Allahabad High Court
Subhash Chand Goyal Son Of Shri ... vs U.P.E.C., Through Its Managing ... on 24 March, 2005
Equivalent citations: AIR 2005 All 246, 2005 (2) AWC 2017, III (2005) BC 398, 2005 (3) ESC 1847
Author: R M Sahi
Bench: R Misra, A Sahi
JUDGMENT R.P. Misra and A.P. Sahi, JJ.

1. The petitioner, who had made an offer for purchase of the assets of respondent No. 4 M/s Seema Ice and Cold Storage (P) Ltd. that were put to sale under Section 29 of the State Financial Corporations Act, 1951 by the respondent Nos. 1 and 2 U.P. Financial Corporation, questions the entire decision making process of the finalization of the sale, made by the financial Corporation in favour of respondent No. 3, on the ground that the decision of the respondent financial Corporation is unreasonable, unfair and is non-transparent and is therefore liable to be struck down as being violative of Article 14 of the Constitution of India.

2. The matter was heard and an interim order was passed on 24.3.1995 calling upon the financial Corporation to file counter-affidavit and it was directed that in the meanwhile the auction shall not be finalized without considering the objection of the petitioner. Pursuant to the said interim order, a decision was taken by the respondent financial Corporation on 22.4.1995 in the meeting of a Committee of the Corporation whereby it was resolved that since the Corporation had already entered into a lawful agreement with the respondent No. 3 M/s Dass Cold Storage & Ice Factory through Shri K.P. Agrawal, and since the said purchaser had already complied with the terms and conditions and possession has also been handed over to him, there was no ground for the Corporation to resume the proceedings. The Committee also recorded that the offer of the petitioner Shri Subhash Chand (royal was received "very late" i.e. on 14.3.1995 after the sale was finalized on 13.3.1995 in favour of the respondent No. 3, as such, it decided to reject the offer of the petitioner and refund the earnest money deposited by him. Thereafter, the Corporation appears to have executed a registered sale-deed on 5.7.1996 in favour of respondent No. 3. The aforesaid entire proceedings have also been challenged by way of an amendment which amendment application had been allowed by this Court and accordingly the reliefs have been permitted to be amended vide orders dated 6.8.1999 and 10.8.1999 respectively. A further amendment application was moved which was also allowed on 3.1.2000 whereby the petitioner included a relief praying for a mandamus commanding the respondents to accept the bid of the petitioner and reconvey the property in question to him.

3. A counter-affidavit has been filed on behalf of the respondent No. 3 purchaser and 2 counter-affidavits have been filed on behalf of the financial Corporation; one sworn by Shri R.K. Srivastava which is counter-affidavit to the main writ petition and the other counter-affidavit which was filed to the amendment sought by the petitioner sworn by Shri R.D.R. Pandey to which the rejoinder-affidavits have been filed by the petitioner. An application along with a supplementary counter affidavit sworn by Shri R.K. Srivastava dated 14.2.2000 has also been filed stating therein that the date of finalization of negotiation has been wrongly mentioned in the counter-affidavit filed by him to the main petition and the same should be read in accordance with the date given in the supplementary counter affidavit.

4. The writ petition, as is evident from the order-sheet, was taken up for admission on several occasions and the orders were passed pertaining to the amendment and other pleadings in the year 2000. It appears that in order to effect service on the respondent No. 3, an order was passed on 29.11.2000. The array of parties, had originally in the writ petition, described respondent No. 3 as K.P. Agrawal, Dass Cold Storage, which was allowed to be amended vide courts order on 23.4.2001 and the respondent No. 3 was re-arrayed as M/s Dass Cold Storage Pvt. Ltd. through its Director Shri K.P. Agrawal. The writ petition was thereafter admitted on 15.5.2001 and notices were issued whereupon Shri Pradeep Kumar, Advocate, and Shri V.B. Singh, Senior Advocate, appeared for the respondent Nos. 1 and 2 and the respondent No. 3 was represented by Shri P.N. Saxena, Senior Advocate, along with Shri Mahesh Agrawal, Advocate. Since the counsels for the respondent No. 3 thereafter did not appear on the dates fixed, this Court passed an order on 28.9.2004 for putting the respondent No. 3 to notice by publication in the news-paper which order was complied with. Thereafter, on 16.11.2004 Shri Mahesh Agrawal, Advocate, appeared for the respondent No. 3 and he was commanded by this Court to disclose the status of the property as on date. The matter was taken up on 5.1.2005 and after hearing the parties, this Court in order to ascertain the bonafide of the petitioner on the objections raised by the counsel for the U.P. Financial Corporation, passed an order permitting the learned counsel for the petitioner to make a deposit of Rs. 50 Lacs by way of bank Draft payable to the Registrar General of this Court. The order is quoted herein below:-

"List on 8.2.2005.

Sri P.S. Baghel, learned counsel for the U.P. Financial Corporation .states that to show his bonafide the petitioner may be directed to deposit a sum of Rs. 50,00,000/- (fifty Lacs) by way of Bank Draft with the Registrar General of this Court on or before 6.2.2005 to which the learned counsel for the petitioner has no objection."

5. Thereafter, the matter was heard on 17.1.2005, on which date this Court directed Shri P.S. Baghel, who had been appearing on behalf of the financial Corporation, to produce the records in order to ascertain the correct status of pleadings made by the parties. The date fixed was 19.1.2005 on which date the respondent Nos. 5 and 6 surfaced on the scene along with an impleadment application praying for being impleaded as respondent Nos. 5 & 6 on the ground that they had come to know of the pendency of the writ petition for the first time only on 20.12.2004 through the respondent No. 3 and that they had already purchased the property presently in dispute from the respondent No. 3 by a registered sale-deed on 29.10.1999. They prayed that since their rights are likely to be affected by the order of this writ petition, they should be also heard. The aforesaid application was allowed on 19.1.2005 impleading the respondent Nos. 5 & 6 and the learned counsel for the said respondent Shri Ravi Kiran Jain, Senior Advocate, assisted by Shri Mayank Agrawal, made a statement that they do not propose to file any counter-affidavit in the writ petition. The following order is quoted for ready reference:-

" Application filed today, is allowed.

The applicants be impleaded as respondents No. 5 and 6. It has been stated by the learned counsel for the newly impleaded respondents that he does not propose to file any counter-affidavit."

6. The matter proceeded thereafter and the petitioner in view of the order dated 5.1.2005 deposited a sum of Rs. 50 Lacs with the Registrar General which is noted in the order-sheet.

7. The case was again heard on 20.1.2005 and 24.1.2005 and thereafter the arguments were concluded by Shri Ravi Kant, learned Senior Advocate, for the petitioner assisted by Shri Swapnil Kumar on 23.2.2005. Shri P.S. Baghel, Advocate, for the respondent Nos. 1 and 2 advanced his arguments on the said date and also submitted the records before the Court for consideration. The matter was finally concluded with the argument of Shri Shashi Nandan, learned Senior Counsel, assisted by Smt. Seema Agrawal for respondent No. 3 and Shri Ravi Kiran Jain, assisted by Shri Mayank Agrawal, concluded the argument on 24.2.2005 on behalf of the respondent Nos. 5 & 6 whereafter the judgment was reserved. The aforesaid facts have been narrated to indicate the pains which this Court had to undergo to persuade the conclusion of the hearing in this pending matter.

8. Having heard the learned counsel for the parties and having perused the record as produced by the U.P. Financial Corporation, we proceed to deal with the arguments advanced by them.

9. Shri P.S. Baghel, Advocate for the respondent Nos. 1 and 2, made a request to deal with his primary submission to the effect that the writ petition ought to be dismissed as not maintainable in view of the fact that the petitioner is no-one-else but a person set up by the respondent No. 4 - M/s Seema Cold Storage, the principal borrower, whose writ petition No. 7300 of 1995 had been dismissed on 25.2.1997 and the second writ petition filed by the borrower being writ petition No. 37362 of 1997 had also been dismissed for want of prosecution on 27.1.2004. The contention of Shri Baghel is that the idea of filing the present writ petition in effect is mooted by respondent No. 4, who some how the other, wanted the proceedings under Section 29 to be forestalled. To buttress his submission, he has further invited our attention to the fact that the respondent No. 4, who "has not put any appearance in the present writ petition, filed a separate writ petition No. 7300 of 1995 simultaneously along with the present writ petition which was entertained on the same day as the present writ petition and an another interim order on 24.3.1995 was passed directing that the sale in favour of the highest offerer shall not be finalized, if already not finalized, provided the petitioner therein (respondent No. 4) deposits the entire outstanding dues on or before 3.4.1995. In the event of the failure of the petitioner to make the deposit, the stay order shall stand vacated.

10. Shri Baghel urged that it is, thus, obvious that two writ petitions were filed simultaneously one by the present petitioner who is the purchaser set up by respondent No. 4 and the second writ petition filed by the respondent No. 4 which stands dismissed. A perusal of the order dated 25.2.1997 passed in Civil Misc. Writ Petition No. 7300 of 1995 indicates that the petition was dismissed, and so also an application for impleadment, with liberty to the petitioner therein (respondent No. 4 herein) to ventilate his grievances before the company Judge inasmuch as the respondent No. 4 company was already undergoing liquidation before the company court.

11. We had summoned the records of both the writ petitions and from a perusal thereof we clearly find that the present petitioner -Subhash Chand Goyal had neither moved any application for impleading him as a party in the said writ petition nor was he a party in the said writ petition. The dismissal of the said writ petitions, filed by the principal borrower i.e. the respondent No. 4 herein

can not in any way effect the right of the petitioner to stake his claim for the relief claimed in the present writ petition. The claim of the petitioner in the present writ petition is an independent claim founded on the basis of an offer made by him to purchase the property on the basis of the correspondence with which we will deal in detail hereinafter. The filing of the present writ petition by the petitioner, therefore, cannot be said to be a collusive act as suggested by the learned counsel for the respondents as it claims an independent right of his offer being considered and having been wrongly rejected by the respondent Nos. 1 and 2. The merits of the claim of the petitioner, therefore, are independent of any such rights as were claimed by the respondent No. 4 in the writ petition filed by it. Even otherwise since the petitioner was not a party to the said proceeding, the aforesaid decisions do not in any way bind the petitioner and the petitioner in our considered opinion has every right to maintain the instant writ petition. The objection of Shri P.S. Baghel, therefore, on this account is rejected.

12. Before advancing to deal with the legal submissions, it would be appropriate to narrate the facts which form the basis of our findings given hereinafter. The facts stated in the pleadings are also supplemented by the facts that we have gathered from the record produced before us by the learned counsel for the respondent -financial Corporation dealing with the entire transaction.

13. The respondent -- financial Corporation had extended a loan to the respondent No. 4. On a failure to discharge the aforesaid debts, proceedings were initiated by the U.P. Financial Corporation to put the assets of the respondent No. 4 to sale by taking recourse to proceedings under Section 29 of the State Financial Corporation Act. Negotiations were made with some intending purchasers; to name one of them M/s Ramesh Ice and Cold Storage through Ramesh Chandra Gupta whose offer was accepted. Since they failed to make the deposit, their offer was cancelled. Thereafter, a notice was published again on 24.2.1995 in the news-papers advertising the sale of the respondent No. 4 - Cold Storage, this advertisement published in Hindi daily Dainik Jagran dated 24.2.1995 has been appended as Annexure-I to the writ petition. The advertisement recites that the intending purchasers may submit their proposal/offer along with a deposit of Rs. 25,000/- by way of draft within 15 days for detail information and may contact the Regional Manager, Agra. The advertisement simply spells out the name of the respondent No. 4 and its director indicating that it is a Cold Storage having a capacity of 65000 quintals. No other details or terms and conditions are specified in the said advertisement. It is further evident from the records that an offer was made by M/s K.P. Cold Storage through its proprietor Shri K.P. Agrawal. It is to be noted that the offer was not on behalf of M/s Dass Cold Storage.

14. The counter-affidavit of Shri R.K. Srivastava, Senior Manager (Law), of the financial Corporation unfolded the following facts: -

"That, the contents of paragraph No. 6 of the writ petition are not admitted and denied. It is necessary to state here that the offer of petitioner was not received in the Head Officer of answering Corporation on or before finalisation of the offer of Respondent No. 3, i.e. 2.3.1995. The Head Office of the answering Corporation received the offer of petitioner on 14.3.1995, whereas the negotiation Committee of the answering Corporation tentatively accepted the offer of Respondent No. 3 of Rs. 47.00 Lacs on 2.3.1995 subject to letter issued on 4.3.1995 to the respondent No. 4.

It is also relevant to submit here that the entire allegations stated in para under reply were cooked up by the petitioner only to give colour to his case and he has colluded with Respondent No. 4 who was not interested to sale the joint property in recovery action initiated by the answering Respondent Corporation. It is wrong to say that the Regional officer of the Respondent No. 3 did not accept any offer as stated in para under reply. The other allegations regarding collusion is also totally false and as such vehemently denied. The averments stated by petitioner in para under reply are vague, misconceived and as such denied.

5. That, in reply to the contents of paragraph Nos. 7 and 8 of the writ petition, it is submitted that the offer of Sri Vinod Kumar Agrawal and Shiv Kumar were received on 8.3.1995 without any pay order amount of earnest money to the answering respondent Corporation, then they were informed by the answering respondent Corporation, that their offer can not be considered because the sale has already been finalized on 2.3.1995 by the Negotiation Committee of the answering respondent Corporation in favour of Respondent No. 3, who made highest offer. After the aforesaid proposed acceptance, the offer was forwarded for finalisation by negotiation Committee of the answering respondent Corporation, the answering respondent Corporation issued a letter on 4.3.1995 in compliance of decisions of Hon'ble Supreme Court, to respondent No. 4, to submit his own offer of the same amount or to bring some buyer of the said amount or higher amount. The answering Corporation further stated in letter dated 4.3.1995, that if the Respondent No. 4 failed to comply the direction of said letter within 7 days then the offer of Respondent No. 3 will finally be confirmed by the answering respondent Corporation.

It is further important to state here that the Respondent No. 4 did not submit any proposal within 7 days as directed by the answering Corporation vide his letter dated 4.3.1995, therefore, the answering respondent Corporation has no other option except to finalise the proposed offer of Respondent No. 3. At the time of finalisation of proposal of Respondent No. 3 which was submitted to negotiation Committee, the authorities of the answering Corporation further discussed the matter and the amount was again increased of Rs. 2.00 Lacs i.e. 47.00 Lacs."

15. A perusal of the aforesaid facts indicate that the offer of the petitioner was not received on or before the finalization of the offer on 2.3.1995. The offer of the petitioner was received on 14.3.1995 which was after the expiry of 15 days as indicated in the advertisement and that the offer of the respondent No. 3 of Rs. 47 Lacs was accepted tentatively on 2.3.1995 subject to the letter dated 4.3.1995. It has further been stated in paragraph No. 5 of the counter-affidavit that the offers of other persons could not be considered because the sale had already been finalized on 2.3.1995 by the negotiation Committee of the financial Corporation in favour of the respondent No. 3, who had made the highest offer. It is further stated that the aforesaid proposed acceptance was forwarded for finalization by the negotiation Committee to the authorities and that a letter was issued on 4.3.1995 to comply with the conditions .enunciated by the Apex Court in Mahendra Chandra's case reported in 1993 (2) SCC 279. It has been further stated that the initial offer of respondent No. 3 was Rs. 45 Lacs which was increased by negotiation by Rs. 2 Lacs.

16. Before coming to the question of the timing of the receipt of the offer made by the petitioner it would be noteworthy to refer to the letter dated 4.3.1995 said to have been issued to the borrower

i.e. the respondent No. 4 to either come forward and settle the payments himself or in case the borrower is not willing to purchase the assets, liberty was given to him to bring a third person with an offer higher than the offer already accepted by the Corporation subject to the condition that the said third person, should deposit the sale price within 7 days from the date of issuance of the letter. The said notice/ letter dated 4.3.1995 has been appended as Annexure-6 to the writ petition.

17. The file and the records of the Head-Office and the Regional Office have been perused by us. The minutes of 94th negotiation Committee meeting held on 2.3.1995 at the Head Office of the Corporation at Kanpur chaired by Shri Navneet Sahgal, General Manger, as Chairman with 3 other members is extracted herein below:

" SALE PROPOSAL OF M/S SEEMA ICE & COLD STORAGE (P) LTD. AGRA The proposal for sale of above noted unit in favour of Sri K.P. Agarwal C/o M/s K.P. Cold Storage was placed before the Committee. The representative of the purchasing concerned was also present. The matter was also discussed with R.M., Agra on phone and it was reported that notice under Section 29 was issued against borrower. The total outstanding in this case was reported as under:-

```
 Term Loan -- UPFC with Intt.            Rs. 45.00 Lacs
Payment to Farmers                      Rs. 20.00 Lacs
Bank Liability                          Rs. 16.00 Lacs
Electricity Liability                   Rs.  4.00 Lacs
                                        ______________
                                TOTAL = Rs. 85.00 Lacs
                                        ______________


Thus, the total liabilities shall be Rs. 85.00 Lacs. The valuation of cold storage is ar
 Rs. 10.00 Lacs cash down
Balance in 10 half yearly instalments commencing
from Oct.95.


If the purchasing concern does not pay amount to the fanners then he shall deposit full


Looking to the circumstances that   ..... the Committee decided to recommend the a
```

18. A perusal of the aforesaid minutes recorded further unfold that the valuation of the Cold Storage was around Rs. 66 Lacs. The Meeting itself had resolved to accept the offer of the respondent No. 3 on payment of Rs. 10 Lac cash down and the balance in 10 half yearly instalments. A general condition was also added that in addition to the aforesaid amount Rs. 20 Lacs would be paid by the purchaser to the farmers. It is significant to note that no such conditions of terms of offer were indicated in the advertisement nor was the valuation of the Cold Storage indicated in the advertisement. Not only this, the said terms and conditions which came to be finalized on 2.3.1995 were nowhere mentioned in the letter dated 4.3.1995 sent to the borrower for bringing the third person. The aforesaid terms and conditions remained a secrecy between the financial corporation

and the respondent No. 3. The minutes of the meeting have been quoted by us from the record of the Head Office, the reference whereof has been given in the counter-affidavit. A further perusal of the records discloses some more facts which have not been stated in the counter-affidavit. The proposal accepted by the negotiation Committee on 2.3.1995 was put for approval before the General Manager as well as before the Managing Director by the Deputy General manager and the aforesaid proposal was countersigned on 6.3.1995 itself by the General manager Shri Navneet Sahgal, IAS, and the Managing Director Shri R.M. Sethi, IAS. During the course of arguments, we had pointed this out to Shri P.S. Baghel, learned counsel for the financial - Corporation, who stated that the approvals are given by putting the signatures which have been done in the instant case. Shri Baghel, however, contended that the aforesaid approval was tentative subject to the letter dated 4.3.1995. Neither the note sheet nor the minutes dated 2.3.1995 indicate any such thing as suggested by Shri Baghel. However, this matter shall be dealt with us later on.

19. From the records it transpires that an agreement to sell was made in writing which is dated 13.3.1995 between the respondent Nos. 1, 2 & 3. The Stamp Paper for the said agreement to sell was purchased on 10.3.1995. The aforesaid agreement to sell is not a registered document.

20. The petitioner alleges to have tendered his offer on 8.3.1995 and it is further alleged by him that since the Regional Office did not accept the same by hand, therefore, he was compelled to dispatch the same by registered speed-post to the Head office vide letter dated 10.3.1995 accompanied by the requisite amount of demand draft. The aforesaid speed post letter along with the envelope is also available in the records produced before us. The same has been dispatched on 10.3.1995 as is evident from post office stamp thereon. The envelope, however, on the left hand side endorses a No. 199 dated 14.3.1995. The said endorsement does not bear any initials and is in ink. These facts are being indicated as this is one of the major bone of contention between the parties regarding the date of receipt of the offer of the petitioner. The respondents have maintained through out that the offer was received by them on 14.3.1995. The petitioner by means of an application and a supplementary-affidavit dated 14.10.1996 has brought on record the information tendered by the department of post and telegraph, India, certifying that the aforesaid letter which was sent by speed post was delivered to the addressee i.e. the U.P. Financial Corporation, Head Office, Kanpur on 13.3.1995 itself. The aforesaid document has been filed as Annexure-SA-3 to the Supplementary-Affidavit accompanying the application dated 14.10.1996. At this juncture it would be apposite to mention that no counter-affidavit has been filed to the aforesaid application nor have the aforesaid documents appended along with the supplementary-affidavit been rebutted by the filing of any other Affidavit by the respondent Nos. 1 and 2. It is further to be noted that thereafter amendment applications were filed and the respondent- financial Corporation filed a counter-affidavit to the application through Shri R.D.R. Pandey which Affidavit is dated 30.12.1999 but no effort has been made by the financial Corporation to rebut the aforesaid supplementary-affidavit along with the documents therein filed by the petitioner.

21. The respondent Nos. 1 and 2 contend that the offer was ultimately finalized on 13.3.1995 which was the last day of the expiry of the period referred to in the advertisement. It is admitted to the parties that 11th of March' 95 was a second Saturday, 12th of March' 95 was a Sunday and 13th of March' 95 was a Monday. The respondents contend that on a plain and simple calculation since 15

days had expired, and since the offer of the petitioner was received on 14.3.1995, there was no question of considering his claim as according to respondents, the offer was received "very late".

22. The respondents have further disclosed that they finalized the deal on 13.3.1995. To explain their conduct and the averments made in the counter-affidavit of Shri R.K. Srivastava, an application has been filed on behalf of the respondent Nos. 1 and 2 along with a supplementary-counter-affidavit stating that the earlier counter-affidavit mentions the wrong date of finalization as offer as 2.3.1995. It has been asserted that as matter of fact, the date of finalization is 13.3.1995 and, as such, the date 2.3.1995 as mentioned in the counter-affidavit be deleted and its place the same be read as 13.3.1995. This application was filed after 5 years of the filing of the writ petition on 14.2.2000. No orders were passed on the said application and it was directed to be placed on the record. No prayer has been made in the prayer clause of the said application for substituting the date as suggested in the accompanying Affidavit.

23. After the passing of the interim order on 24.3.1995 in the instant petition, the respondent -- financial Corporation rejected the offer of the petitioner vide resolution dated 22.4.1995, the extract whereof is quoted herein below:

"In compliance of the aforesaid directions of the Hon'ble High Court, facts and background of the case were examined by the Committee in detail. The Committee, after detailed deliberation and considering the fact that Corporation has already entered into a legal agreement with the purchaser M/s Dass Cold Storage & IC Factory, has received a sum of Rs. 10.00 Lacs being part sale consideration, the said purchaser has already complied with all the terms of sale letter and the possession has also been delivered to the purchaser, there was no ground for the Corporation to call back the possession from a bonafide purchaser, as after obtaining possession, effective steps have been taken by the purchaser for running of the Cold Storage. The Committee also observed that the offer of Sri S.C. Goel was also received very late i.e. on 14.3.1995 after the finalization of sale by the Corporation. The Committee, accordingly, decided to reject the offer of Sri Subhash Chand Goel and refund the Earnest money to the said offerer."

24. Even though the matter was pending here, the respondent -financial Corporation executed the sale-deed on 5.7.1996 in favour of the respondent No. 3. The writ petition was thereafter amended by the petitioner with a prayer for quashing the entire proceeding of sale in favour of the respondent No. 3 and further to direct the respondents to accept the bid of the petitioner.

25. There is one more important fact of the case which requires to be noted as the said fact is necessary to test the argument of the petitioner. The said fact was not pleaded by either of the parties but which fact is very much necessary to be taken note of as it is reflected from the own records of the respondent Nos. 1 and 2. The same is a letter dated 17.12.2004 sent by the Senior Branch Manager, Bank of Baroda, Main Branch, Agra, addressed to the Regional Manager -respondent No. 2 wherein it has been stated that the second charge on the fixed assets of M/s Seema Ice and Cold Storage was acknowledged by the Financial Corporation on 4.11.1993. The letter also states that the Corporation has already auctioned the fixed assets of the company before its winding up and the proportionate/ residual amount has not been remitted to the Bank. The

significance of this letter is to be noted while considering the aspect of reasonableness of the actions of the financial Corporation in proceeding to obtain the best possible price as held by the Apex Court in the decisions referred to hereinafter.

26. Shri Baghel has further drawn our attention to the records of the earlier writ petition filed by the principal borrower, the respondent No. 4 herein, wherein he had failed to succeed in getting the proceedings quashed. He further submits that the case has also to be judged on the basis of another fact namely that the principal borrower had been given an opportunity vide letter dated 4.3.1995 and also had the opportunity to avail of the interim order passed in his writ petition on 24.3.1995 quoted herein above, whereby the borrower had been given the liberty to make the entire deposit of sale. The aforesaid facts have been brought to our notice by Shri Baghel to contend that the aforesaid correspondence related to the petitioner and in essence the said writ petition were for the benefit of the petitioner and, therefore, the present writ petition deserves to be dismissed as the petitioner is no-one-else than a person set up by the respondent No. 4.

27. Having traced the aforesaid facts, which are necessary for the adjudication of the controversy and having perused the entire record produced by the respondent - financial Corporation, we now proceed to deal with legal submissions advanced on the basis thereof.

28. The first submission to be dealt with, is, with regard to the scope of interference by way of judicial review in such matters. Shri Baghel relying on the decision of Haryana Financial Corporation and Anr. v. Jagdamba Oil Mills and Anr., 2002 (3) SCC 496, has urged that courts are not empowered to correct any and every error of judgment and that no interference is called for unless and until malafides are alleged, pleaded and proved. He has submitted that there is absolutely no unfairness in the action of the financial Corporation and that the Corporation has taken every best possible measure to ensure fairness in action. He has urged that even though the case of Mahesh Chandra v. R.M., U.P. Financial Corporation, reported in (1993) 2 SCC 279, has been over ruled in Jagdamba Oil Mills' case (supra) yet all care and precaution was taken and the notice issued on 4.3.1995 was in conformity with the guidelines issued in Mahesh Chandra's case. Shri Ravi Kant on the other hand contended that even though the guidelines issued in Mahesh Chandra's case have been over ruled as indicated hereinabove, yet the principle of reasonableness have been reiterated by the Apex Court in the case of M/s S.J.S. Business Enterprises (P) Ltd. v. State of Bihar and Ors. reported in (2004) 7 SCC 166. He has invited our attention to paragraphs 17 and 18 of the said decision which are quoted herein below:-

"17. We are of the view that the sale effected in favour of respondent No. 6 cannot be sustained. It is axiomatic that the statutory powers vested in the State Financial Corporation under the State Financial Corporation Act, must be exercised bone fide. The presumption that public officials will discharge their duties honestly and in accordance with the law may be rebutted by establishing circumstances which reasonably probabalize the abuse of that power. In such event it is for the concerned officer to explain the circumstances which are set up against him. If there is no credible explanation forthcoming the court can assume that the impugned action was improper (See: M/s. Pannalal Binjraj and Ors. v. Union of India and Ors). Doubtless some of the restrictions placed on State Financial Corporations exercising their powers under Section 29 of the State Financial

Corporation Act, as prescribed in Mahesh Chandra v. Regional manager, U.P. Financial Corpn. are no longer in place in view of the subsequent decision in Haryana Financial State corporation v. Jagdamba Oil Mills. However, in over ruling the decision in Mahesh Chandra, this Court has affirmed the view taken in Chairman and Managing Director, SIPCOT, Madras v. Contromix Pvt. Ltd. and said that in the matter of sale under Section 29, the State Financial Corporation must act in accordance with the statute and must not act unfairly i.e. unreasonably. If they do their action can be called into question under Article 226. Reasonableness is to be tested against the dominant consideration to secure the best price for the property to be sold. "This can only be achieved when there is a maximum participation in the process of sale and every body has an opportunity of making an offer. Public auction after adequate publicity ensures participation of every person who is interested in purchasing the property and generally secures the best price".

Adequate publicity to ensure maximum participation of bidders in turn requires that a fair and practical period of time must be given to purchasers to effectively participate in the sale. Unless the subject matter of sale is of such a nature which requires immediate disposal, an opportunity must be given to the possible purchaser who is required to purchase the property on "as us where is basis' to inspect it and to give a considered offer with the necessary financial support to deposit the earnest money and pay the offered amount, if required."

29. Shri Ravi Kant has further invited our attention to this view having been reiterated in the case of Gajraj Jain v. The State of Bihar, (2004) 7 SCC 151.

30. The question that arises for further consideration in this regard is as to what would be the stage of applicability of the aforesaid principles. The Apex Court has cautioned time and again that the Courts cannot sit in appeal over such administrative decisions unless and until they find that the decision is in violation of a statutory provision or is malafide or the decision making process does not conform to the principle of fair play in action. The scrutiny, therefore, is to be confined to the decision making process and not the decision itself. Reference may be had to the decisions cited at the Bar in the case of Tata Cellular v. Union of India, AIR 1996 SC 11, with special reference to paragraph Nos. 77 to 113. The essence of the aforesaid contention is aptly summarized in paragraph 90 of the said decision quoted herein below:-

"Judicial review is concerned with reviewing not the merits of the decision in support of which the application of judicial review is made, but the decision making process itself."

31. The Apex Court has referred to its earlier decision rendered in Sterling Computers Ltd. v. M & N Publications Ltd. and Ors. reported in AIR 1996 SC 51 (Paras 18, 19 & 20).

32. Shri Baghel on the aforesaid issue cited 2 more decisions to assert that the Corporation has very wide and unfettered powers and that its decision could only be questioned if its action is malafide and that even a wrong decision taken by the Corporation is not open to challenge He further submits that in cases where more than one choice is available to the authority, the Authority would be competent to exercise its discretion and which cannot be questioned under Article 226 of the Constitution of India inasmuch as it is not for the Courts to substitute the decision of the financial

Corporation, however, more prudent, it may be. The decisions relied upon by Shri Baghel are in the case of U.P. Financial Corporation v. Gem Cap (India) Pvt. Ltd. and Ors., (1993) 2 SCC 299 (paras 11 & 12) and U.P. Financial Corporation and Ors. v. Naini Oxygen & Acetylene Gas ltd. and Anr. (1995) 2 SCC 754 (para 21). We have examined the aforesaid decisions and we find that both the petitions related to the conduct of the principal borrower who were persistent defaulters. The Apex Court ruled that at the instance of a dishonest borrower, who has no intention to pay, the courts should be loath to sit in appeal and interfere in the decisions of the financial Corporation.

33. However, the case of Mahesh Chandra (supra) was distinguished in the following manner in Gem Cap's case (supra) which is quoted herein below:-

"13. On behalf of the appellant reliance has been placed upon the decision of this Court in Mahesh Chandra v. Regional manager, U.P. Financial Corporation. We have perused the decision. That was a case where the debtor was anxious to pay off the debt and had been taking several steps to discharge his obligation. On the facts of that particular case it was found that the corporation was acting reasonably (sic unreasonably). In that context certain observations were made. The decision also deals with the procedure to be adopted by the corporation while selling the units taken over under Section 29. That aspect is not relevant in this case. We are, therefore, of the opinion that the said decision is of no help to the appellant herein.

34. A perusal of the aforesaid authorities cited by Sri Baghel would indicate that they did not arise from any such facts with which we are concerned in the present case. The petitioner in the present case has tendered an offer of Rs. 59 Lacs as against the offer of the respondent No. 3 of Rs. 47 Lacs with the intention to purchase the property. It is in order to test the bonafide of the petitioner that on the suggestion of the learned counsel for the financial Corporation, we had passed the order on 5.1.2005 quoted herein above and which has been complied by the petitioner by making a deposit of Rs. 50 Lacs with the Registrar General of this Court. In view of the facts of this case, the contention of Shri P.S. Baghel cannot be accepted as the ratio of the aforesaid decisions relied upon by him cannot be pressed into service for considering the case at hand.

35. Apart from the aforesaid reasoning it is further relevant to note that we are keeping ourselves confined to the scope of inquiry of the decision making process which has been questioned by the petitioner, who is a third party having extended an offer of Rs. 12 Lacs more than that of the respondent No. 3. In order to further define our limits , we are reminded of the following ratio of the Apex Court in the case of Surya Dev Rai v. Ram Chander Rai and Ors. (2003) 6 SCC 675 (para 20), which is quoted herein below:

"20. Authority in abundance is available for the proposition that an error apparent on the face of record can be corrected by certiorari. The broad working rule for determining what is a patent error or an error apparent on the face of the record was well set out in Satyanarayan Laxminarayan Hegde v. Mallikarijun Bhavanappa Tirumale. It was held that the alleged error should be self-evident. An error which needs to be established by lengthy and complicated arguments or an error in a long-drawn process of reasoning on points where there may conceivably be two opinions cannot be called a patent error. In a writ of certiorari the High Court may quash the proceedings of the

tribunal, authority or court but may not substitute its own findings or directions in lieu of the one given in the proceedings forming the subject matter of certiorari."

36. To appreciate the argument on the question of the decision making process right from the advertisement to the date on which the offer of the petitioner has been received, as alleged by the respondent, has to be carefully noted which is as follows:-

- 24.2.1995 Advertisement
- 2.3.1995 Meeting of the negotiation committee at the head Office, Kanpur, accepting the offer of the respondent No. 3 of Rs. 47 Lacs.
- 4.3.1995 Notice issued by the Corporation to the borrower either to clear all the dues himself or bring a third person.
- 6.3.1995 Approval by the General manager and the Managing Director to the decision of the negotiation committee dated 2.3.1995.
- 8.3.1995 The principal borrower (respondent No. 4 herein) receives the letter dated 4.3.1995 -- It is stated that the borrower and the petitioner tendered their offer before the Regional Manager, Agra, which was refused to be received.
- 10.3.1995 Offer of the petitioner dispatched by Speed-post to the Head Office at Kanpur -- Intimation by the borrower (respondent No. 4) dispatched to the Regional Office intimating the offer of Rs. 59 Lacs of the petitioner.
- 11.3.1995 A second Saturday.
- 12.3.1995 A Sunday.
- 13.3.1995 Unregistered agreement to sell entered into between the financial Corporation and respondent No. 3 giving effect to the decision taken on 2.3.1995 by the negotiation Committee -- Possession handed over to the respondent No. 3.
- 14.3.1995 Financial Corporation admits having received the offer of the petitioner in Head Office.

37. The first and foremost fact to be considered is, the terms of the advertisement dated 24.2.1995. A perusal of the same would indicate that 15 days' time was provided for submission of offers in respect of the Cold Storage under sale for the purpose of having further detailed information by contacting the Regional Manager, U.P. Financial Corporation, Agra. A perusal of the advertisement would indicate that it does not disqualify or prohibit the consideration of any offer for negotiations or for detailed information if the same is received after 15 days. A perusal of the date indicated herein above on a simple mathematical calculation would lead to the conclusion that the outer limit of 15 days was expiring on 11.3.1995 which was the second Saturday and 12.3.1995 was a Sunday. The offers, therefore, could have been received up to 13.3.1995 whereafter the same could have been considered and negotiated. The advertisement does not specify any other terms and conditions at

all. It does not even give the approximate value of the property nor does it even remotely hint the terms and conditions, which would be available for negotiating the sale.

38. The advertisement, therefore, suffered from such a short fall and is not in conformity with law keeping in view the following proposition laid down in the case of Dutta Associates Pvt. Ltd. v. Indo Merchantiles Pvt. Ltd. and Ors., (1997) 1 SCC 53 (para 7) which is quoted herein below:-

"In the circumstances, we affirm the judgment of the Division Bench in writ appeal on the grounds stated above and direct that fresh tenders may be floated in the light of the observations made in this judgment. We reiterate that whatever procedure the Government proposes to follow in accepting the tender must be clearly stated in the tender notice. The consideration of the tenders received and the procedure to be followed in the matter of acceptance of a tender should be transparent, fair and open. While a bona fide error or error of judgment would not certainly matter, any abuse of power for extraneous reasons, it is obvious, would expose the authorities concerned, whether it is the Minister for Excise or the Commissioner of Excise, to appropriate penalties at the hands of the courts, following the law laid down by this Court in Shiv Sagar Tiwari v. Union of India (In re, Capt. Satish Sharma and Sheila Kaul)."

39. It is further to be noted that the Apex Court has held that it is imperative to get the goods valued before putting it to sell in the case of Gajraj Jain v. State of Bihar and Ors., reported in (2004) 7 SCC 151, (Paras 13 & 14). The respondent -- financial Corporation in the decision of the negotiation Committee have recorded the valuation of the property at that point of time as Rs. 66 Lacs.

40. In order to test the bona fides of the respondent - financial Corporation in the decision making process it is further necessary to deal with the decision of the negotiation Committee dated 2.3.1995. The aforesaid decision has been quoted herein above for ready reference, A perusal of the said decision would leave no room for doubt that the negotiation Committee had proceeded to consider the offer of the respondent No. 3 without waiting for any other offer to arrive and for all practical purposes had finalized the deal with the respondent No. 3 for Rs. 45 Lacs. It has been further indicated in the note-sheet of the records that upon negotiation a sum of Rs. 2 Lacs was further increased and a stipulation was made that Rs. 20 Lacs which are the dues payable to the (SIC) shall be paid by the purchaser. There is no indication as to how and in what manner the aforesaid Rs. 20 Lacs would be disbursed. What is significant in the decision is that the decision was taken before the expiry of 15 days and the terms and conditions of payment of Rs. 10 Lacs cash down with a further facility of payment of balance amount in 10 equal half early instalments was also extended by the negotiation Committee. We find that no such terms and conditions had been indicated in the advertisement nor any such details were even disclosed thereafter. We are fortified in our aforesaid inference also on account of the notice dated 4.3.1995 sent by the financial Corporation to the borrower for making payment of the sale consideration of Rs. 47 Lacs either themselves or by bringing a third person which notice does not stipulate or disclose any of the terms and conditions on which the of the respondent No. 3 had been accepted. There is no explanation on behalf of the financial Corporation as to why they did not choose to refer the aforesaid stipulation either in the advertisement or in the notices sent to the borrower for bringing a third person. The non-disclosure of such a fact which was relevant in our opinion clearly amounts to a unreasonable and unfair

approach of the U.P, Financial Corporation. The Corporation could have disclosed the aforesaid terms and conditions accepted by it. The only inference that can be drawn is that the Corporation had already completed its negotiation with the respondent No. 3 and did not want the said fact to be disclosed to a third party for the reasons best known to it. Upon a specific question having been raised by us during the course of argument, Shri Baghel, learned counsel for the Corporation, urged that this was a uniform practice of the financial - Corporation and the secondly in spite of the aforesaid notice which was in conformity with Mahesh Chandra's case the borrower failed to comply with the same and the offer of the petitioner had not been received in time. We find ourselves unable to accept the aforesaid contention of the learned counsel for the financial - Corporation in as much as, if such alleged uniform practice prevents any other intending purchaser to make an offer on the same terms and conditions, then such an approach by the U.P. Financial Corporation, in our opinion, is unreasonable, unfair and non-transparent thereby violative of Article 14 of the Constitution of India.

41. There is no explanation as to what prevented the financial Corporation from disclosing the aforesaid terms and conditions in the notice dated 4.3.1995. In view of this, the petitioner who was a third party and who was put to invitation on the basis of the said notice could not know either from the advertisement or from the said notice about the terms of the deal in the negotiations held on 2.3.1995.

42. Coming to the next aspect of the aforesaid decision making process, it is evident from the record that even though the notice dated 4.3.1995 gave 7 days' time to submit the offer, yet the deliberation of the negotiation Committee and its decisions to accept the offer of the respondent No. 3 was approved both by the General Manager as well as by the Managing Director on 6.3.1995 itself. We had perused the records and had inquired from the learned counsel of the financial Corporation who stated that approval was given by the said Officers by putting their signatures on the note sheet. This fact again reflects the unfair attitude of the respondent - financial Corporation and its Apex Officers, who it appears, had already made up their mind to finalize the deal with the respondent No. 3. The only reasoning that occurs to the mind is that the officers who approved the acceptance in favour of the respondent No. 3 could have waited for the expiry of 15 days and could have reasonably considered any offer that was higher than that of the respondent No. 3. The aforesaid episode in approving the acceptance of the offer even before the period of 7 days had expired as per the notice dated 4.3.1995 and even before the expiry of 15 days as indicated in the advertisement leads to the only conclusion that every thing was done in undue haste and the entire negotiation was tailored to exclusively benefit the respondent No. 3. The action of the respondent -- financial Corporation is, therefore, in our opinion, absolutely unfair on this score as well. The sending of the notice on 4.3.1995 and the giving of 15 days' time for an offer to be submitted was in the aforesaid circumstances a mere eyewash.

43. The next step taken by the financial Corporation was to enter into an agreement to sell with the respondent No. 3 on 13.3.1995 which incorporates all the terms and conditions as decided by the negotiation Committee on 2.3.1995 and approved by the Officers on 6.3.1995. The said agreement to sell is admittedly not a registered document. Shri Baghel tried to convince us that in view of the provisions of Section 29(2), no such registration is required. We failed to understand as to under

what provision of law is the registration of such an agreement which intends to convey immovable property worth Rs. 47 Lacs is exempted from registration. Admittedly the instrument purports and seeks to convey the property in question on the terms and conditions stated therein. The contention of Shri P.S. Baghel, therefore, on this score has to be rejected. Shri Shashi Nandan, Senior Advocate, who appeared for the respondent No. 3, conceded that it did require registration but at the same time nonregistration thereof will simply render the instrument in admissible in evidence and nothing more. He further submitted that non-registration of the instrument would not invalidate the negotiations already finalized. It is admitted to the parties that no further instrument was executed until the sale-deed was finally executed and registered on 5.7.1996. At the best the only argument that could be advanced would be the plea of defence available under Section 53A of the Transfer of Property Act. However, as held in the decision of the Apex Court in Delhi Motor Company v. U.A. Basarurkar, AIR 1968 SC 794 (Para 6), Section 53A is only meant to bring about the bar against enforcement of rights by a lessor in respect of the property of which the lessee had already taken possession, but does not give any right to the lessee to claim possession or to claim any other rights on the basis of an unregistered lease. Section 53A of the T.P. Act is only available as a defence to a lessee and not as conferring a right on the basis of which the lessee can claim rights against the lessor. Thus, the respondent No. 3 may be able to utilize the said instrument as against the U.P. Financial Corporation, that too even like a shield and not like a sword.

44. As already brought out herein above, the offer of the petitioner was dispatched on 10.3.1995 by Speed post. It is apparent from the records that the correspondence between the borrower and the financial Corporation was by the accepted mode of postal services. The tender of the offer made by the petitioner by speed-post, therefore, is by a common carrier.

45. At this juncture it is relevant to mention that there was no express stipulation in the advertisement about any such mode. The Apex Court in such a situation in the case of Prima Realty v. Union of India and Ors., reported in JT 1996 (10) 383, has held as under:-

"8. The law on the point is settled by the decisions of this Court. In Commissioner of Income-tax, Bihar & Orissa v. Patmy & Co., 1959 Suppl. (2) SCR 868, it was held that "it it is shown that the creditor authorised the debtor either expressly or impliedly to send a cheque by post the property in the cheque passes to the creditor as soon as it is posted. Therefore, the post office is an agent of the person to whom the cheque is posted if there be any express or implied authority to send it by post." In Shri Jagdish Mills Ltd. v. The Commissioner of Income-tax, 1960 (1) SCR 236, it was held as under:

".....The stipulation in the contract between the appellant and the Government was that the payment would be made by cheques. The government of India was located in Delhi and the cheques would be necessarily drawn by it from Delhi. Could it be imagined that in the normal course of affairs the cheques thus drawn in Delhi would be sent by a messenger to Baroda so that they may be delivered to the appellant in Baroda? Or that the officer concerned would come to Baroda himself and hand the same over to the appellant in Baroda? The only reasonable and proper way of dealing with situation was that the payment would be made by cheques which the- Government would send to the appellant at Baroda by post. According to the course of business usage in general which

appears to have been followed in this case, the parties must have intended that the cheques should be sent by post which is the usual and normal agency for transmission of such articles. If that were so, there was imported by necessary implication an implied request by the appellant to send the cheques by post from Delhi thus constituting the Post office its agent for the purposes of receiving those payments."

(page 247)

9. Admittedly, there was no express stipulation of the mode of payment of the consideration or that the cheque would be sent by post. However, according to the ordinary course of business usage the only reasonable and proper inference is that the payment of such large amount would be made by cheque issued by the Central Government and unless the payee went to collect the cheque personally, the cheque had to be sent by post to the payee. According to this implied term, it must be assumed that unless the cheque was collected personally by the payee it would be sent by post thereby constituting the post office as the agent of the payee for the purpose of receiving the payment. In the present case the payees did not indicate the mode of payment to them inspite of a letter received by them to indicate the mode of payment. The appellant did not even choose to reply to that letter. In these circumstances it was reasonable for the concerned authority to have waited for the cheque to be collected personally by the payee till the last date, i.e. May 31, 1995 and to have dispatched it by post on that day when no one came to collect the cheque personally from the authority. In such a situation, payment by cheque dispatched by post on may 31, 1995 amounted to tender of the payment to the payee on may 31, 1995 itself when the cheque was put in the course of transmission through post so as to be beyond the control of the sender from the time of its dispatch by post. This contention has no merit."

46. The position, therefore, is that the petitioner had already dispatched his offer on 10.3.1995 along with the earnest money by speed-post. As indicated herein above 11.3.2005 was a second Saturday and 12.3.2005 was a Sunday. The petitioner has pleaded that the aforesaid letter of speed post containing the offer of the petitioner was served on the financial Corporation at its Head office in Kanpur on 13.3.1995 itself. It has been brought on record by way of a supplementary-affidavit that the aforesaid fact is certified by the post office. The document containing the certification of delivery on the addressee of the aforesaid speed-post on 13.3.1995 is contained in the supplementary-affidavit appended to the application dated 14.10.1996 filed by the petitioner as Annexure-SA-3. The said certificate has been issued by the concerned post-office officially clearly reciting that the aforesaid letter dispatched by the petitioner was delivered to the addressee on 13.3.1995. This document was already brought on the record in the year 1996 itself but the same has not been rebutted by the financial Corporation even though Shri R.D.R. Pandey has filed a counter-affidavit to the amendments sought by the petitioner as late as by an Affidavit dated 30.12.1999. The respondent -- financial Corporation had ample opportunity during the past 9 years to rebut the said document from the post office but no effort appears to have been made in this regard. Shri Baghel, however, from the records pointed out towards the envelope, which is still retained, containing the offer of the petitioner and a perusal thereof clearly indicates that the letter was dispatched on 10.3.1995 but it bears an endorsement on the left hand side at the front of the envelop the digits 199/14.3.1995. The aforesaid endorsement does not bear any initial or stamp of

the post office. There is no explanation forthcoming as to who and why the aforesaid endorsement was made. The respondent - financial Corporation through out in the Affidavits have maintained that the offer was received only on 14.3.1995. In our opinion, there is no credible evidence worth any probative value to accept the contention of Shri Baghel made on behalf of the respondent - financial Corporation in that regard. The only inference that can be drawn is that the offer of the petitioner had been received in time and we accordingly hold the same.

47. The aforesaid facts clearly indicate that the respondents had made up their mind to keep out all persons including the petitioner from participating in the offer in a free fair and transparent manner. The delivery of the possession on the same day i.e. on 13.3.1995 on which date the deal is said to be finalized clearly smacks of undue haste on the part of the respondent and, therefore, the action of the respondent -- Corporation is unreasonable.

48. With regard to the aforesaid acceptance and approval already made before the expiry of 15 days, a very peculiar application supported by an Affidavit has been moved for accepting the same on record sworn by none else by than Shri R.K. Srivastava, the senior Jaw Manager; who had also sworn the counter-affidavit earlier on behalf of financial Corporation. The counter-affidavit indicated that the deal had been finalized on 2.3.1995 and the same was sought to be clarified by the application dated 14.2.2000 after 5 years of the filing of the counter-affidavit that the date 2.3.1995 is a wrong date and the finalization of the offer should be read as on 13.3.1995. This clearly indicates a contrary stand having been taken by the deponent of the said Affidavit after having realized the implication that may arise out of the inconsistent stand taken by the respondent. As has already been indicated herein above, the Affidavit filed along with the application dated 14.2.2000 is a misleading Affidavit. Neither from the record nor from the pleadings is there any decision either of the negotiation Committee or of any Apex Officers taking a decision on 13.3.1995 to finalize the deal. The only document is the said agreement to sell which is not preceded by any decision of 13.3.1995. The aforesaid fact clearly demonstrates and leaves no room for doubt that the decision to sell the property in favour of the respondent No. 3 had already been taken on 2.3.1995 and 6.3.1995 respectively and the effort of the financial Corporation was to clearly prevent any other person including the petitioner from getting his offer considered. This, therefore, vitiates the entire decision making process and which in our opinion leaves no option for this Court except to strike down the same and allow the writ petition.

49. A reference to the Apex Court decision cited by Shri Ravikant, learned Senior Counsel, on behalf of the petitioner in the case of Huda and Anr. v. Dr. Babeswar Kanhar and Anr. (2005) 1 SCC 191, would be apposite. Paragraph 5 of the said decision is extracted herein below:-

"5. What is stipulated in Clause 4 of the letter dated 30.10.2001 is a communication regarding refusal to accept the allotment. This was done on 28.11.2001. Respondent 1 cannot be put to loss for the closure of the office of HUDA on 1.12.2001 and 2.12.2001 and the postal holiday on 30.11.2001. In fact he had no control over these matters. Even the logic of Section 10 of the General Clauses Act, 1897 can be pressed into service. Apart from the said section and various provisions in various other Acts, there is the general principle that a party prevented from doing an act by some' circumstances beyond his control, can do so at the first subsequent opportunity (see Sambasiva Chari v. Ramasami

Reddi) The underlying object of the principle is to enable a person to do what he could have done on a holiday, on the next working day. Where, therefore, a period is prescribed for the performance of an act in a court or office, and that period expires on a holiday, then the act should be considered to have been done within that period if it is done on the next day on which the court or office is open. The reason is that law does not compel the performance of an impossibility. (See hossein Ally v. Donzelle). Every consideration of justice and expediency would require that the accepted principle which underlies Section 10 of the General Clauses Act should be applied in cases where it does not otherwise in terms apply The principles underlying are lex non cogit ad impossibilia (the law does not compel a man to do the impossible) and actus curiae neminem gravabit (the act of court shall prejudice no man). Above being the position, there is nothing infirm in the orders passed by the forums below. However, the rate of interest fixed appears to be slightly on the higher side and is reduced to 9 % to be paid with effect from 3.12.2001 i.e. the date on which the letter was received by HUDA.

50. Applying the principle laid in the aforesaid decision it is apparent that the respondent - financial Corporation ought to have waited for taking a final decision after expiry of the period referred to in the advertisement which they did not do. Even otherwise the advertisement had not laid down the dead line for the final decision to be taken by the Corporation and, as such, it was not imperative for the financial Corporation to not wait any further. The Corporation as indicated hereinabove did not allow the time prescribed to pass and in a predetermined mood proceeded to sell the property and handover possession to the respondent No. 3 on 13.3.1995 itself.

51. Another factor which goes to the root of the matter has also to be taken into account. This Court while entertaining the petition on 24.3.1995 had directed the Corporation not to finalize the offer without considering the objection of the petitioner. In response thereto, the Corporation took a decision on 24.4.1995 to reject the objections of the petitioner on two grounds. Firstly that the sale had already been concluded in favour of the respondent No. 3 on 13.3.1995 and, as such, the offer of the petitioner could not be considered at all. The second ground given was that since the offer of the petitioner was received "very late' i.e. on 14.3.1995, therefore, it would not possible to consider the claim of the petitioner.

52. We have given our thoughtful consideration to the aforesaid decision of the financial Corporation which has also been placed before us. The Corporation has not dealt with the objections of the petitioner at all in the manner in which it ought to have been done. On the contrary the word "late" is prefixed by an adverb "very". The said word "Very" is often used to emphasize a noun denoting tine. It means extremely; exceedingly; greatly; and to a great extent. To our mind the use of the aforesaid adverb by the Corporation establishes either a poor understanding of the Language or as in the present case a clear deliberate attempt to define the word "late" so as to exclude the possibility of even a remote consideration of the offer of the petitioner. We fail to understand as to how an offer, according to the respondents which was received one day late, can be termed to be very late. On the contrary, in our opinion, the decision to sell the property in favour of the respondent No. 3 was taken too early i.e. on 6.3.1995 and in an absolutely unreasonable manner as explained hereinabove. The aforesaid decision of the financial Corporation by rejecting the objection of the petitioner is, therefore, unsustainable and is also set aside,

53. Shri Ravikant, Senior Advocate, has taken us extensively to the judgment of the apex Court rendered in the case of S.J.S. Business Enterprises (supra), A perusal of the decision clearly indicates that having taken note of Mahesh Chandra's case, the Apex Court has clearly ruled that the test of reasonableness to be adopted in such matters is to find out as to whether there has been a dominant consideration made by the Corporation to secure the best price for the property to be sold which should be reflected in the decision making process. This should be ensured by adequate publicity to ensure maximum participation of bidders providing with a fair and practical period of time to the purchasers to effectively participate in the sale. Again in Gajraj Jain's case the aforesaid proposition has been reiterated in paras 9 & 10 of the said decision by referring to other decisions in this regard. The Corporation according to the Apex Court hold the property in trust and the decision in Gajraj Singh's; case leaves no room for doubt that the property should be sold in such a manner that it fetches the best possible price in order to secure the interest of the other creditors as well. Paras 12 and 13 of the said decision is extracted herein below:-

"12. Under Section 29(1) of the 1951 Act where any industrial concern under a liability to the financial corporation makes any default in repayment of loan, the corporation is empowered to take over possession of the industrial concern and realize the property pledged, mortgaged, hypothecated or assigned to the corporation. Under Section 29(4), all costs, charges and expenses incurred by the corporation as incidental to such realization of the property pledged, hypothecated or mortgaged shall be recovered firstly from the industrial concern and the balance shall be paid to the person entitled thereto. As stated above, a charge consists in the right of a creditor to receive the payment out of the proceeds of the realization of property or fund charged with the debt. A bare reading of Sub-sections (1) and (4) of Section 29 shows that it is similar to Section 69 of the TP Act under which it is stipulated that a mortgagee exercising the power of sale is a trustee of the surplus sale proceeds and after satisfying his own charge he holds the surplus for the subsequent encumbrancers and ultimately for the mortgagor. (See Rajah Kishendatt Ram v. Rajah Mumtaz Ali Khan.) Section 29(1) contemplates, therefore, a sale for distribution of sale proceeds and not a sale for distribution of property charged with the debt. It also implies that the first charge-holder must act in a manner which protects not only its own interest but also the interest of the subsequent charge-holder and the mortgagor. This in turn implies that the first charge-holder is bound to obtain the best possible price must, in the context, mean the fair market value.

13. In the present case, it is not in dispute that the assets of the flour mill were charged. The first charge was in favour of the Corporation; whereas the second was in favour of Central Bank of India. Under Section 29(1), the Corporation while enforcing the first charge was required to put the assets charged with the debt to sale and apply the sale proceeds in the manner stated in Section 29(4). But before doing so, it is imperative to have the assets proposed to be sold, valued. In breach of Sub-sections (1) and (4) of Section 29, after putting the assets to sale by public auction the Corporation enters into an agreement for sale of the assets with Respondent 4 without ascertaining the market value and realizing the sale proceeds for distribution. The assets are agreed to be sold for Rs. 198.85 Lakhs merely by adding the Corporation dues and the claim of Central Bank of India. Even this sale consideration is not realized in full. The Corporation accepts downright payment of Rs. 28.85 Lakhs (its own dues) and the balance of Rs. 170 Lakhs is received by it in the form of a promise to it by Respondent No. 4 to pay the dues of Central Bank of India, which is not even a party

to the arrangement. According to Kanga and Palkhiwala: Law and Practice of Income Tax (8th Edn., p.47), a promise to pay the debt at a future date is no realization. In the case of M.C. Chacko v. State Bank of Travancore it has been held by this Court, that a mere undertaking to discharge an obligation or liability of the debtor may at the highest amount to indemnity, however, it is not enough to charge the property/fund with the debt. Further, according to Mulla and Pollock: Contract Act (12th Edn., p. 106), contracting parties may confer rights or benefits upon a third party in the form of promise to pay but the third party on whom such right or benefit is conferred by the contract cannot sue under it. Lastly, as stated above, a charge cannot be enforced against a bona fide purchaser for value (See Ghose: Law of Mortgage, p. 127). In the case of Subbu Chetti v. Arunachalam Chettiar it has been held that when a person transfers property to another and stipulates for payment by the purchaser to a third person, a suit by such person to enforce the stipulation will not lie. In the present case, there is no sale for distribution of sale proceeds in terms of Section 29(1). There is no realization of the property, charged with debt, in terms of Sub-sections (1) and (4) of Section 29 of the Act. The interest of Central Bank of India and the mortgagor is totally defeated by the impugned arrangement between Respondents 2 and 4. The words "realization of the property pledged, mortgaged, hypothecated" presuppose realization of sale proceeds and application/appropriation thereof to liquidate the dues of the paramount charge-holder and from the surplus payment to person (s) entitled thereto. It is for this reason that the best possible price has got to be tried for under Section 29 of the Act. In the circumstances, we hold that the impugned agreement of sale as well as the transfer of assets in favour of Respondent 4 are in breach of Section 29(1) and Section 29(4) of the 1951 Act."

54. We have gone through the records and as indicated herein above, the letter of the Senior Branch Manager, Bank of Baroda, Main Branch, Agra dated 17.12.2004 confirms our view that the respondent -- financial Corporation has acted in clear violation of the aforesaid proposition of law extracted by us herein above and laid down by the Apex Court. The second charge over the property was that of Bank of Baroda. No effort was made to inform the Bank of Baroda or make payment to it of the proportionate assets. For the aforesaid reason also it was necessary for the Corporation to have taken all due care and precaution in fetching the best possible price. The petitioner had definitely offered a much higher price than the respondent No. 3. The dominant consideration for the Corporation ought to have been, to have accepted the offer of the petitioner of Rs. 59 Lacs which was Rs. 12 Lacs more than that of the respondent No. 3. This would have further secured the interest of the other creditor or any other loan or debt dues against the respondent No. 4 -- borrower. The financial Corporation, therefore, having hastily gone through the deal in an absolutely unfair, unreasonable and non-transparent manner has led us to conclude that the action of the financial Corporation cannot with stand the test of Article 14 of the Constitution of India.

55. The action of the respondent can also be described as an action actuated by malice in law. An action is malafide in law if it is contrary to the purpose for which it was authorized to be exercised. It is worthwhile to quote the words of Lord Halsbury in Sharpe v. Wakefield 1891 AC 173 at P. 179:

".....when it is said that some thing is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion.....according to law and not humour. It is to be, not arbitrary, vague; fanciful, but legal

and regular."

Likewise, if there were no grounds, as observed by Lord Morton is Ross v. Papadopollos (1958) 2 All ER 23 at p. 33, ' on which the authority concerned could be satisfied, the court might infer either that the authority did not honestly form that view or that in forming it the authority could not have applied its mind to the relevant facts."

56. Another paragraph from the famous case of A.D.M. Jabalpur v. S. Shukla, reported in AIR 1976 SC 1271 para 207, extracted from the minority judgment of justice Khanna is quoted herein below:

"207. Between malice in fact and malice in law, as observed by Viscount Haldane, L.C. in the case of Shearer v. Shields, 1914 AC 808 (Scot) there is a broad distinction which is not peculiar to any particular system of jurisprudence. A person who inflicts an injury upon an other person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far as the state of his mind is concerned, he acts ignorantly, and in that sense innocently. Malice in fact is quite a different thing; it means an actual malicious intention on the part of the person who has done the wrongful act, and it may be, in proceedings based on wrongs independent of contract, a very material ingredient in the question of whether a valid cause of action can be stated. The above principle was applied by this Court in detention matters in Bhut Nath v. State of West Bengal, (1974) 3 SCR 315 = (AIR 1974 SC 806)."

The action of the financial -- Corporation is also malafide in law in view of the law enunciated herein above by the Apex Court.

57. There is yet another manipulation which can be marginally taken note of. The offer which was made by Shri K.P. Agrawal was on behalf of M/s K.P. Cold Storage and which offer was accepted by the negotiation Committee on 2.3.1995. From the records, it appears that the offer was converted in favour of respondent No. 3 -- M/s Dass Cold Storage which firm did not make any offer within the time prescribed. The person concerned Shri K.P. Agrawal may have been representing both the firms but the offer which was made was by M/s K.P. Cold Storage and (SIC). There was no offer of M/s Dass Cold Storage at all. The transfer and conveyance of the property on 13.3.1995 was on the asking of Shri K.P. Agrawal made in favour of Dass Cold Storage. This issue, however, cannot be sidelined and marginalized and is a very significant fact which demonstrates the manipulation resorted to by the respondent No. 3. In our opinion, there being no offer by M/s Dass Cold Storage, there could not have been any such acceptance in favour of the said firm and transfer of the property by the respondents in the aforesaid manner.

58. This takes us to the final stage of the case as to what relief should be extended to the petitioner. On the basis of the finding arrived at hereinabove, we are of the opinion that the entire deal in favour of the respondent No. 3 deserves to be struck down. We, accordingly, quash the entire proceeding of sale conducted in favour of the respondent No. 3 and declare it to be a nullity including the execution of the sale-deed in favour of the respondent No. 3.

59. The Apex Court has time and again ruled that the parties to litigation upon the termination thereof should be relegated to the same position as on the date of the institution of the proceeding. The following extract from the case of Beg Raj Singh v. State of U.P. and Ors. reported in (2003) 1 SCC 726 is as under.-

"..... A plaintiff or petitioner having been found entitled to a right to relief, the court would as an ordinary rule try to place the successful party in the same position in which he would have been if the wrong complained against would not have been done to him....."

60. The petitioner, therefore, in our opinion is entitled to get his claim considered as we find him to have pursued his claim bonafidely with a real intention to purchase the property. The petitioner is, therefore, entitled for the relief of getting his claim considered by the U.P. Financial Corporation treating his offer to be within time.

61. At this juncture comes in the consideration of the argument advanced by Shri Ravi Kiran Jain, who has put in appearance by filing an impleadment application on behalf of the subsequent purchaser i.e. the respondent Nos. 5 & 6, who have purchased the property on 29.10.1999 from the respondent No. 3. It is alleged in the Affidavit appended to the impleadment application that they came to know of the present proceedings and the litigation only just before the moving of the application for impleadment and had no prior knowledge of any such litigation. It has also been alleged in the Affidavit that some vital and extensive improvement have been made to the Cold Storage Plant by increasing its capacity and other such improvement which has caused the client of Shri Ravi Kiran Jain a fair amount of money. The amount has been disclosed broadly without specifying details in the Affidavit therein. As noted above, Shri Ravi Kiran Jain had made a clear statement that he did not propose to file any counter-affidavit to the writ petition. Shri Jain has pointed out the provisions of Section 51, 52, & 53 of the transfer of property Act and has urged that rights of respondent Nos. 5 & 6 to the property in question which have accrued as a bonafide purchaser for valid consideration cannot be defeated on account of the present pending litigation. He has further urged that purchase made by his client is not hit by Section 52 of the Transfer of Property Act and that even otherwise he was never put to notice about the same. We have examined the contention advanced by Shri Jain and we find it appropriate to refer to a decision of our court in a referred matter reported in AIR 1978 Alld. 318. While considering the implication of Section 52 read with Section 19(b) of the Specific Relief Act, the Court referred to certain passages of English decisions and commentaries and thereafter concluded in the following manner:-

"In our opinion, therefore, when the doctrine of lis pendens renders a transfer made during the pendency of the suit subservient to the rights of the plaintiff seeking specific performance of a prior contract entered into by the vendor in his favour and when on account of the operation of the doctrine of lis pendens such conveyance is treated as if it had never any existence, the subsequent transferee, even though he had obtained the transfer without notice of the original contract, cannot set up against plaintiff-contractor any right; for it would defeat the rule of lis pendens which is founded upon public policy. And considered in that manner, Section 52 of the T.P. Act is not subject to S. 19(b) of the Specific Relief Act.

8. We may yet arrive to a similar conclusion in a different manner. "A judgment inter paries raises an estoppel only against the parties to the proceeding in which it is given, and their privies, for example, those claiming or deriving title under them." (Halsbury's Laws of England, Third Edition, Volume 15, para 372). The transferee pendente lite would be treated as a representative in interest of the parties to the suit and the judgment which has been pronounced, in the absence of fraud and collusion, would have the effect of finally determining the rights of the parties and the cause of action which would sustain the suit in which the doctrine of lis pendens applied would be merged in the judgment duly pronounced in what may be described as the previously decided suit. The decision being res judicala would bind not only the parties thereto but also the transferees pendente lite from them.

In a case to which besides the vendor the subsequent transferee is also impleaded in the array of the defendants, the judgment is final and binding not only on the parties to the original contract but also the transferee pendente lite from vendor. The conveyance in favour of the subsequent purchaser is treated as if it never had any existence. There would then be no lis or action which would survive, enabling the subsequent purchaser to take the defence of bona fide transfer for value without notice of the original contract. Accordingly, we take the view that lis pendens affects the transferee pendente lite and Section 52 of the T.P. Act is not subject to Section 19(b) of the new Specific Relief Act. The conveyance in favour of the subsequent purchaser pending the suit brought by the plaintiff contractor for specific performance of the contract between him and the vendor is taken "as if it had never any existence."

62. Applying the aforesaid principles it is evident that the respondent Nos. 5 & 6 are clearly bound by the aforesaid doctrine and they do not acquire any better right or title in the property than the respondent No. 3. Once the sale finalized and executed in favour of the respondent No. 3 has been found by us to be invalid, the subsequent sale in favour of the respondent No. 5 and others has also to fall through. The respondent Nos. 5 and 6 have not brought on record any document to indicate the terms and conditions on which the sale-deed had been executed in their favour. In these circumstances, this Court is not in a position to grant any protection to them.

63. In view of the findings arrived at herein above, the writ petition consequently succeeds and is allowed and the entire proceedings finalized in favour of respondent No. 3 including the execution of the sale-deed are hereby quashed. As a consequence thereof the respondent Nos. 5 & 6 are also not entitled to retain possession of the property as the sale-deed executed in their favour on 29.10.1999 can not confer any right upon them as the present writ petition has been allowed. The respondent U.P. Financial Corporation is hereby directed to consider the offer of the petitioner and proceed to negotiate the property in accordance with the principle of obtaining the best possible price. The Registrar General, before whom the amount of Rs. 50 Lacs have been deposited by way of 10 bank drafts of Rs. 10 Lacs each as per our order dated 5.1.2005 by the petitioner shall forthwith release the same in favour of the petitioner.

64. The writ petition stands allowed with no order as to costs.