai), contending that in the absence of any prejudice shown to have been suffered by the borrower and that is likely to be caused by reason of the shortfall in the EMD, the sale cannot be set aside. The decision referred to above deals with a challenge made to the possession notice issued under Section 13(2) of the SARFAESI Act on the ground that without withdrawing the O.A. filed before the Debt Recovery Tribunal and without communicating the reasons on the non-acceptance of the objection, the said publications were bad in law. This Court referred to the decision in Mardia Chemicals case that failure to communicate the reasons for rejection of the objection under Section 133A was only an irregularity and hence, the proceedings could not be held as illegal. The decision reported in (2006) 4 SCC 47.(Saheb Khan Vs. Mohd. Yousufuddin) is distinguishable on facts. So too the decision

reported in (2000) 3 SCC 8.(Kadiyala Rama Rao Vs. Gutala Kahna Rao) and (2010) 13 SCC 9.(May George V. Special Tahsildar and others).

97. As pointed out in the decision reported in (2007) 2 CTC 1 (Sundaram Home Finance Limited, rep by its Manager-Recovery, Madhavan, 46, Whites Road, Royapettah, Chennai-14 vs.

1. The Tahsildar, Hosur 2. The District Collector, Krishnagiri), the sale held contrary to the auction terms are flagrant abuse of the Act. Hence, we reject the petitioner's contention, placing reliance on the decision reported in 2009-3-L.W. 792 (Nazima Continental & others Vs. The Indian Overseas Bank, Triplicane Branch and others). We also reject the reliance placed by the learned counsel appearing for the Bank on the decision reported in (2011) 5 SCC 60.(Shankara Cooperative Housing Society Ltd Vs. M.Prabhakar) as to the raising of additional grounds by the borrower to challenge the sale as distigushable on facts . As already pointed out in the preceding paragraph, this Court permitted the borrower to raise additional grounds in the face of the complaints made by the Bank and the purchaser. Hence, this decision does not, in any manner, advance the case of the Bank. So too the decision reported in (2008) 17 SCC 49.(Bachhaj Nahar Vs. Nilima Mandal).

98. Learned counsel appearing for the Bank placed reliance on Section 69(3) of the Transfer of Property Act and submitted that in any event, the borrower, at best, can only have a claim for damages. In this connection, he referred to the decisions reported in (2011) 5 SCC 60.(Shankara Cooperative Housing Society Ltd Vs. M.Prabhakar) at paragraphs 88 and 89, 2009-3-L.W. 792 (Nazima Continental & others Vs. The Indian Overseas Bank, Triplicane Branch and others), (2003) 1 SCC 47.(Ram Nibas Gagar Vs. Debojyoti Das) and (2008) 17 SCC 49.(Bachhaj Nahar Vs. Nilima Mandal). None of these judgments are of any assistance to the Bank in this case, considering the violation of the mandatory condition in the auction notice on the payment of 10% EMD, conferring eligibility on an applicant to participate in the auction. On the admitted facts and the status of the claim on 10% EMD, the non-compliance being fundamental, it strikes at the root of the valid sale to confer any protection to the Bank.

99. In the light of the view taken, it is not necessary for us to consider the decision cited by the learned counsel for the borrower on the mandatory character of EMD and the need for proving the damage or prejudice caused to the borrower.

100. It is a matter of record that pending the proceedings before the Tribunal as well as before this Court, the borrower had cleared the entire dues of Rs.89,00,000/- on various dates. The dues as on 01.08.2008 was Rs.88,52,741/-. This is apart from the expenses incurred and the subsequent interest from 01.08.2008. After 06.03.2011, the borrower had admittedly paid Rs.49,00,000/-. According to the Bank, the borrower owed a sum of Rs.79,06,33,445.32 and in fact, the Bank stated that after adjusting the liability, money is available to the credit of the borrower and which has to be refunded to the borrower. Considering the fact that this Court has set aside the sale, it is for the Bank to pass appropriate orders on the liability due and payable by the borrower and intimate the same to the borrower, so that both parties can work out the further course of action.

101. It must not be forgotten that at the end of the day, the purport of SARFAESI Act is to recover the money due and payable by the borrower. As on the date of sale, it is no doubt true that the borrower had not cleared the debt. Yet, they asked for settlement of their outstanding dues. But in the meantime, the Bank went ahead with the sale of the property.

102. Learned senior counsel appearing for the petitioner pointed out that the secured asset is a very valuable piece of evidence that the property was sought to be valued on a very low price and there are no materials to support the value arrived at by the Bank. We do not find any good ground to accept this, for, the liability of the borrower is to the extent that he owes to the Bank. The property in question brought for sale was a security offered by the guarantor. As already seen, till this date, the guarantor is nowhere in the picture before this Court or before any authority, including the petitioner objecting to the valuation arrived at. The value given by the borrower is of the year 2010. In the circumstances, we do not accept the plea of the borrower that the claim is not substantiated.

103. Whatever be the merits of his contention on the value, this Court finds no justifiable ground to accept the plea of the borrower on this aspect. In any event,

having regard to our view taken on the non-compliance of a vital condition on EMD conferring eligibility to a participant in the auction proceedings, we have no hesitation in rejecting the writ petitions, thereby confirming the order of the Debt Recovery Appellate Tribunal on this aspect. Consequently, the writ petitions filed are dismissed. The claim of the purchaser as regards their borrowing from Indian Overseas Bank and the suffering of interest therein is a matter for them to pursue and we do not find any reason to express any decision on this. No costs. Connected Miscellaneous Petitions also stand dismissed. sl ksv

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