

SHAKEENA & ANR.

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v.

BANK OF INDIA & ORS.

(Civil Appeal Nos. 8097-8098 of 2009)

AUGUST 20, 2019

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[A. M. KHANWILKAR AND AJAY RASTOGI, JJ.]

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002: ss. 13(2), 13(4) – Right of redemption – Loan taken by appellants from respondent Bank – In view of default in discharging the loan by appellants, respondent Bank exercised its power under s.13(4) and took over constructive possession of mortgaged property – Appellant filed applications before DRT which, however, were dismissed for non-prosecution – Thereafter, respondent bank brought secured property for sale – Respondent no. 3 was the highest bidder and he deposited 25% of sale consideration – On 2.1.2006, appellant deposited Rs.25 lacs in the account of his father followed by deposit of three cheques of Rs.25 lacs which were returned by respondent bank on the ground that same was not a valid tender – Meanwhile, respondent no. 3 complied with all terms and conditions of sale, as a result of which sale was confirmed in his favour – Respondent bank credited a sum in the loan accounts of appellants and closed both the loan accounts – On 6.1.2006, respondent bank issued a sale certificate in favour of respondent no.3 – Appellant filed applications for restoration of the main proceedings before DRT which was dismissed – Appellants thereafter forwarded demand drafts in the name of Authorised Officer of the bank which was also not accepted – Appellant filed writ petition before High Court for quashing of the auction of subject property – Whether the appellants had a subsisting right of redemption until the sale certificate was duly registered entailing in transfer of subject property – Held: There was substance in the stand taken by respondent bank that no valid tender was made by the appellants so as to discharge them from their obligation – The amount allegedly deposited in the account of father of appellant No.2 and not in their loan accounts was not be a valid tender – Similarly, appellants attempted to pay in the form of cheques on

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- A *2.1.2006 – However, as per the terms and conditions, payment by cheques was not permissible – Thus, the respondent bank was not obliged to accept the amount in the form of cheques – Even the third attempt made by appellants was to offer demand drafts drawn in favour of or in the name of the Authorised Officer of the respondent bank and not in the name of the bank or authorising the bank to appropriate it towards the subject loan accounts – Therefore, these demand drafts were rightly not accepted as a valid tender – Thus, appellants failed to exercise their right of redemption before the issue of sale certificate much less the registration thereof.*
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C **Dismissing the appeals, the Court**

- C **HELD:** 1. Indisputably, after the disposal of the writ appeals by the Division Bench of the High Court, the auction purchaser (respondent No.3) got the sale certificate registered on 18th September, 2007 and then transferred the property by a registered sale deed on 5th October, 2007 to third party. It was not the case of the appellants that some interim injunction prohibiting respondent No.3 from registering the sale certificate or transferring the suit property, was operating against him after the decision of the Division Bench of High Court. In fact, the impugned judgment was not even carried in appeal before this Court by the appellants until then. The special leave petitions came to be filed only on 13th October, 2007 and order of status quo was passed by this Court on 23rd November, 2007. In other words, there has been a paradigm shift in the rights of the parties upon registration of the sale certificate on 18th September, 2007 and also because of the registered sale deed in favour of third party on 5th October, 2007. [Para 25] [359-A-D]
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- G **2. The appellants had allowed the action taken by the respondent bank under Section 13(4) of the 2002 Act, to become final consequent to the order of the DRT rejecting challenge thereto due to non-compliance of the conditional order. Even the subsequent application for restoration of the DRT proceedings came to be rejected. The appellants then filed the subject writ petition on 19th January, 2006, by which date the auction had already concluded including the sale certificate was issued in favour of the highest bidder on 6th January, 2006. Moreover, the**

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principal assertion of the appellants before the High Court was that they were wanting to exercise their right of redemption of mortgage, but due to fortuitous situation and the inappropriate stand taken by the respondent bank were prevented from doing so. No other plea was pursued by the appellants in support of the reliefs claimed by them before the High Court. The appellants cannot be permitted to assail the auction process on any other count. [Para 26] [359-D-G]

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3. Reverting to the stand taken by the appellants that they had attempted to exercise their right of redemption by depositing an aggregate sum of Rs. 25 Lacs on 30th December, 2005 and 4th January, 2006, in the account of the father of appellant No.2 followed by issuing cheque(s) in the aggregate sum of Rs.25,21,446/- on 2nd January, 2006; and once again offering the amount by demand drafts in the sum of Rs.25,06,250/- on 18th January, 2006. This stand though attractive at the first blush, will have to be stated to be rejected. [Para 27] [359-G-H; 360-A-B]

4. Notably, the appellants took no steps, whatsoever, to pay the outstanding dues to the respondent bank by way of a valid tender nor moved any formal application before the High Court after filing of the writ petitions on 19 January, 2006, to permit them to deposit the requisite amount either in the concerned loan accounts or in the court. That was not done even until the disposal of the writ petitions by the Single Judge or during the pendency of the writ appeals before the Division Bench and until the disposal thereof vide the impugned judgment. The appellants, for reasons best known to them, have not chosen to deposit the amount in the loan accounts or attempted to seek permission of the Court to deposit the same in Court from 19th January, 2006 immediately after filing of writ petitions or for that matter until the registration of the sale certificate on 18th September, 2007. In this backdrop, it is not possible to countenance the stand of the appellants that they had made a valid tender to the respondent bank or that the respondent bank had mischievously or malafide rejected their offer to defeat their rights, to redeem the mortgage before registration of the sale certificate on 18th September, 2007. [Para 28] [360-F-H; 361-A-B]

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- A 5. No relief can be granted to the appellants, assuming that the appellants are right in contending that as per the applicable provision at the relevant time (unamended Section 13(8) of the 2002 Act), they could have exercised their right of redemption until the registration of the sale certificate – which, indisputably, has already happened on 18th September, 2007. Therefore, it is not possible to countenance the plea of the appellants to reopen the entire auction process. This is moreso because, the narrative of the appellants that they had made a valid tender towards the subject loan accounts before registration of the sale certificate, has been found to be tenuous. Thus understood, their right of redemption in any case stood obliterated on 18th September, 2007. Further, the amended Section 13(8) of the 2002 Act which has come into force w.e.f. 1st September, 2016, will now stare at the face of the appellants. As per the amended provision, stringent condition has been stipulated that the tender of dues to the secured creditor together with all costs, charges and expenses incurred by him shall be at any time before the “date of publication of notice” for public auction or inviting quotations or tender from public or private deed for transfer by way of lease assessment or sale of the secured assets. That event happened before the institution of the subject writ petitions by the appellants. The appellants have failed to make a valid and legal tender to the respondent bank before the issue of sale certificate on 6th January, 2006, muchless registration thereof on 18th September, 2007. [Paras 29, 30] [360-C-F; H; 362-A]

B. Arvind Kumar v. Govt. of India and Others (2007) 5 SCC 745 ; Mardia Chemicals Ltd. and Others v. Union of India and Others (2004) 4 SCC 311 : [2004] 3 SCR 982 ; Narandas Karsondas v. S.A. Kamtam and Another (1977) 3 SCC 247 : [1977] 2 SCR 341 ; Mathew Varghese v. M. Amritha Kumar and Others (2014) 5 SCC 610 : [2014] 2 SCR 736 ; Dwarika Prasad v. State of Uttar Pradesh and Others (2018) 5 SCC 491 : [2018] 3 SCR 29 ; J. Rajiv Subramaniyan and Another v. Pandiyas and Others (2014) 5 SCC 651 : [2014] 3 SCR 1140 ; T. Ravi and Another v. B. Chinna Narasimha

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and Others (2017) 7 SCC 342 : [2017] 3 SCR 1 ; Kirpal Kaur v. Jitender Pal Singh and Others (2015) 9 SCC 356 : [2015] 8 SCR 51 ; Kanaiyalal Lalchand Sachdev and Others v. State of Maharashtra and Others (2011) 2 SCC 782 : [2011] 2 SCR 602 – referred to. A

<u>Case Law Reference</u>		B
(2007) 5 SCC 745	referred to	Para 16
[2004] 3 SCR 982	referred to	Para 16
[1977] 2 SCR 341	referred to	Para 17
[2014] 2 SCR 736	referred to	Para 17 C
[2018] 3 SCR 29	referred to	Para 17
[2014] 3 SCR 1140	referred to	Para 18
[2017] 3 SCR 1	referred to	Para 18
[2015] 8 SCR 51	referred to	Para 18 D
[2011] 2 SCR 602	referred to	Para 21

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 8097-8098 of 2009.

From the final Judgment dated 10.08.2007 of the High Court of Judicature at Madras in W.A. (MD) Nos.145 and 146 of 2007. E

Dr. A. Francis Julian, Sr. Adv., Antony R. Julian, Danish Zabair Khan, M/s Arputham Aruna and Co., Advs. for the Appellants.

Pranab Kumar Mullick, Mrs. Soma Mullick, Sebat Kumar Devria, K.K. Mani, Ms. T. Archana, Advs. for the Respondents. F

The Judgment of the Court was delivered by

A. M. KHANWILKAR, J.

1. These appeals take exception to the impugned judgment and order of the Madras High Court, Madurai Bench dated 10th August, 2007 in Writ Appeal (MD) Nos.145 and 146 of 2007 respectively; whereby, the Division Bench of the High Court dismissed the writ petitions filed by the appellants praying for setting aside of notice issued by the respondent bank in exercise of powers under the Securitisation and

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- A Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, “**2002 Act**”) dated 14th November, 2005 and the consequent public notice dated 15th November, 2005 for sale of the subject property, the public auction conducted in furtherance thereof on 19th December, 2005, declaration of respondent No.3 as the highest bidder in the said public auction and the sale certificate issued in his favour dated 6th January, 2006.
 - 2. Briefly stated, in 2003, Shri P. Shahul Hameed and Smt. Shakeena (appellants/borrowers) were sanctioned a term loan of Rs.10 Lacs each under Star Mortgage Loan by the respondent bank. The accounts became NPA (Non-Performing Assets) from 30th June, 2004.
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 - C As there was default in re-payment, the respondent bank issued legal notice dated 19th October, 2004 to repay the dues within seven days. On 1st December, 2004, notice was issued under Section 13(2) of the 2002 Act to the appellants, calling upon them to discharge the loan within sixty days. In reply, the appellants by representations dated 10th December, 2004, requested the respondent bank to grant time for bringing the account in order. In view of the default in discharging the loans by the appellants, the respondent bank, exercised its power under Section 13(4) of the 2002 Act. Accordingly, constructive possession of the mortgaged property was taken over by the respondent bank on 8th February, 2005.
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3. The appellants then filed S.A. Nos.21 and 22 of 2005, by invoking Section 17 of the 2002 Act, before the Debts Recovery Tribunal II, Chennai, challenging the notices, issued by the respondent bank. On 18th March, 2005, DRT-II, Chennai passed an order in S.A. Nos.21 and 22 of 2005 staying all further proceedings on condition that the appellants would pay Rs.1.50 Lac in each appeal. However, the appellants failed to comply with the said order and, therefore, the order being a self-operating order, stood automatically vacated. Later on, S.A. Nos.21 & 22 of 2005 were eventually dismissed for non-prosecution/default on 28th September, 2005, for non-payment of court fee.
4. The respondent bank then brought the secured property for sale by inviting sealed tenders vide sale notice dated 15th November, 2005. Notice was also given to the appellants on 14th November, 2005. The appellants herein neither objected to the said sale notice nor challenged the same. Thus, the sale was held on 19th December, 2005, in which one Mr. Chidhamaramanickam, respondent No.3 herein was

declared as the highest bidder who had quoted a sum of Rs.42,51,000/- (Rupees Forty-Two Lacs Fifty-One Thousand Only). He also deposited 25% of the sale consideration immediately, as per the rules. On 2nd January, 2006, the appellants approached the respondent bank and deposited three cheques for total sum of Rs.25,21,446/- (Rupees Twenty-Five Lacs Twenty-One Thousand Four Hundred Forty-Six Only). These cheques were duly returned by the respondent bank on 4th February, 2006 as it could not be treated as a valid tender.

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5. The highest bidder (respondent No.3) in the meantime had complied with all the terms and conditions of sale as a result of which the sale was confirmed in his favour. In that, he paid the entire sale consideration of Rs.42,51,000/- (Rupees Forty-Two Lacs Fifty-One Thousand Only) by 4th January, 2006. On payment of sale consideration, the respondent bank credited a sum of Rs.12,40,000/- (Rupees Twelve Lacs Forty Thousand Only) in the loan account of appellant No.2 herein and a sum of Rs.12,52,350/- (Rupees Twelve Lacs Fifty-Two Thousand Three Hundred Fifty Only) in the loan account of appellant No.1 herein and closed both the loan accounts.

6. On 6th January, 2006, the respondent bank issued a sale certificate in favour of respondent No.3. According to the respondent bank upon issue of sale certificate, the sale had become final.

7. Be that as it may, the appellants filed applications for restoration of the main proceedings before DRT. However, the said applications came to be dismissed on 10th January, 2006. Even that order has been allowed to become final by the appellants.

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8. As aforementioned, consequent to sale of the secured asset, a sum of Rs.24,92,750/- (Rupees Twenty-Four Lacs Ninety-Two Thousand Seven Hundred Fifty Only) was adjusted towards the loan accounts of the appellants and a sum of Rs.10,000/- (Rupees Ten Thousand Only) towards legal expenses. Out of the balance sum of Rs.17,48,250/- (Rupees Seventeen Lacs Forty-Eight Thousand Two Hundred Fifty Only), the bank returned a sum of Rs.17,25,000/- (Rupees Seventeen Lacs Twenty-Five Thousand Only) to the appellant (Petitioner in Writ Petition No.634 of 2006) by way of a bankers cheque along with letter dated 18th January, 2006. However, the said appellant did not encash the bankers cheque and instead returned the same. The bank had retained a sum of Rs.23,250/- (Rupees Twenty-Three Thousand Two Hundred Fifty

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- A Only) towards future legal expenses with the undertaking that the balance amount will be returned after adjusting the lawyer charges/legal expenses.

9. The Appellants then forwarded demand drafts for Rs. 25,06,250/- (Rupees Twenty-Five Lacs Six Thousand Two Hundred Fifty Only), which was received by the respondent bank on 17th January,

- B 2006. According to the respondent bank, the appellants had ante dated the covering letter as if it was written on 12th January, 2006, undertaking to pay the balance amount. The respondent bank, however, did not accept or encash the said demand drafts as a valid tender - as it were drawn in the name of the Authorised Officer of the bank i.e. respondent No.2 herein; and also because the sale certificate had already been issued on 6th January, 2006.

10. On 19th January, 2006 the appellants, feeling aggrieved by the action of respondent bank for having taken constructive possession of the secured assets and the notice of sale dated 14th November, 2005,

- D filed subject Writ Petition (MD) Nos.634 and 635 of 2006 before the High Court of Madras at Madurai Bench for quashing of the auction of the subject property and further to direct the respondents to receive the amount offered by them towards settlement of loan accounts. Respondent no.3 herein (auction purchaser) got himself impleaded as a party-respondent in the said writ petitions, filed by the appellants herein, and
- E opposed the same.

11. The Learned Single Judge vide judgment dated 9th March, 2007, allowed the writ petitions filed by the appellants herein, holding that the appellants had a subsisting right of redemption until the sale certificate was duly registered entailing in transfer of the subject property.

- F It has been noted that such registration was not done in the present case until the filing of writ petitions and until disposal thereof.

- G 12. Against the judgment of the Learned Single Judge, respondent No.3 herein (auction purchaser) filed Writ Appeal Nos.145 and 146 of 2007 before the Madurai Bench of Madras High Court. By the impugned judgment dated 10th August, 2007, the Division Bench allowed the appeals filed by respondent No.3 herein and set aside the Order dated 9th March, 2007 passed by the Learned Single Judge.

- H 13. On 18th September, 2007, the stated sale certificate in respect of the suit property had been registered and soon thereafter on 5th October, 2007, respondent No.3 sold the property to a third party.

14. Feeling aggrieved by the decision of the Division Bench of the High Court, the appellants have approached this Court by way of present appeals. This Court, on 23rd November, 2007, ordered that status quo as on that date be maintained with regard to the suit property. Later on, this Court granted leave to appeal on 27th November, 2009 and the interim order continued during the pendency of the appeals.

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15. Be it noted that on 1st September, 2016 amendment to Section 3(8) of the 2002 Act came into force as a result of which the dues of the secured creditor together with all costs, charges and expenses incurred by him are required to be tendered to the secured creditor at any time before the date of publication of notice for public auction or inviting quotations or tender from public or private treaty for transfer by way of lease, assignment or sale of the secured assets.

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16. Reverting to the impugned judgment of the Division Bench of High Court, it essentially considered three points as noted in paragraph 8 of the impugned judgment. The same reads thus:

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(i) Whether the sale of the secured asset in public auction as per section 13(4) of SARFAESI Act, which ended in issuance of a sale certificate as per rule 9(7) of the Security Interest (Enforcement) Rules, 2003 (in short “the rules”) is a complete and absolute sale for the purpose of SARFAESI Act or whether the sale would become final only on the registration of the sale certificate?

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(ii) Whether the action of the second respondent in not accepting the amounts paid by the borrowers and not cancelling the sale certificate before the registration of the sale is in derogation of section 60 of the Transfer of Property Act, in view of the Section 37 of SARFAESI Act? And

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(iii) Whether section 35 of the SARFAESI Act has the effect of overriding section 37 of the SARFAESI Act?”

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While answering the first point, the Court observed thus:

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“10.7 At the outset, it is to be stated that nothing survives in the notice dated 14.11.2005 to adjudicate, as, on the date of filing of the writ petitions, the entire proceedings under Section 13(4) of the Act have come to an end and become final, by issuance of sale certificate under sub-rule (7) of rule 9 of the rules on

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- A 06.01.2006. The writ petitions have been prepared and signed by the parties only on 19.01.2006. In such circumstances, the proper course for the borrowers would be to prefer an appeal before the Appellate Tribunal against the order of the Tribunal dated 10.01.2006 under the provisions of the SARFAESI Act. The borrowers, however, have approached this court invoking Article 226 of the Constitution of India.”

And again, in paragraph No.10.9

- “10.9 In our considered view, the borrowers should have approached the secured creditor or the authorized officer before the date fixed for sale and not after the sale, as provided under sub-section (8) to section 13 of the SARFAESI Act. As discussed earlier, only if the borrowers approach the secured creditor or the authorized officer before the date fixed for sale or transfer and tender or pay all the dues to the secured creditor, the Section creates a bar on the secured creditor or authorized officer to proceed further with the proposed sale or transfer. In this case, admittedly, the date fixed for the sale was 19.12.2005. But, even according to the version of the borrowers, they approached the secured creditor only on 02.01.2006 in such circumstances, the contention of the learned counsel for the borrowers is without any basis contrary and to the provisions contained in sub section (8) of Section 13 of the Act.”

The Court then relied upon the decision of this Court in *B. Arvind Kumar Vs. Govt. of India and Others*¹ and applying the principle underlying the said decision concluded that registration of sale certificate was not essential. The Court observed thus:

- “10.17 The ratio laid down by the Division Bench of this court in Arumugham, S. & 2 others v. C.K.Venugopal Chetty & 5 others and the Supreme Court in B. Arvind Kumar vs. Government of India and others, referred supra, squarely applies to the case on hand and we, therefore, have no incertitude to hold that the sale which took place on 19.12.2005 has become final when it is confirmed in favour of the auction purchaser and the auction purchaser is vested with rights in relation to the property purchased in auction on issuance of the sale certificate and he has become

H ¹(2007) 5 SCC 745

the absolute owner of the property. Further, as held by the Division bench of this court in Arumugham, S. & 2 others v. C.K. Venugopal Chetty & 5 others and the Supreme Court in B. Arvind Kumar Vs. Government of India and others, referred *supra*, the sale certificate issued in favour of the appellant does not require any registration in view of section 17(2) (xii) of the Registration Act as the same has been granted pursuant to the sale held in public auction by the authorized officer under SARFAESI Act.

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10.18 The finding of the learned Single Judge that the sale is not complete without registration of sale certificate, therefore, is not sustainable in law and the same is liable to be set aside.

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10.19 If the argument of the borrowers that even after the issuance of the sale certificate, prior to registration, they are entitled to redeem the property is accepted, it would make the provisions of the SARFAESI Act redundant and the very object of the SARFAESI Act enabling the Banks and financial Institutions to realize long term assets, manage problems of liquidity, asset liability mismatch and to improve recovery of debts by exercising powers to take possession of securities, sell them and thereby reduce non performing assets by adopting measures for recovery and reconstruction would fail and would open a pandora's box for the litigations upsetting the sale confirmed in favour of the bonafide auction purchasers, who invested huge money.

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10.20 In view of our finding on this point, we hold that the sale of the secured asset in public auction as per section 13(4) of SARFAESI Act, which ended in issuance of a sale certificate as per rule 9(7) of the Rules is a complete and absolute sale for the purpose of SARFAESI Act and same need not be registered under the provisions of the Registration Act.”

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While considering the second point, after noticing the Section 37 of the 2002 Act and Section 60 of the Transfer of Property Act, the Court rejected the argument of the appellants for the following reasons:

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“11.4 We have more than one reasons to reject the said contention of the learned counsel for the borrowers.

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11.5.1 Firstly, as held by us, while answering point (i) the sale in this case has become absolute and complete on the date when

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- A the sale was confirmed on the appellant/auction purchaser and he is vested with all the rights in relation to the property purchased by him in the public auction on issuance of sale certificate on 06.01.2006, i.e., prior to the date on which the borrowers have approached the second respondent for repayment, contrary to the provisions of Section 13(8) of the SARFAESI Act.
- B 11.5.2 Secondly, the sale certificate issued in this case does not require any registration as per section 17(2) (xii) of the Registration Act, 1908 and our said view is fortified with the decisions of the Division bench of this Court in Arumugham, S. & 2 others v. C.K. Venugopal Chetty & 5 others and the Supreme Court in B. Arvind Kumar vs. Government of India and others, referred supra.
- C 11.5.3.1 thirdly, it is true that the borrowers have the right of redemption as provided under Section 60 of the Transfer of Property Act, 1882, in view of Section 37 of SARFAESI Act and to substantiate the said stand, the learned counsel for the borrowers relies on the decision of the Supreme Court in Narandas Karsondas vs. S.A. Kamtam and another, (1977) 3 SCC 247 wherein it is held that the mortgagor has a right to redemption unless the sale of the property was complete by registration in accordance with the provisions of the Registration Act.
- D 11.5.3.2 With great respect, we are of the view that the decision of the Supreme Court in Narandas Karsondas vs. S.A. Kamtam and another, referred supra, is not applicable to the facts of this case. Even, as held by the Supreme Court in Narandas Karsondas vs. S.A. Kamtam and another, referred supra, the right of the mortgagor to redemption continues only till such time the sale of the property was complete by registration. In this case, our finding, following the decision of the Division bench of this court in Arumugham, S. & 2 others vs. C.K. Venugopal Chetty & 5 others and the Supreme Court in B. Arvind Kumar vs. Government of India and others, referred supra, is that the sale in this case has become absolute and complete by the issuance of sale certificate on 6.1.2006. Further, section 17(2) (xii) of the Registration Act, 1908 does not require registration of a sale certificate granted to any purchaser of any property sold in public auction by a civil or revenue officer and it is the finding of the Supreme Court in B. Arvind Kumar vs. Government of India and others, referred supra,
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that the sale certificate issued by a civil or revenue officer in respect of a property sold in public auction does not fall under the category of non-testamentary documents which require registration under Sub-section (b) and (c) of Section 17(1) of the Registration Act 1908.

11.5.4 Fourthly, the right to redeem the mortgage, as provided in section 60 of the Transfer of Property Act, is, of course, a very valuable right possessed by the mortgagor. At the same time, such a right to redeem the mortgage can be exercised before it is foreclosed, or the estate is sold. It has been held that the mortgagor can adopt the course provided under section 60 of the Transfer of Property Act only before the mortgage has filed a suit for enforcement of the mortgage and not thereafter, vide Poulose and another vs. State Bank of Travancore, AIR 1989 Kerala 79. In this case, as discussed earlier, the borrowers approached the second respondent/Bank only after initiation of the proceedings under Section 13(4) of the SARFAESI Act, and that too after the property was sold in public auction and the sale was confirmed in favour of the appellant.”

The Court then proceeded to examine the third point and considering the interplay between Sections 35 and 37 of the 2002 Act, including the dictum in *Mardia Chemicals Ltd. and Others Vs. Union of India and Others*² went on to observe thus:

“12.4 As per the section 37 of the SARFAESI Act, the provisions of this act shall be “in addition to” and “not in derogation of” any other law for the time being in force. There is no ambiguity in the understanding the legislative intent behind the framing of this section.

12.5 On behalf of borrowers it is contended that a right of redemption available to them before the sale is completed by way of a registered deed under the Transfer of Property Act, a law for the time being in force, is not taken away by the introduction of the SARFAESI Act, by virtue of section 37 of the SARFAESI Act, as the provisions of the SARFAESI Act and the rules framed thereunder shall be in addition to and not in derogation of the right of redemption conferred under the transfer of property act. But,

² (2004) 4 SCC 311

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- A we have already rendered a finding that the registration of sale certificate as per section 17(2)(xii) of the Registration Act is not mandatory for the completion of the sale pursuant to the public auction and issuance of the sale certificate under the scheme of the SARFAESI Act. Assuming, the right of redemption conferred under the Transfer of Property act is protected under Section 37 of the SARFAESI Act, and independently available without reference to the registration of the sale certificate under Section 17(2)(xii) of the Registration Act, the sale already effected satisfying the conditions contemplated under Section 13(8) of the SARFAESI Act, shall by virtue of section 37 of the SARFAESI Act, prevail over such other rights, much less the right of redemption conferred under transfer of property act, which is protected under section 37 of the SARFAESI Act, in view of the non obstante clause provided under section 35 of the SARFAESI Act, because a non obstante clause provided under section 35 of the SARFAESI Act makes it clear that even though there are inconsistencies to such other rights conferred under any other law for the time being in force that are protected under section 37 of the SARFAESI Act, the action initiated under the provisions of the SARFAESI Act shall have the overriding effect as per section 35 of the SARFAESI Act, because SARFAESI Act is a special act which aims to accelerate the growth of economy of our country empowering the lenders, namely Nationalized Banks, Private Sector banks and other Financial Institutions to realize their dues from the defaulted borrowers who are very lethargic in repayment of the loans borrowed by them, by exercising their right of expeditious attachment and foreclosure for the enforcement of security and therefore, sections 35 and 37 of the SARFAESI Act have to be read conjointly to achieve the object of the SARFAESI Act, but not to defeat the same and therefore, we do not see any conflict between them.”
- G On the above analysis, the Division Bench of the High Court allowed the appeals filed by respondent No.3 and dismissed the writ petitions filed by the appellants.
- H 17. The appellants would contend that as per 2002 Act and Rules framed thereunder, the right of the mortgagor to redeem the mortgage gets extinguished only upon registration of the sale certificate, resulting

in transfer of the auctioned property. For that, reliance has been placed on the exposition in *Narandas Karsondas Vs. S.A. Kamtam and Another*³ and in particular in *Mathew Varghese Vs. M. Amritha Kumar and Others*⁴. Reliance is also placed on a recent decision of this Court (three Judge Bench) in *Dwarika Prasad Vs. State of Uttar Pradesh and Others*⁵. The appellants have assailed the conclusion recorded in the impugned judgment that registration of sale certificate was not essential on the ground that the same was based on a decision in *B. Arvind Kumar* (supra), which had no application to the public auction conducted under the provisions of the 2002 Act. On the other hand, registration of sale certificate is the quintessence for transfer of the auctioned property in favour of the auction purchaser. In that, the public auction conducted under the 2002 Act by the secured creditor is not on account of order of any court; and neither is the Authorised Officer a Civil or Revenue Officer for the purposes of Section 17(2)(xii) of the Registration Act. Reliance is placed on Rule 2(a) of the Enforcement Rules, which defines Authorised Officer as an officer not less than a Chief Manager of a Public Sector Bank or equivalent, as specified by the Board of Directors or Board of Trustees of the secured creditor or any other person or authority exercising power of superintendence, direction and control of the business or affairs of the secured creditor, as the case may be, to exercise the rights of a secured creditor under the 2002 Act. Thus, the Authorised Officer is essentially an employee of the bank and not a Civil or Revenue Officer as such. There is no deeming provision in the 2002 Act or the Rules framed thereunder, to construe the Authorised Officer of the bank as a civil or revenue officer for the purpose of Section 17(2)(xii) of the Registration Act.

18. It is then submitted that public auction of the subject property has been conducted without a valuation report by an approved valuer as required under the Enforcement Rules, 2002. Further, the reserve price fixed by the respondent bank as Rs.40,00,000/- (Rupees Forty Lacs Only) did not reflect the actual market value of the property on the date of auction. The value ought to have been no less than Rs.2 Crores. Reliance is placed on *J. Rajiv Subramaniyan and Another Vs. Pandiyas and Others*⁶ to contend that the secured creditor has a duty

³ (1977) 3 SCC 247

⁴ (2014) 5 SCC 610

⁵ (2018) 5 SCC 491

⁶ (2014) 5 SCC 651

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- A to ensure that the borrower gets maximum yield from the sale of the assets, failing which the auction sale would vitiate. As regards the subsequent sale of subject property by respondent No.3 to third party, it is contended that the same is hit by the doctrine of *lis pendens* in terms of Section 52 of the Transfer of Property Act, 1882. Further, the subsequent purchaser is not a bona fide purchaser for consideration without notice; and in any case cannot be heard to resist the claim of the appellants which ought to succeed against the respondent bank and the auction purchaser (respondent No.3). Reliance is placed on *T. Ravi and Another Vs. B. Chinna Narasimha and Others*⁷ and *Kirpal Kaur Vs. Jitender Pal Singh and Others*⁸ to buttress the above submissions.
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- C It is lastly contended that this Court, in the peculiar facts of the present case, must exercise powers under Article 142 of the Constitution of India to declare the subsequent sale of the mortgaged property as null and void and direct the concerned persons to immediately handover the vacant and peaceful possession thereof to the appellants.
- D 19. The respondent No.1(bank) and respondent No.2 (Authorised Officer of the bank) would however, submit that the appellants failed to deposit the dues payable to the respondent bank in terms of Section 13(8) of the 2002 Act as applicable at the relevant time and did not challenge the notice of auction before the date of auction despite sufficient opportunity was given to them in that behalf. Whereas, the auction was conducted on 19th December, 2005 and respondent No.3 being the highest bidder was issued sale certificate on 6th January, 2006 upon payment of the consideration amount on 4th January, 2006. With issuance of sale certificate, it is urged that the sale transaction in favour of respondent No.3 had become final. According to the respondents Section 13(8) of the 2002 Act, mandates tender of the dues by the debtor/borrower to the secured creditor at any time before the date fixed for sale which in this case was 19th December, 2005. Our attention was invited to the fact that sub-section (8) has undergone a change and has been made more stringent, requiring tender of dues to the secured creditor together with all costs, charges and expenses incurred by him at any time before the “date of publication of notice” for public auction or inviting quotations or tender from public or private treaty for transfer by way of lease, assignment or sale of the secured assets.
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⁷ (2017) 7 SCC 342

⁸ (2015) 9 SCC 356

20. It is then urged that the appellants had failed to make a valid tender to pay the outstanding dues till the date of registration of the sale certificate on 18th September, 2007. Indeed, the appellants had deposited a sum of rupees twenty-five lac by 4th January, 2006, but that amount was deposited in the account of the father of appellant No.2. Thus, the respondent bank did not accept the same as a valid tender made by the appellants towards the loan accounts. Similarly, the cheques issued by the appellants on 2nd January, 2006 in the sum of Rs.25,21,446/- (Rupees Twenty-Five Lacs Twenty-One Thousand Four Hundred Forty-Six Only), were of no avail not being a valid tender as per the agreed terms. The third attempt was allegedly made by the appellants, to pay the dues in the form of demand drafts for an aggregate amount of Rs.25,06,250/- (Rupees Twenty-Five Lacs Six Thousand Two Hundred Fifty Only), on 18th January, 2006. That again is of no avail as the demand drafts were drawn in the name of respondent No.2 i.e. Shri B. Jagathkumar (Authorised Officer) instead of in the name of the respondent bank. Hence, even this was not a valid tender. Notably, the appellants made no attempt to deposit the amount in their loan accounts until the impugned decision was passed by the Division Bench including the date of registration of sale certificate on 18th September, 2007. The sale in favour of respondent No.3 stood complete and final on that day.

21. It is urged that the exposition in the decisions pressed into service by the appellants in *Mathew Varghese* (supra) and *Dwarika Prasad* (supra), in fact, would go against the appellants. Further, the High Court was right in concluding that the sale certificate issued in favour of respondent No.3 did not require registration and that the sale process was complete on issuance of the sale certificate on 6th January, 2006. For this, reliance has been placed on the dictum in *B. Arvind Kumar* (supra). Additionally, reliance is placed upon the provisions of Rule 65 of Schedule II of Income Tax Act, 1961 as applicable at the relevant time. Lastly, it is contended that the appellants have failed to avail alternative efficacious remedy against the order dated 10th January, 2006 passed by the Debt Recovery Tribunal dismissing the proceedings initiated by the appellants to challenge the action taken by the respondent bank under Section 13(4) of the 2002 Act. It is urged that the appellants should be non - suited on the basis of the dictum in *Kanaiyalal Lalchand Sachdev and Others Vs. State of Maharashtra and Others*⁹.

⁹ (2011) 2 SCC 782

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- A 22. The respondent No.3, besides supporting the view taken by the High Court in the impugned judgment, would additionally urge that the said respondent has paid the entire consideration amount, Rs.42,51,000/- (Rupees Forty-Two Lacs Fifty One Thousand Only), on 4th January, 2006. Whereafter, the sale certificate was issued in his favour on 6th January, 2006. The appellants, however, filed writ petitions only on 19th January, 2006. The appellants did not avail the option of redemption by tendering the dues to the respondent bank before the date fixed for sale or public auction which in this case was 19th December, 2005. Furthermore, the legal notice issued at the instance of appellants also does not clearly indicate their intention to redeem the mortgage by closing
- B loan accounts and readiness and willingness to pay the entire dues. The tender made by the appellants was not a valid tender and no fault can be found with the respondent bank for having returned the cheques/drafts and not to encash the same. Further, after the High Court rendered the impugned decision on 10th August, 2007, the sale certificate has been duly registered on 18th September, 2007 and even until that date no valid offer or tender has been made by the appellants for payment of the outstanding dues to the respondent bank. The title of the subject property had already passed on to respondent No.3. Therefore, respondent No.3 was within his rights to sell the property to a third party by a registered sale deed on 5th October, 2007. By not impleading the subsequent
- C purchaser, the civil appeals cannot proceed any further and no relief can be granted to the appellants.

23. We have heard Dr. A. Francis Julian, leaned Senior Counsel for the appellants, Mr. Pranab Kumar Mullick, Advocate for respondent Nos.1 & 2 and Mr. K.K. Mani, Advocate for respondent No.3.

- F 24. After cogitating over the factual matrix and perusing the relevant records, it is seen that the ground of challenge considered by the High Court at the behest of the appellants in the impugned judgment, in our opinion, has become unavailable. In that, the matter proceeded before the High Court for setting aside the entire auction process on the
- G premise that the sale certificate was yet to be registered in favour of the highest bidder (respondent No.3); and the appellants had made (unsuccessful) attempts to exercise their right of redemption by offering the outstanding dues to the respondent bank. It was argued by the appellants that only upon registration of the sale certificate, the right of the borrower to redeem the mortgage would get extinguished and
- H obliterated.

25. Indisputably, after the disposal of the writ appeals by the Division Bench of the High Court vide impugned judgment on 10th August, 2007, the auction purchaser (respondent No.3) got the sale certificate registered on 18th September, 2007 and then transferred the property by a registered sale deed on 5th October, 2007 to third party. It is not the case of the appellants that some interim injunction prohibiting respondent No.3 from registering the sale certificate or transferring the suit property, was operating against him after the decision of the Division Bench of High Court. In fact, the impugned judgment was not even carried in appeal before this Court by the appellants until then. The special leave petitions came to be filed only on 13th October, 2007 and order of status quo was passed by this Court on 23rd November, 2007. In other words, there has been a paradigm shift in the rights of the parties upon registration of the sale certificate on 18th September, 2007 and also because of the registered sale deed in favour of third party on 5th October, 2007. The contention pursued before the High Court by the appellants, therefore, has now become unavailable.

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26. Be it noted that the appellants had allowed the action taken by the respondent bank under Section 13(4) of the 2002 Act, to become final consequent to the order of the DRT rejecting challenge thereto due to non-compliance of the conditional order. Even the subsequent application for restoration of the DRT proceedings came to be rejected. The appellants then filed the subject Writ Petition (C) Nos.634-635 of 2006 on 19th January, 2006, by which date the auction had already concluded including the sale certificate was issued in favour of the highest bidder on 6th January, 2006. Moreover, the principal assertion of the appellants before the High Court was that they were wanting to exercise their right of redemption of mortgage, but due to fortuitous situation and the inappropriate stand taken by the respondent bank were prevented from doing so. No other plea was pursued by the appellants in support of the reliefs claimed by them before the High Court, as can be discerned from the three points formulated in paragraph No.8 of the impugned judgment (reproduced in paragraph No.16 hereinabove). The appellants cannot be permitted to assail the auction process on any other count.

27. Reverting to the stand taken by the appellants that they had attempted to exercise their right of redemption by depositing an aggregate sum of Rupees Twenty Five Lacs on 30th December, 2005 and 4th January, 2006, in the account of the father of appellant No.2 followed by issuing

- A cheque(s) in the aggregate sum of Rs.25,21,446/- (Rupees Twenty-Five Lacs Twenty-One Thousand Four Hundred Forty-Six Only), on 2nd January, 2006; and once again offering the amount by demand drafts in the sum of Rs.25,06,250/- (Rupees Twenty-Five Lacs Six Thousand Two Hundred Fifty Only), on 18th January, 2006. This stand though attractive at the first blush, will have to be stated to be rejected. On the other hand, we find substance in the stand taken by the respondent bank that none of the above was a valid tender so as to extricate or discharge the appellants from their obligation - to deposit the outstanding dues payable by them before the specified date. In that, the amount was allegedly deposited by them in the account of the father of appellant
- B No.2 and not in their loan accounts as such. Unless the amount was transferred/deposited in the loan accounts of the appellants in relation to which the mortgage operated, it would not be a valid tender for paying the outstanding dues. Similarly, on the second occasion the appellants attempted to pay in the form of cheque(s) issued on 2nd January, 2006.
- C However, as per the terms and conditions for grant of loan payment by cheque(s) was not permissible. Thus, the respondent bank was not obliged to accept the amount in the form of cheque(s). The respondent bank, therefore, justly declined to accept the cheque(s), not being a valid tender. Even the third attempt made by the appellants was to offer demand drafts drawn in favour of or in the name of the Authorised Officer of the
- D respondent bank and not in the name of the bank or authorising the bank to appropriate it towards the subject loan accounts. Hence, these demand drafts were rightly not accepted as a valid tender.

28. Notably, the appellants took no steps, whatsoever, to pay the outstanding dues to the respondent bank by way of a valid tender nor moved any formal application before the High Court after filing of the writ petitions on 19 January, 2006, to permit them to deposit the requisite amount either in the concerned loan accounts or in the court. That was not done even until the disposal of the writ petitions by the Single Judge or during the pendency of the writ appeals before the Division Bench and until the disposal thereof vide the impugned judgment. We must also notice the stand taken by the respondent bank that even the legal notice sent by the appellants to the respondent bank, in no way expresses unambiguous commitment of the appellants to exercise their right of redemption. Suffice it to observe that the appellants, for reasons best known to them, have not chosen to deposit the amount in the loan accounts or attempted to seek permission of the Court to deposit the same in
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Court from 19th January, 2006 immediately after filing of writ petitions or for that matter until the registration of the sale certificate on 18th September, 2007. In this backdrop, it is not possible to countenance the stand of the appellants that they had made a valid tender to the respondent bank or that the respondent bank had mischievously or malafide rejected their offer to defeat their rights, to redeem the mortgage before registration of the sale certificate on 18th September, 2007.

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29. A fortiorari, it must follow that the appellants have failed to exercise their right of redemption in the manner known to law, muchless until the registration of the sale certificate on 18th September, 2007. In that view of the matter no relief can be granted to the appellants, assuming that the appellants are right in contending that as per the applicable provision at the relevant time (unamended Section 13(8) of the 2002 Act), they could have exercised their right of redemption until the registration of the sale certificate – which, indisputably, has already happened on 18th September, 2007. Therefore, it is not possible to countenance the plea of the appellants to reopen the entire auction process. This is moreso because, the narrative of the appellants that they had made a valid tender towards the subject loan accounts before registration of the sale certificate, has been found to be tenuous. Thus understood, their right of redemption in any case stood obliterated on 18th September, 2007. Further, the amended Section 13(8) of the 2002 Act which has come into force w.e.f. 1st September, 2016, will now stare at the face of the appellants. As per the amended provision, stringent condition has been stipulated that the tender of dues to the secured creditor together with all costs, charges and expenses incurred by him shall be at any time before the “date of publication of notice” for public auction or inviting quotations or tender from public or private deed for transfer by way of lease assessment or sale of the secured assets. That event happened before the institution of the subject writ petitions by the appellants.

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30. Having said thus, in the peculiar facts of the present case, we do not deem it necessary to dilate further on the argument that registration of the sale certificate in relation to the auction conducted under the 2002 Act is essential. Similarly, it is not necessary to examine other grounds urged by the appellants, in light of our conclusion that the appellants have failed to make a valid and legal tender to the respondent bank

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- A before the issue of sale certificate on 6th January, 2006, muchless registration thereof on 18th September, 2007.

31. For the view we have taken, it is not possible for us to countenance the argument of the appellants that we should exercise plenary powers under Article 142 of the Constitution of India. The B reported decisions pressed into service by both sides also need not detain us as the appellants have, in law, lost their option to exercise right of redemption, consequent to registration of the sale certificate on 18th September, 2007 and their failure to pay the dues to the secured creditors before that date.
- C 32. Accordingly, these appeals must fail and same are dismissed with no order as to costs. Ordered accordingly.

All applications are also disposed of in the above terms.

Devika Gujral

Appeals dismissed.