

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

WEDNESDAY, THE 20<sup>TH</sup> DAY OF OCTOBER 2021 / 28TH ASWINA, 1943

OP (DRT) NO. 9 OF 2021

AGAINST SA 139/2019 OF DEBT RECOVERY TRIBUNAL, ERNAKULAM,

PETITIONER:

SREE GOKULAM CHIT AND FINANCE CO. PVT. LTD.  
SREE GOKULAM TOWER, OLD NO.356,  
NEW NO.66,ARCOT ROAD, KODAMBAKKAM,  
CHENNAI,  
REP.BY AUTHORISED REPRESENTATIVE  
PRASANTH A.K.,  
AGED 57, S/O. PRABHASHANKAR  
  
BY ADVS.  
SHRI.S.RENJITH  
SHRI.ALJO K. JOSEPH

RESPONDENTS/APPLICANTS & DEFENDANTS IN SA:

- 1      EMIL AND ERIC HOSPITALITY SERVICES  
         A PARTNERSHIP FIRM,  
         HAVING ITS PLACE OF BUSINESS AT  
         BUILDING NOS.3/34,35 AND 36,  
         EAST FORT P.O., PARAVATTANI,  
         THRISSUR DISTRICT,  
         KERALA,  
         REP BY ITS MANAGING PARTNER,  
         MARTIN SEBASTIAN
- 2      MARTIN SEBASTIAN  
         S/O.LATE SEBASTIAN, AGED 56 YEARS

CITADEL HOUSE,  
C.NAGAR, NADATHARA P.O.,  
THRISSUR, KERALA

3 J.M.FINANCIALLY ASSET RECONSTRUCTION  
COMPANY LIMITED,  
3RD FLOOR, B WING, SUASHISH IT PARK,  
PLOT NO.68E, OFF.DATTAPADA ROAD,  
OPP.TATA STEEL, BORIVALI EAST,  
MUMBAI-400066,  
MAHARASHTRA

4 THE AUTHORIZED OFFICER,  
J.M.FINANCIAL ASSET RECONSTRUCTION COMPANY  
LIMITED, 3RD FLOOR, B WING,  
SUASHISH IT PARK, PLOT NO.68E,  
OFF.DATTAPADA ROAD, OPP.TATA STEEL,  
BORIVALI EAST,  
MUMBAI-400066,  
MAHARASHTRA

BY ADVS.  
SRI.VARGHESE C.KURIAKOSE  
SRI.V.V.ASOKAN (SR.)  
SRI.SUNIL SHANKAR

THIS OP (DEBT RECOVERY TRIBUNAL) HAVING COME UP FOR  
ADMISSION ON 12.10.2021, THE COURT ON 20.10.2021 DELIVERED  
THE FOLLOWING:

“C.R.”

**BECHU KURIAN THOMAS, J.**

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**O.P. (DRT) No.9 of 2021**  
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Dated this the 20<sup>th</sup> day of October, 2021

**JUDGMENT**

The attempt of a lone bidder in an auction, to implead in a securitisation application before the Debts Recovery Tribunal ended in a failure. The said lone bidder, is challenging in this original petition, two separate orders issued by the Tribunal, including the order rejecting his application for impleading. Original petitioner claims to be the auction purchaser and is challenging Ext.P2 order dated 15-01-2021 and Ext.P5 order dated 08-02-2021 passed by the Tribunal. This challenge is preferred under Article 227 of the Constitution of India.

2. There are three parties to this litigation, (i) original petitioner, (ii) respondents 1 and 2, and (iii) respondents 3 and 4. Petitioner claims to be the auction purchaser while respondents 1 and 2 are the borrowers, the 3<sup>rd</sup> and 4<sup>th</sup> respondents are the asset reconstruction company and its authorized officer, respectively. For easier

comprehension, the three parties are referred to as Petitioner, Borrowers and ARC in this judgment.

3. In the first amongst the two impugned orders, the Tribunal had observed that the Borrowers had arranged a proposed purchaser who was ready to purchase the security interest for Rs.7.60 Crores. It is observed in Ext.P2 that the Borrowers will accordingly pay an amount of Rs.2 Crores through the proposed purchaser within eight days and the balance on or before 07-02-2021. In the latter of the two orders, i.e. Ext.P5, the Tribunal rejected the impleading application of the Petitioner herein.

4. Challenge in this original petition is built upon the auction notice published on 03-12-2020 and the consequent participation of the Petitioner at the auction held on 29-12-2020 for Rs.7.51 Crores. By Ext.P1 letter issued by the ARC to the Petitioner on 31-12-2020, it was conveyed that Petitioner's bid was accepted and the balance amount of auction money is liable to be deposited. It is claimed that, after the publication of the auction sale notice and the consequent sale, Borrowers could not have brought in any person to purchase the property. On 15-01-2021, the Tribunal, by Ext.P2 order permitted the Borrowers to deposit an amount of Rs.2 Crores through an

intending purchaser, that too, for a sum which was merely Rs.9 lakhs more than what the Petitioner had bid for, at the auction. Petitioner alleges that the direction of the Tribunal to the ARC to accept the amount of Rs.2 Crores, behind the back of the auction purchaser and contrary to section 13(8) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short the Act), is without authority and in excess of its jurisdiction.

5. Petitioner further contends that, on coming to know about the order of the Tribunal dated 15-01-2021, it sought to implead itself in the securitisation proceedings by filing I.A No.158 of 2021 (Ext.P3), apart from I.A No.159 of 2021, seeking directions to confirm the sale and issue the consequent sale certificate favouring the Petitioner. It is pleaded that the Tribunal by Ext.P5 order dismissed the application for impleading. According to the Petitioner, after the Borrowers lost their right to redeem the property, the Tribunal could not have permitted the Borrowers to bring in some other person to purchase the property by offering to pay an amount which is marginally higher than what was bid at, by the Petitioner. The findings of the Tribunal are attacked as being contrary to the statute and the settled propositions of law.

6. A counter affidavit has been filed on behalf of the Borrowers. Apart from questioning the maintainability of the original petition on the ground of alternative remedy under section 18 of the Act, it is stated that Ext.P2, though styled as an order, is only a proceeding recording an arrangement entered into between the Borrowers and the ARC and hence, the same cannot be subject to any supervisory jurisdiction of this Court under Article 227 of the Constitution of India.

7. The Borrowers further pleaded that the 1<sup>st</sup> respondent had availed two term loans on 12-10-2009 from the Federal Bank, after mortgaging two properties and even after repaying a portion of the loan, default occurred. It was also stated that though proceedings were initiated in 2012 and later when a sale notice was published on 14-03-2019, the Borrowers preferred S.A No.139 of 2019 before the Debts Recovery Tribunal-I, Ernakulam. In the meantime, the bank had filed O.A. No.42 of 2013 before the Tribunal and pursuant to final orders, issued a recovery certificate as DRC No.77/2018. In the said DRC proceedings, the Borrowers had filed three applications (i) to grant eight months' time to arrange a private sale, (ii) leave to arrange a private sale, and (iii) to remove the boards erected by the ARC to enable the arrangement of a private sale. It was pleaded in

the counter affidavit that all those applications were rejected by Ext.R1(h) order dated 03-12-2020 by the Recovery Officer. It was thereafter that the sale notice Ext.R1(j) was published, fixing the reserve price at Rs.7.5 Crores.

8. The Borrowers further averred that after the sale notice of 03-12-2020 was published, an amendment application was preferred in the securitisation application to include the challenge against the said sale notice, which was allowed on 21-12-2020. Later when the case was taken up on 28-12-2020, the counsel for the ARC reported that one bid had been obtained for the sale and hence the Tribunal ordered stay of confirmation of sale, but contrary to the terms of the interim order, the fourth respondent issued Ext.P1 letter accepting the bid offered by the Petitioner. Borrowers alleged that, since Petitioner had not complied with the terms of Ext.P1, respondents entered into an arrangement between themselves. On the basis of the consensus with the ARC, Borrowers entered into a private arrangement which alone is recorded by the Tribunal in the proceedings of 15-01-2021. The Borrowers further asserted that the payment of the balance amount of Rs.5.51 Crores, as per the terms of Ext.P1, was not complied with by the Petitioner and a conditional

acceptance of Ext.P1 alone was carried out by the Petitioner, which itself shows the invalidity of the sale alleged to have been carried out.

9. In the counter affidavit filed by ARC, apart from the contentions relating to the background of the proceedings prior to the auction notice dated 03-12-2020, it was stated that the amendment application filed by the Borrowers in S.A. No.139 of 2019 was allowed on 21-12-2020 and the matter was posted for hearing on 28-12-2020 on which date, after hearing the matter at length, the Debts Recovery Tribunal refused to stay the auction and permitted the auction to be conducted, and bids be invited, but stayed the confirmation of sale.

10. According to the ARC, since the Petitioner was the only bidder and since they bid for an amount of Rs.7.51 Crores, it was declared as the highest bidder on 29-12-2020, which was communicated to the Petitioner by Ext.P1. It is further pointed out that this was the first time an interested person came forward to purchase the property after the failure of multiple auctions conducted earlier, that too, after more than seven years of the loan falling outstanding. On receiving 25% of the total consideration, a letter dated 31-12-2020 was issued, acknowledging the receipt of the said

sum on 30-12-2020 and informing the Petitioner about making the balance payment on or before 30-01-2021.

11. It is also pleaded by the ARC that in deference to the order of the Tribunal on 28-12-2020, the sale was not confirmed in favour of the auction purchaser. The alleged arrangement between the Borrowers and ARC, relating to the proposed private arrangement was stoutly denied. It was also stated that after this original petition was filed and this Court granted a stay, Petitioner paid the entire balance consideration on 03-03-2021 itself, and in compliance with the provisions of the Act, the ARC issued sale certificate dated 08-03-2021 in favour of the Petitioner and the possession was handed over on 19-03-2021. It was also pointed out that an SLP was filed by the Borrowers knowing fully well about the facts that transpired after the filing of this original petition and when the Supreme Court passed an order of status quo on 22-03-2021, that too, with regard to possession alone, since the possession had already been handed over on 19-03-2021 to the Petitioner, the Borrowers cannot plead the benefit of the said order of the Supreme Court in its favour. It was also pleaded that since the Supreme Court did not interdict the issuance of sale certificate or other further steps

in pursuance thereto, except preserving the status quo as regards possession, the registration of the sale certificate on 17-04-2021 does not violate any of the orders of the Court. It was also averred that, pursuant to this Court staying the proceedings, the third and fourth respondents had returned the amount of Rs.2 Crores and offered the same to the counsel for the Borrowers, though the same was refused on 19-03-2021.

12. Adv. Aljo K. Joseph, the learned counsel for the Petitioner, apart from reiterating the contentions raised in the original petition further pointed out that, the Borrowers had lost their right to redeem the property after publication of notice for sale and as per section 13(8) of the Act, the only option of the Borrowers was to pay the entire amount due on the property. It was further argued that the total liability of the Borrowers was more than Rs. 20 Crores and the property was declared as a non-performing asset more than a decade ago and in spite of several attempts at auction of the property, no bidders came forward and it was only after the sale notice of 03-12-2020 that Petitioner came in with a willingness to purchase the property. The decisions of the Supreme Court in **Valji Khimji and Company v. Official Liquidator of Hindustan Nitro**

**Product (Gujarat) Limited and Others [(2008) 9 SCC 299], Pegasus Assets Reconstruction (P) Ltd. v. Haryana Concast Ltd. and Another [(2016) 4 SCC 47], and Shakeena v. Bank of India [JT-2019-8-344]** were relied upon in support of the contentions raised by the Petitioner.

13. Adv. Varghese C. Kuriakose, the learned counsel for the Borrowers, contended that Ext.P1 can never be regarded as a confirmation of sale and that the Petitioner had never replied pursuant to Ext.P1 as directed therein, thereby leaving the auction incomplete. It was also argued that in the absence of a confirmed sale, no right as such accrued to the auction purchaser, so that Ext.P5 order does not warrant any interference and further, the order in Ext.P2 was issued since the Petitioner had not replied pursuant to Ext.P1 and therefore, the ARC proceeded to accept the offer made by the Borrowers on consent and accepted the amount of Rs.2 Crores offered through the Borrowers with open eyes. It was also contended that, since Ext.P2 order was issued based upon a consensus, the ARC cannot thereafter back out and confirm the sale in favour of the Petitioner. The learned counsel also questioned the steps initiated by the ARC, consequent to obtaining the interim order

from this Court in the present case. It was submitted that all those proceedings including the execution of the sale certificate and the alleged handing over of possession were not only contempt of court but also carried out behind the back of the Borrowers as well as an abuse of the process of court intended to override the orders of the Supreme Court in the special leave petition.

12. The learned Senior Counsel Sri. V.V Ashokan, duly instructed by Adv. Sunil Shankar, on behalf of the ARC, submitted that two term loans were granted to the Borrowers and the accounts were declared as a non-performing asset on 31-03-2011 and pursuant to an application filed before the DRT as O.A. No.42 of 2013, a decree was obtained and a recovery certificate was issued for an amount of Rs.19,64,73,829/-. After denying the alleged consensus between the Borrowers and the ARC to accept the offer of a proposed purchaser brought by the Borrowers, the learned Senior Counsel referring to the additional statement filed by the ARC, submitted that the order on 15-01-2021 came to be passed only because of Ext.R3(a) rejoinder filed by the Borrowers. The learned Senior Counsel reiterated that there was never any arrangement with the Borrowers nor any consensus for a private sale for Rs.7.6

Crores. It was further pointed out that the difference between the purchase price of the Petitioner and that of the alleged purchaser brought by the Borrowers is only Rs.9 lakhs, which is marginal and not a substantial sum, sufficient to wipe away the liability of the Borrowers. It was also submitted that after 07-01-2021 the stay of confirmation was never extended and further, after the order of stay issued by this Court in this original petition, there was nothing that prevented the authorised officer from confirming the sale in favour of the Petitioner or from registering the sale deed. The learned Senior Counsel thus supported the Petitioner in the original petition.

13. On an appreciation of the contentions raised by the parties to this lis, the following questions are required to be adjudicated:

*(i) Is the original petition maintainable?*

*(ii) Whether the direction of the Tribunal on 15-01-2021 in Ext.P2 directing the ARC to accept Rs.2 crores from an intending purchaser proposed to be brought in by the borrowers is valid, especially after the bid of the Petitioner at the auction held on 29-12-2020 was accepted by the ARC?*

*(iii) Is the order Ext.P5 rejecting the impleading application of the Petitioner justified?*

Q.No. (i) Is the original petition maintainable?

14. Even though the first respondent had taken a specific contention regarding the maintainability of the original petition in the

counter affidavit filed, such a plea was not canvassed during the hearing. Still, I propose to consider the question of maintainability.

15. The original petition was filed under Article 227 of the Constitution of India. On 01-03-2021, when the matter came up before a learned single Judge of this Court as a defect, the Court directed the Registry to number the original petition. It is noticed that certified copies of the impugned orders had not been obtained or produced. Later, on 03-03-2021, after notice was accepted by the counsel for the respondents, the learned single Judge observed that *prima facie* the original petition deserves consideration. An interim order was also passed, an abstract of which is as follows: *"In the meanwhile, if the petitioner deposits with R3 and R4, balance consideration within a period of two days from today, impugned orders are stayed."* Pursuant to the aforesaid order, the balance of the auction purchase money was deposited. The case came up for consideration on several days and all parties to the dispute have filed their respective counter-affidavits.

16. Since, at the time, Petitioner had not obtained the certified copy of the orders impugned, it could not have preferred an appeal before the Appellate Tribunal. Further, though all parties proceeded

to place their written pleadings and argued the case on merits, without raising the question of maintainability of the original petition, I proceed to consider the original petition on merits. In the circumstances mentioned above, I hold the original petition to be maintainable before this Court.

Q. No. (ii) Whether the direction of the Tribunal on 15-01-2021 in Ext.P2 directing the ARC to accept Rs.2 Crores from an intending purchaser proposed to be brought in by the borrower is valid, especially after the bid of the Petitioner at the auction held on 28-12-2020 was accepted by the ARC?

17. Ext.P2 is one of the two orders challenged in this original petition. Ext.P2 is an order of the Tribunal dated 15-01-2021 wherein it is recorded that the applicants before the Tribunal (Borrowers) have arranged a proposed buyer for the property, who is ready to purchase the property, at a price of Rs.7.60 Crores. It further mentions that the applicants before the Tribunal will pay an amount of Rs.2 Crores, through the proposed purchaser within eight days, and the balance amount will be paid on or before 07-02-2021.

18. Ext.P6 is a typed copy of the 'A' diary of the DRT(Ernakulam) and is not disputed. A perusal of the proceedings of 21-12-2020 shows that an amendment application filed by the

Borrowers as I.A. No.1307 of 2020 in S.A. No.139 of 2019, challenging the auction sale notice dated 03-12-2020 scheduling the sale to be held on 29-12-2020, was allowed. Thus, it came to the notice of the Tribunal at least on the said posting date, that the sale is scheduled to be held on 29-12-2020.

19. Thereafter, from the proceedings of 28-12-2020, it is seen recorded that the learned counsel for the ARC brought to the notice of the Tribunal that pursuant to the auction sale notice, they had received one bid. Despite the said submission, Tribunal refused to stay the auction and instead recorded as follows: “....*However it will not be appropriate to stay the auction sale scheduled on 29-12-2020. Accordingly, defendant bank is permitted to receive further bid, if any, in pursuance of auction sale notice Annexure A/09 and to conduct auction sale on 29-12-2020. However the confirmation of the sale is stayed till next date of hearing. Matter is adjourned for filing of written statement and counter to interim application as well as hearing on 07-01-2021*”.

20. On 07-01-2021, the case was merely reposted to 12-01-2021, on which date, it was again adjourned to 15-01-2021 for final hearing. The interim stay of confirmation of sale was not

extended after 07-01-2021. Thus, the Tribunal refused to interfere with the scheduled sale despite being informed that there was one bidder and instead, only stayed the confirmation of sale, that too, till the next date of hearing, which was not thereafter extended.

21. Petitioner being the lone bidder in the auction held on 29-12-2021, was issued with Ext.P1 letter, confirming the acceptance of the bid offered by the Petitioner and the receipt of 25% of the bid amount. No other bidders had participated at the auction nor had the ARC received any other bids. The only restriction that remained against confirming the sale in favour of the bidder was the order of the Tribunal staying the confirmation of sale till 07-01-2021 and the payment of balance consideration. Since the stay was not extended beyond 07-01-2021, there was no prohibition in confirming the sale in favour of the Petitioner.

22. In this context, it is relevant to appreciate whether the Borrowers have a right to bring in a new auction purchaser after the sale took place and that too for an amount far below the actual dues from the Borrowers, but marginally above the bid offered by the Petitioner.

23. Section 13 of the Act deals with enforcement of security interest and provides in sub-clause (1) and (8) (after amendment in 2016) as follows:

**S.13 Enforcement of security interest.-**

*(1) Notwithstanding anything contained in section 69 or section 69-A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the Court or tribunal, by such creditor in accordance with the provisions of this Act.*

|       |      |      |      |      |
|-------|------|------|------|------|
| XXXXX | XXXX | XXXX | XXXX | XXXX |
| XXXXX | XXXX | XXXX | XXXX | XXXX |

*(8) Where the amount of dues of the secured creditor together with all costs, charges and expenses incurred by him is 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,-*

*(i) the secured assets shall shall not be transferred by way of lease assignment or sale by the secured creditor; and*

*(ii) in case, any step has been taken by the secured creditor for transfer by way of lease or assignment or sale of the assets before tendering of such amount under this sub-section, no further step shall be taken by such secured creditor for transfer by way of lease or assignment or sale of such secured assets.*

24. Prior to the amendment, section 13(8) provided that the tendering of the amounts due to the secured creditor can be at any

time before the date fixed for sale or transfer, as the case may be. There is a significant change to the provision after the amendment of 2016. The change is evident from the words “...*is tendered to the creditor at any time before the date of publication of notice for public auction.....*”. The restriction in section 13(8) of the Act, after the amendment is that if the amount of dues of the secured creditor along with the charges are tendered prior to the date of publication of notice, then the secured creditor is interdicted from transferring the secured interest and if any step has been taken for transfer of the secured asset, no further steps shall be taken. The corollary of section 13(8) of the Act is unambiguous. If the amount due to the secured creditor is offered after the date of publication of the notice for public auction, the secured creditor is not bound by such offer or tendering and instead shall be entitled to proceed with the sale or with such mode of transfer intended by the second creditor.

25. Section 13(8) of the Act incorporates the principle of the right of redemption of a mortgagor. Earlier, until 2016, the right of redemption was available till the date of sale. However, after the amendment, by virtue of the provisions of the Act, the right of redemption of a mortgagor comes to an end on the date of

publication of notice for public auction. Thereafter the mortgagor loses the right to redeem the secured asset. While appreciating the scheme behind section 13(8) of the Act, the Court cannot lose sight of sub-clause (1) of section 13 of the Act. The statute has given a free hand to a secured creditor to enforce any security interest without the intervention of the Court or Tribunal. If the enforcement is by the methods and manner provided under the Act, the Court or Tribunal cannot interfere with the measures adopted.

26. The decision in **Shakeena v. Bank of India** [JT-2019-8-344], relied on by the Petitioner, has no application to the facts of the case as the Court was considering a sale that took place in 2005, which was prior to the amendment of Section 13(8) of the Act. However, there is an observation in paragraph 29 as follows:

*“.....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.*”. Though this is only an obiter dictum, it is settled, even an obiter dictum of the Supreme Court is binding on the High Courts.

27. In this context, this Court deems it apposite to observe that, in the absence of specific cases of violation of provisions of law, the Tribunals would do well not to interfere with auction sales, unless of course the secured creditor consent. It is vital to the scheme and intent of the Act that the sanctity of auction sales are maintained, lest the intending bidders would think twice before coming forward with bids. If the intending bidders are ensured the required confidence of auction sales under the Act, the price fetched at such auctions will be higher. Such higher prices at the auctions auger better in the interests of all and at the same time achieves the purpose of the Act also.

28. In the instant case, the Recovery Officer had rejected the application of the Borrowers to carry out a private sale of the property, and it was after that the sale was notified by notice dated 03-12-2020. The Borrowers have no case that they had offered, either through themselves or through any prospective purchaser, the amounts due to the secured creditor before the date of notice. the

offer of the Borrowers as reflected in Ext.P2 was made only after the auction. In such circumstances, the Tribunal acted in excess of jurisdiction in passing an order in the nature of Ext.P2 directing the Borrowers to pay an amount of Rs.2 Crores through a proposed purchaser to the ARC, ignoring the bid of the Petitioner made at the auction held on 29-12-2020 and even accepted by the ARC through Ext.P1. Such a direction, issued on 15-01-2021 is thus without authority and issued in irregular exercise of jurisdiction.

Q.No.(iii) Is the order Ext.P5 rejecting the impleading application of the Petitioner justified?

29. By Ext.P5, the Tribunal rejected the application of the Petitioner for impleading as a party in the securitisation application. In coming to the said conclusion, the Tribunal proceeded to assume that the sale can be cancelled until confirmation is carried out and also that the authorised officer is entitled to sell the property through other modes also, to obtain the real value for the property. The Tribunal seems to have been swayed by the offer of Rs.7.60 Crores by the Borrowers through an alleged intending purchaser, in contradistinction to Rs.7.51 Crores offered by the Petitioner as the auction purchaser in the sale notified.

30. While rejecting the application for impleading filed by the Petitioner, the Tribunal committed four fundamental flaws. The four flaws are as follows: (i) After 03-12-2020, the Borrowers lost their right to redeem the property under section 13(8) and ARC was entitled to accept a suitable bid of its choice, (ii) it ignored the right, though inchoate, of the Petitioner as on 29-12-2020, by virtue of his bid having been accepted by the ARC and 25% of the bid amount deposited by the Petitioner, (iii) no orders could have been rendered in the nature of Ext.P2, behind the back of the Petitioner after 29-12-2020, and (iv) the sanctity of an auction sale contemplated under the provisions of the Act cannot be defeated by bringing another intending purchaser, that too for a meagre sum of Rs.9 lakhs above what was offered at the auction sale.

31. The claim of the Borrowers that Ext.P2 order was passed as a consensus, is stoutly denied by the ARC. Though the claim of consensus falls in the realm of a disputed fact, for the present, there is an indication in the pleadings itself as to how that offer came to the notice of the Tribunal. Ext.R3(a) is a rejoinder filed by the Borrowers on 14-01-2021. In the said pleading, the Borrowers referred to an intending purchaser available, to purchase the property for Rs.7.60

Crores, whom the borrower can bring in. Coupled with the above, the rejection of the application seeking permission to have a private sale by order dated 03-12-2020 indicates that the claim of consensus for passing the order in Ext.P2 is bereft of any basis. Thus, the contention now raised about the consensus with the ARC cannot be digested without a pinch of salt.

32. In this context, it is relevant to bear in mind the decision in **Valji Khimji and Company v. Official Liquidator of Hindustan Nitro Product (Gujarat) Limited and Others** [(2008) 9 SCC 299].

In the aforesaid decision, the Supreme Court observed that *“If it is held that every confirmed sale can be set aside the result would be that no auction-sale will ever be complete because always somebody can come after the auction or its confirmation offering a higher amount”*. It was further observed by the Court that *“.....When an auction-sale is advertised in well-known newspapers having wide circulation, all eligible persons can come and bid for the same, and they are themselves to be blamed if they do not come forward to bid at the time of the auction. They cannot ordinarily later on be allowed after the bidding (or confirmation) is over to offer a higher price. Of course, the situation may be different if an auction-sale is finalised, say for Rs 1 crore, and subsequently somebody*

*turns up offering Rs.10 crores. In this situation it is possible to infer that there was some fraud because if somebody subsequently offers Rs 10 crores, then an inference can be drawn that an attempt had been made to acquire that property/asset at a grossly inadequate price. This situation itself may indicate fraud or some collusion. However, if the price offered after the auction is over which is only a little over the auction price, that cannot by itself suggest that any fraud has been done”.*

33. The situation projected by the Supreme Court has happened in the instant case. The loan account of the Borrowers was declared as NPA on 31-03-2011 and the decree was obtained for Rs.19 Crores. Possession of the property was taken on 29-01-2019. On two earlier occasions of sale, there were no bidders. On the third occasion, when the auction notice was published on 03-12-2020 scheduling the sale to 29-12-2020, Petitioner submitted its bid for Rs.7.51 Crores. 16 days after the sale, Borrowers suggested that there is another purchaser for Rs.7.60 Crores, the quantum of which is only a meagre sum of Rs.9 lakhs in excess of what was bid at the auction sale. If the said bid is accepted behind the back of the Petitioner, certainly prejudice will be caused to the Petitioner and the scheme of the Act will be contravened. Petitioner,

therefore, was entitled to be a participant in the securitisation proceedings challenging the sale notice of 03-12-2020.

34. In view of the above discussion, it is evident that the Petitioner is also entitled to implead himself in the securitisation application. The rejection of the impleading application by Ext.P5 order is therefore perverse, and the jurisdiction was exercised irregularly warranting interference under Article 227 of the Constitution of India.

35. Though the Tribunal has observed, in Ext.P5, that after issuing Ext.P1, the petitioner had not paid the balance amount and the Petitioner had only made a conditional acceptance since Petitioner had replied that the original documents should be brought for verification to Calicut and balance can be paid only after verification of the original documents. This Court is at a loss to understand as to how the said reply of the Petitioner would amount to a conditional acceptance, since, it is an obligation of the purchaser to be cautious and be satisfied with the original documents of title. The ARC cannot be faulted for issuing a letter in the nature of Ext.P1, as it was not a confirmation letter but only a letter accepting the bid of the Petitioner. Of course, it would have been ideal, had it been stated

in the letter that the sale was subject to the order of stay of confirmation issued by the Tribunal. However, the absence of a mention in Ext.P1, of the stay order issued by the Tribunal, does not in any way, detract the sanctity of the auction sale or the fact of acceptance of the bid by the ARC

36. The validity or otherwise of the proceedings that transpired after the order of status quo on possession by the Supreme Court is not considered in this Judgment as it is submitted across the Bar that the Borrowers have already filed a contempt petition, which is pending consideration before the Supreme Court.

37. Hence Ext.P2 and Ext.P5 orders are set aside. The petitioner will stand impleaded as an additional respondent in S.A. No.139 of 2019 on the files of the Debts Recovery Tribunal, Ernakulam.

The original petition is allowed as above.

**Sd/-**

**BECHU KURIAN THOMAS  
JUDGE**

vps

APPENDIX OF OP (DRT) 9/2021

PETITIONER'S/S' EXHIBITS

|             |                                                                                                                                                                  |
|-------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| EXHIBIT P1  | TRUE COPY OF THE LETTER ISSUED BY THE 4TH RESPONDENT DATED 31.12.2020                                                                                            |
| EXHIBIT P2  | TRUE COPY OF THE ORDER DATED 15.01.2021 IN SA NO.139 OF 2019 BEFORE THE DRT-I, ERNAKULAM                                                                         |
| EXHIBIT P3  | TRUE COPY OF THE IMPEADING PETITION IA NO.158 OF 2021 IN SA NO.139 OF 2019 FILED BY THE PETITIONER BEFORE DRT                                                    |
| EXHIBIT P4  | TRUE COPY OF THE IA NO.159 OF 2021 IN SA NO.139 OF 2019                                                                                                          |
| EXHIBIT P5  | TRUE COPY OF THE ORDER DATED 08.02.2021 IN IA NO.158 OF 2021 IN SA NO.139 OF 2019 OF DRT-I , ERNAKULAM                                                           |
| EXHIBIT P6  | TRUE TYPE WRITTEN COPY OF THE RELEVANT PORTION OF A DIARY PROCEEDINGS IN SA NO.139 OF 2019 OF DRT-I, ERNKAULAM                                                   |
| EXHIBIT P7  | TRUE COPY OF THE JUDGMENT IN SRI SAI ANNADHATAH POLUMERS AND OTHERS VS THE CANARA BANK REPORTED IN 2018 (5) ALT 207 BY THE HONB'LE HIGHT COURT OF ANDHRA PRADESH |
| EXHIBIT P8  | TRUE COPY OF THE JUDGMENT IN SHAKEENA & ANR V/S BANK OF INDIA & ORS REPORTED IN 2019 (11) SCALE 59 BY THE HON'BLE SUPREME COURT.                                 |
| EXHIBIT P9  | TRUE COPY OF THE JUDGMENT IN MATHEW VARGHESE V/S.M.AMRITHA KUMAR REPORTED IN 2014 (5) SCC 610                                                                    |
| EXHIBIT P10 | TRUE COPOY OF THE JUDGMENT IN VALJI KHIMJI AND COMPANY VS OFFICIAL LIQUIDATOR OF HINDUSTAN NITRO PRODUCT (GUJARAT) LTD & ORS REPORTED IN 2008 (9) SCC 299        |

EXHIBIT P11            TRUE COPY OF THE JUDGMENT IN PEGASUS  
ASSETS RECONSTRUCTION P LTD V/S HARYANA  
CONCAST LIMITED & ANR REORTED IN 2016 (4)  
SCC 47

RESPONDENT'S/S' EXHIBITS

EXHIBIT R(1) (a)        TRUE COPY OF THE NOTICE DATED 24.7.2020  
ISSUED BY THE RECOVERY OFFICER

EXHIBIT R(1) (b)        TRUE COPY OF THE APPLICATION AS IA  
NO.981/2020

EXHIBIT R(1) (c)        TRUE COPY OF THE APPLICATION AS IA  
NO.982/2020

EXHIBIT R(1) (d)        TRUE COPY OF THE APPLICATION AS IA  
NO.983/2020

EXHIBIT R(1) (e)        TRUE COPY OF THE STATEMENT OF OBJECTION  
SUBMITTED TO IA NO.981/2020

EXHIBIT R(1) (f)        TRUE COPY OF THE STATEMENT OF OBJECTION  
SUBMITTED TO IA NO.982/2020

EXHIBIT R(1) (g)        TRUE COPY OF THE STATEMENT OF OBJECTION  
SUBMITTED TO IA NO.983/2020

EXHIBIT R(1) (h)        TRUE COPY OF THE ORDER PASSED BY THE  
RECOVERY OFFICER DATED 3.12.2020

EXHIBIT R(1) (i)        TRUE COPY OF THE PLAINT IN OS  
NO.1238/2020 ON THE FILES OF MUNSIFF'S  
COURT, ERNAKULAM

EXHIBIT R(1) (j)        TRUE COPY OF THE SALE NOTICE DATED  
3.12.2020

EXHIBIT R(1) (k)        TRUE COPY OF THE AMENDED SECURITISATION  
APPLICATION AS SA NO.139/2019 ON THE  
FILES OF DRT, ERNAKULAM

EXHIBIT R(1) (l)        TRUE COPY OF THE ORDER PASSED BY THE  
TRIBUNAL STAYING CONFIRMATION OF SALE

|                  |                                                                                                                           |
|------------------|---------------------------------------------------------------------------------------------------------------------------|
| EXHIBIT R(1) (m) | TRUE COPY OF THE ADDITIONAL WRITTEN STATEMENT FILED WITHOUT ANNEXURES                                                     |
| EXHIBIT R(1) (n) | TRUE COPY OF THE VALUATION REPORT FILED BY BKC ADVISORS PVT. LTD.                                                         |
| EXHIBIT R(1) (o) | TRUE COPY OF THE MEMO ENCLOSING PHOTOCOPY OF THE DEMAND DRAFT NO.474282 DRAWN ON PUNJAB NATIONAL BANK                     |
| EXHIBIT R(1) (p) | TRUE COPY OF THE OBJECTION FILED BY THE RESPONDENTS                                                                       |
| ANN.R3 (a)       | TRUE COPY OF THE REJOINDER (WITHOUT ANNEXURES) FILED BY THE PETITIONER HEREIN IN SA NO.139/2019, DEBT RECOVERY TRIBUNAL-I |
| ANN.R3 (b)       | TRUE COPY OF THE IA NO.145/2021 FILED BY THE PETITIONER HEREIN IN SA NO.139/2019, DEBT RECOVERY TRIBUNAL-I                |